



Wasike v Simiyu (Environment & Land Case 161 of 2014 & 91 of 2013 & 99 of 2019 & 86 of 2017 (Consolidated)) [2024] KEELC 3630 (KLR) (7 May 2024) (Judgment)

Neutral citation: [2024] KEELC 3630 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 161 OF 2014 &
91 OF 2013 & 99 OF 2019 & 86 OF 2017 (CONSOLIDATED)**

AA OMOLLO, J

MAY 7, 2024

BETWEEN

KEVIN MORRIS WASIKE PLAINTIFF

AND

GABRIEL MUINDI SIMIYU DEFENDANT

JUDGMENT

1. The Plaintiff herein contends that together with Joseph Wanjala and Kulundu Desterio, they have been the proprietors and occupants of land parcel number Bukhayo/Lupida/1979 measuring 6 acres, having purchased the same from Clement Ekasiba in 2003 at a consideration of K.Shs. 261,000. That the Vendor sold various other portions of the land to the other buyers and in the year 2012, the Defendant moved in and occupied the Plaintiff's portion of the land hence denying him access and use of the land. He seeks an order of eviction from the portion of land and a permanent injunction barring him from using the land.
2. In his Complaint dated 7th August, 2014 and filed on the 21st of August, 2014, the Plaintiff prays for judgement against the Defendant and for the following orders:
 - a. That the Defendant be evicted from land parcel No. Bukhayo/Lupida/1979 and thereafter be restrained from trespassing on the same suit land;
 - b. Costs of the suit;
 - c. Interest at Court rates; and
 - d. Any other relief that could be granted by this Honourable Court.
3. The Defendant's Statement of Defence is dated 20th November, 2014 and filed on even date. The Defendant denied all the averments in the Complaint and particularly that the Plaintiff is the registered



proprietor of all that parcel of land known as Bukhayo/Lupida/1979. He avers that if the Plaintiff is the proprietor, then the registration is illegal and untenable as it was done fraudulently and against the wishes of the original proprietors. The Defendant categorically stated in his defence that he has been in occupation of the suit parcel and in possession thereof since 1998 having acquired the same from the previous registered owner who was his father. He urged this Court to dismiss the Plaintiff's suit with costs.

Pleadings in ELC Case No. 91 of 2013

4. The Plaintiff in this case is Gabriel Muindi Simiyu while the Defendant is Desterio Barasa Ondwasi. The Plaintiff averred that although he is the absolute registered proprietor of all that parcel of land known as Bukhayo/Lupida/2491, on or about the 25th of October, 2013 the Defendant illegally, unlawfully and without any colour of right entered and or trespassed on the Plaintiff's land where he started excavating building stones without the Plaintiff's express consent. The Plaintiff avers further that the Defendant has since infringed on his rights of ownership of private property making him unable to enjoy all rights and privileges he is entitled to under the law as the owner of the land. In his Plaint dated 5th November, 2013 and filed on the 7th of November, 2013 he prayed for judgement against the defendant for:
 - a. A permanent injunction restraining the Defendant, either by himself, his agents, servants or anyone acting under him from excavating stones, farming, planting, tilling, using or in any way interfering with the Plaintiff's L.R NO. Bukhayo/Lupida/2491;
 - b. Costs of the suit;
 - c. Any other relief deemed fit and just to grant.
5. The Defendant in this case did not file a defence in the matter and the case proceeded to formal proof and judgement delivered by Hon. Justice A.K Kaniaru on the 30th January, 2019. The Defendant however applied to have the judgement set aside vide his application dated 15th January, 2020 and the Court delivered a ruling on the 30th of April, 2020 by allowing the application. In the application for setting aside, the Defendant attached a draft defence.
6. The Defence attached was brief comprised in 5 paragraphs with the first two being descriptive of the parties. The Defendant denied excavating building stones from the Defendant's land. He avers that he owns L.R. No Bukhayo/Lupida/1979 and has no interest in the Plaintiff's land Bukhayo/Lupida/2491. He also denied receiving any notice to sue from the Plaintiff and urged the court to dismiss the Plaintiff's suit with costs.

Pleadings in ELC Case No. 99 of 2019

7. Kevin Morris Wasike Matumbayi, is the Plaintiff in this case while Abdalla Tabata is the Defendant. The Plaintiff in his Plaint dated 2nd August, 2019 and filed on even date contends that he is the registered proprietor of land parcel number BUKHAYO/LUPIDA/3210 measuring approximately 2.42 Ha and that the Defendant has without any justification invaded the said land and is putting the same to his own use to the Plaintiff's exclusion. The Plaintiff avers that the Defendant's actions have caused him to suffer great losses of which he seeks compensation. He prays for judgement against the Defendant for:
 - a. An order of permanent injunction restraining the Defendant, his agents, servants and or any other person through him from interfering with L.R No. Bukhayo/Lupida/3210;
 - b. Costs of the suit;



- c. Any other relief that this Honourable Court deems fit to grant.
8. The Defendant filed his Statement of Defence on the 29th of August, 2019 and denied the Plaintiff's claim. He pleaded that there is an ongoing suit in Busia ELC 86 of 2016 and Busia ELC 161 of 2014 involving the subject matter which parties are well known to the Plaintiff. He urged this Court to dismiss the suit with costs.

Pleadings in ELC Case No. 86 of 2017

9. The Plaintiff in this case was Kulundu Desterio Barasa Ondwasi while the Defendants were Gabriel Muindi Simiyu, Jacob Etyang Ekasiba, Asumani Mbayi Wambani, Benjamin Melekenyi Otyang'a and Abdalla Tabata.
10. The Plaintiff contends that he is the registered owner of land parcel number Bukhayo/Lupida/1979 and that the Defendants have invaded the land and are currently putting it to their own use which actions he states are illegal and against his constitutional rights and are in contravention of the [Land Registration Act](#). The Plaintiff seeks orders of injunction, restraining the Defendants from interfering with his possession of the land. In his Plaint dated 24th April, 2017 and filed on even date, the Plaintiff prays for judgement against the Defendants for:
 - a. An order of permanent injunction restraining the Defendants by themselves, their agents and or servants from interfering with LR No. Bukhayo/Lupida/1979;
 - b. Costs of this suit and interest until settlement in full;
 - c. Any other relief this Honourable Court deems fit to grant.
11. The 1st Defendant, Gabriel Muindi Simiyu, filed his Statement of Defence on the 6th of June, 2017. He denied having any knowledge that the Plaintiff was the registered owner of the land because it was registered in the names of Kevin Morris Wasike, Joseph Wanzala Adedi and Kulundu Barasa. He asserted that his land parcel number Bukhayo/Lupida/2491 does not border parcel 1979. He stated that the suit was res judicata and urged this Court to dismiss the same with costs.
12. The 3rd Defendant, Asumani Mbayi Wambani, filed his Statement of Defence on the 6th of June, 2017. He denied the Plaintiff's allegations that he is the owner of the suit parcel and stated that he was the registered owner of land parcel number Bukhayo/Lupida/2305 which he emphasised did not border land parcel number 1979. He urged this Court to find that the suit was res judicata and to dismiss the same with costs.
13. Benjamin Melekenyi Otyang'a was the 4th Defendant's herein. He filed his Statement of Defence on the 6th of June, 2017. Like the other Defendants, he denied the averments in the Plaint and specifically that the Plaintiff was the registered owner of the land. He averred that he was the registered owner of land parcel number Bukhayo/Lupida/3306 which did not border the suit parcel. He prayed for the dismissal of the suit with costs.
14. The 5th Defendant, Abdala Tabata, filed his Statement of Defence on the 8th of June, 2017. He denied any knowledge that the Plaintiff was the owner of the suit parcel because the land was registered in the names of Kevin Morris Wasike, Joseph Wanzala Adedi and Kulundu Barasa. He denied trespassing on the Plaintiff's land and stated that he was the owner of land parcel number Bukhayo/Lupida/2306 which did not border the Plaintiff's land parcel number 1979.



Consolidation Order

15. On the 3rd of October, 2019, this Court made an order for the consolidation of the three suits because the subject lands in dispute were related.

Oral hearing;

16. The hearing commenced on the 16th of February, 2021 with Kevin Morris Wasike Matumbayi testifying as PW1. He relied on his witness statements dated 12/2/2021 as his evidence in chief and produced the documents on the lists dated 8/5/2017, 7/7/2014 and 12/2/2021 as PEx1-14. In the statement, PW1 testifies that he is the proprietor of land parcel number Bukhayo/Lupida/1979 together with Kulundu Desterio, Barasa Ondwasi and Joseph Wanjala. He states that he bought six (6) acres of the suit land at a consideration of K.Shs. 261,000 and he took possession of the land immediately. That it was during this time that he discovered that one Gabriel Muindi Simiyu had trespassed and encroached onto the land. He confirmed that he was issued with a title to the land on the 20th of December, 2013.
17. PW1 explained that he brought the present suit so as to obtain orders of eviction and he added that in 2007 he got an order for the re-establishment of the boundaries. The report elaborated that the boundaries on the western side are intact while those on the eastern side have been altered by Gabriel and Abdalla who he says have been harassing him. While pointing at the survey report produced as PEx 14, he indicated that Gabriel occupied the part marked X while Y was occupied by Abdalla. PW1 sought time to have a resurvey for all the three parcels of land carried out. This Court obliged the request.

The Defence Case

18. The Defendants called six witnesses. DW1 was Abdalla Tabata who began by stating that his suit parcel was number Bukhayo/Lupida/2306 and emphasized that he does not share a boundary with Kevin Morris since they were not neighbours. He adopted his witness statement as well the documents filed in Court. He confirmed that he had sold his land to one Benjamin Etyang who is one of the Defendants in ELC Case No. 86 of 2017.
19. Upon cross-examination by the Plaintiff, DW1 stated that he has never threatened the Plaintiff when he came onto the land because he has his own land and as such, he did not chase the workers away.
20. Gabriel Muindi Simiyu testified as DW2. He testified that he was the owner of land parcel number Bukhayo/Lupida/2491 which he inherited from his father and that his father had purchased it from Patrick Ekasiba in 1989. That he obtained the title to the land on the 5th of July, 2014. DW1 stated that he was the Plaintiff in ELC No. 91 of 2013 where he has sued Desterio. It is his testimony that Kevin and 3 others bought their land from a different person and the two parcels of land are not related. That Kevin's allegations of fraud is aimed at taking their family land. DW2 continued to testify that there is a 6 meters' road separating his land from land parcel number 1979 and that each party occupies their portion.
21. DW2 stated further that in ELC No. 86 of 2017, Desterio and Kevin are claiming his land and they want to take advantage of him. He alleged that the County Surveyor who visited the land was close to Kevin and as such his reports should be disregarded.
22. Upon cross-examination by the Plaintiff, DW2 explained that from the road, there was a polytechnic, Jacob's home and his land was just below Jacob's home. He reiterated that the road separates L.R. No. 1979 and 2491 and his land parcel did not originate from L.R. 1979.



23. Jacob Etyang Ekasiba testified as DW3. He began his testimony by explaining that DW2 is the son of one Peter Simiyu who purchased land from his father, Ekasiba. That his deceased father mandated him with the responsibility to give titles to the people who had purchased land but were yet to receive their titles, DW2 was one of those and he processed the title for him and he got land parcel number Lupida/2491.
24. DW3 stated that his land was parcel number 2489 and proceeded to explain that their original title was number 787 while the Plaintiffs' original number was 421 which parcels were separated by the road as indicated in the Registry Index Map (RIM). That there was a case between their fathers and the same was resolved amicably. That L.R. No. 421 created parcels number 1979 and 1980.
25. DW3 was cross-examined by the Plaintiff and he stated that the Surveyor visited the land and did his part but Gabriel was not satisfied with the findings and he lodged a complaint. He reiterated that his father also sold land to DW1 but he got his title prior to their father's death. He denied destroying the sisal boundaries of land parcels number 1979, 2491, 2233 and 2306
26. DW4 was George Onyango Simiyu. He adopted his witness statement dated 20/11/2014 as his evidence in chief and confirmed that he knew the Plaintiff who was his neighbour while DW2 was his younger brother. He stated that the land in the name of the Defendant is held in trust for the family and that they have lived peacefully thereon until Desterio visited the land to harvest stones from their land. That he stopped once they filed a case in Court to stop him but Kevin has since put a structure on the land where they have not planted sugarcane.
27. On cross-examination by Desterio DW4 stated that there was a road between land parcels number 1979 and 2491 and that it was the owner of land parcel number 1979 who encroached on the land by force. He concluded by stating that Kevin discovered that he had built at the wrong place when the surveyor came. Upon cross-examination by the Plaintiff, DW4 state that they objected to the survey that was carried out but are yet to engage a different surveyor to prepare an independent report.
28. Asman Mbayi Wambani testified as DW5. He stated that he has been sued by Desterio. He stated that he bought land parcel number Bukhayo/Lupida/2305 and produced a title as proof of the same. He denied encroaching on Desterio's land as there is a road between the two parcels and stated that he has not increased the size of this land.
29. Desterio cross-examined the witness who stated that he did not agree with the survey report that he had encroached onto the land because the said surveyor had never visited the land whose title he holds. He also denied ever being summoned before any government office or a government official and failed to attend.
30. DW5 was also cross-examined by Kevin Morris Wasike and he reiterated that his land parcel was number 2305 which is a resultant subdivision of an original number he did not recall. He stated that he bought the land after it had already been demarcated but did not measure it at the time of purchase. He admitted that he did not know whether the land borders parcel number 3210 or even where the latter land parcel was. He stated that he had not examined the survey report dated 4/10/2013 and as such could not tell whether his land had encroached onto land parcel 3210. He also denied not having knowledge of the survey report dated 10/6/2021 which report indicated that L.R. no. 787 which created parcel number 2305 had encroached onto land parcel number 1979.
31. DW5 was also cross-examined by Gabriel Simiyu and answered that he never saw the surveyor who prepared the reports produced. He reiterated that his land parcel number 2305 neighbours the lower part of the land of Mohammed and Ali with an existing public road between his land and that of Ali.



32. During re-examination, DW5 insisted that he has not encroached on L.R 3210 and that he was never informed of the survey visit pursuant to which the reports were prepared. That his land parcel number 2305 is not included in the report and that his land is as he was shown when he was purchasing it.
33. Desterio Barasa Ondwasi testified as DW6. He was the Defendant in ELC No. 91 of 2013 and the Plaintiff in ELC No. 86 of 2017. He relied on the documents on the lists dated 24/4/2017 and 15/2/2017 as bundle 1 and 2 respectively. He began by explaining that he has sued the Defendants because they have encroached on his land parcel number Bukhayo/Lupida/1979 which he bought from Clement Ekasiba in 1992. He stated that there was a case before the Tribunal and the subsequent order was adopted as an order of the Court. He continued to state that surveyor visited the land in 1998 and confirmed encroachment by Asman and Tabata.
34. On the issue of the title, DW6 stated that he started processing the title in 1979 but the title was not issued in his name alone but in the name of Kevin Morris Wasike, Joseph Adede Wanjala and himself. That he was under the assumption that he had bought the entire parcel of land. He urged this Court to evict Kevin, Gabriel, Asman and Benjamin from the land.
35. Upon cross-examination by Kevin Morris, he stated that there was a road which separated L.R. numbers 421, 787 and 789 which road is still there to date and that the road has not been interfered with. He explained that he bought a portion of land parcel 421 and there is a mutation creating L.R. No.1979. That the mutation was prepared in 1998 by Clement Ekasiba and eventually a title for land parcel number 1979 was issued on the 4th of February, 1998 in Clement Ekasiba's name. The title was issued in the three names on the 9th of August, 2012. DW6 stated that he was not aware how the names were included in the title and that upon realisation he filed a complaint against Clement Ekasiba but he has not sued him.
36. DW6 elaborated that during his testimony in ELC 61 of 2014 he stated that he had bought 3 acres of the land but this was before he bought the entire parcel of land. He confirmed that in his statement, particularly at paragraph 3, he confirmed that Clement had sold some portion of land to Kevin and Joseph which parcel was 1 acre. He reiterated that he had bought the entire parcel of land even though he had not brought any action against Kevin and Joseph.
37. DW6 continued to state further in cross-examination that the Green Card entry 5 for the land parcel indicated that land parcel number 1979 was sold to Jayantilal Gopal alias Butali Sugar Limited but he stated that the sale did not materialise because Kevin had encroached onto his land. He concluded by stating that he was not aware that land parcel number 1979 had been subdivided into three portions.
38. DW6 was also cross-examined by Gabriel Muindi Simiyu (1st Defendant in 86 of 2017). He stated that the land that was sold to him was Bukhayo/Lupida/421 which was subsequently subdivided into Bukhayo/Lupida/1979 and 1980. He confirmed that he was aware that Gabriel's land was L.R No. 2491 and that he had encroached into his land parcel. He disagreed with the subdivision of LR No. 1979.
39. While being cross-examined by Jacob Ekasiba, DW6 confirmed that he knew Jacob as he was his neighbour and owner of land parcel number 2489. He explained that the sale agreement between him and Clement was done at home and the boundaries planted by Clement and his brother Christopher in 1994. That he bought the 12 acres of the land.
40. Counsel Okutta for the 3rd to 5th Defendants in 86 of 2017 was the last to cross-examine DW6. He reiterated that he bought land parcel number 421 and that after the subdivision the land into 1979 and 1980, they were registered in Clement Ekasiba's name. He confirmed that the land was later transferred



from Clement's name to the three names and termed the encroachment into his land by the Defendants as a mistake.

41. The evidence of two additional witnesses in for the Plaintiff in ELC No. 86 of 2017 was admitted without calling the said witnesses hence marking the close of the Plaintiff's case in that case.

Submissions

42. This Court directed the parties to file their respective submissions and a total of six submissions were filed.

43. Kevin Morris Wasike Matumbayi's (Plaintiff in) submissions are dated 5th July, 2023 and filed on the 11th of July, 2023. He outlined in detailed the briefs of all the consolidated cases and the facts adduced during the hearing. He submitted on the following issues for determination:

- a. Whether the Plaintiff legally and lawfully acquired the suit parcel number L.R Bukhayo/Luoida/3210 as depicted in his certificate of title;
- b. Whether the suit parcel of land has been encroached;
- c. Whether the Defendants have challenged and/or revoked the Certificate of Title to the Plaintiff; and
- d. Who should bear the costs of the suit?

44. On the first issue, he submitted that he had legally and lawfully acquired the suit parcel of land after buying it from the owner as shown in the sale of land agreement. He quoted sections 24 and 26 of the *Land Registration Act* and submitted that the law protects his right as proprietor of the land and in particular that the certificate of title issued by the Registrar shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner with a title not subject to challenge only on the ground of fraud or misrepresentation. He contends that his title is a clean title and none of the parties have proved that the he took more acreage than what he purchased. He relied on the case of Republic Vs. Land Registrar Taita Tavett District & Another (2015) EKLK where the Court held that:

“The Court must therefore uphold the Rule of Law with regard to the applicant's rights, as a registered proprietor, under sections 27 and 28 of the Registered *Land Act* as then applicable to the suit property (now section 25 of the *Land Registration Act*, 2012) until fraud shall have been established in accordance to section 26(1) of the *Land Registration Act*, 2012.”

45. He submitted that Mr. Desterio has taken over all the parcel of land and has done so through use of force and threats and has denied him the opportunity to use the land. That there has been sufficient evidence from all the parties of the consolidated suits that he owns the land parcel. He urged this Court to be guided by the original map sheet that hosted block numbers 421 and 1979 in determining the boundaries of each parcel of land. He placed reliance on the following cases:

- a. Moya Drift Farm Ltd Vs. Theuri (1973) EA 114 where the Court of Appeal held that:

“A registered proprietor of land is the absolute and indefeasible owner of land and is entitled to take proceedings for trespass and eviction of a trespasser even if he did not have possession of the land.”



- b. Park View Shopping Arcade Vs. Kangethe & 2 Others (KLR) E&L 592 where the Court held that:

“The Constitution safeguards the sanctity of private property. It was not proper for the Defendants to forcibly occupy the Plaintiff’s land and then plead public interest in environmental conservation to keep out registered owner. The effect of their action was to deprive the owner of his land without full and fair compensation.”

46. On the issue of whether or not there was encroachment on the land, he submitted that the encroachment has taken place in two levels: internal by one Desterio who has taken over the entire parcels of land depriving the rest of the proprietors their respective parcels of land. The other encroachment, he submits is occasioned by the neighbours in the adjacent parcels of land.
47. He urged this Court to scrutinize and rely the surveyor’s report filed in Court and dated the 4th of October, 2013 which confirms the actual position that there was encroachment to parcel number Bukhayo/Lupida/1979. That the second surveyor’s report is dated 10th June, 2021 which also indicated that land parcel number Bukhayo/Lupida/3210 and 3211 has been encroached on by the adjacent parcels of land.
48. On his third issue, he submitted that the Defendants and Desterio have alleged that he acquired the property was acquired through fraud but have failed to specifically plead the allegations of fraud as provided under Order 2 rule 4 of the Civil Procedure Rules. He relied on the cases of:
- a. Koinange & 13 Others Vs. Charles Karuga Koinange (1986) KLR where the Court observed that:
- “Where fraud is alleged by the Plaintiffs, the onus is on the Plaintiffs to discharge the burden of proof. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a balance of probabilities is required.”
- b. Vijay Morjaria Vs. Nansingh Madhusingh Darbar & Another (2000) Eklr (civil Appeal NO. 106 OF 2000) where the Court stated that:
- “It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleadings. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”
49. He urged this Court to find that both Desterio and the Defendants had encroached onto his land and that they have deliberately declined to heed the order of the Court issued in 2018.
50. He concluded by submitting that the suit should be allowed and found meritorious. He prayed for costs of the consolidated suits.
51. Desterio Barasa’s (the Plaintiff in ELC No. 86 of 2017 and Defendant in ELC 91 of 2013) submissions are dated 8th August, 2023 and filed on the 9th of August, 2023. He reiterated the facts adduced during the trial and submitted that he bought the whole of land parcel number Bukhayo/Lupida/1979 from Clement Ekasiba and that he did not own the land jointly with Kevin Morris Wasike and Joseph



- Wanjala. That Kevin’s decision to subdivide the land into Bukhayo/Lupida/3210, 3211 and 3212 without the input of the other parties. Kevin Wasike has not demonstrated how he obtained the land and the same was obtained fraudulently and without the proper process.
52. On the issue of encroachment, he submitted that he has not encroached onto land parcel number 3210 and instead urged the Court to find that the title to land parcel number 3210 was unclean and was acquired illegally and should be cancelled. He faulted Kevin Morris Wasike for coming to Court with unclean hands and urged this Court to find that the suit No. E161 of 2014 be dismissed with costs.
53. Jacob Etyang Ekasiba’s, (2nd Defendant in ELC Case No. 86 of 2017) submissions are dated 17th July, 2023 and filed on the 21st of August, 2023. He extensively gave a history of the suit parcels and it was his submission that the common denominator in these cases was land parcel numbers Bukhayo/Lupida/1979 and Bukhayo/Lupida/2254. He explained that Bukhayo/Lupida/1979 was purchased by the Plaintiff from Clement Ekasiba Munyani while Bukhayo/Lupida/2254 belonged to Ekasiba Eng’ari who are two different people. That on the 15th September, 2007, parcel number Bukhayo/Lupida/2254 was subdivided to create Bukhayo/Lupida/2302, 2304, 2305 and 2306, parcel number Bukhayo/Lupida/2302 was further subdivided to create 2489, 2490, 2491 and 2492. That suit parcel number Bukhayo/Lupida/1979 is owned by 3 people-Kevin Morris Wasike Matumbayi, Kulundu Desterio Barasa and Joseph Wanjala Adedi who are all co-owners of the land.
54. He continued to submit further that this was a simple case of harassment of the Plaintiffs by the Defendants and that it was in the interest of justice that the prayers ought in the Plaint are granted.
55. Jacob Etyang’ Ekasiba also filed other submissions dated 28th June, 2023 and filed on the 4th of July, 2023. In these submissions, he delves into whether or not he has trespassed onto land parcel number Bukhayo/Lupida/1979. He stated that the boundary between the two parcels were demarcated when the parcels were still part of their parent parcels number 787 and 421. That according to the map obtained from the land adjudication office and filed in court on the 31st January, 2019, the 20th edition map and on diagram 32 which indicated that a straight boundary between parcels No. 1979. That this map shows that parcel number 1979 is across the road and does not transverse the parent parcel no. 421 at any point.
56. He stated that the report produced in Court was prepared by a Kennedy Masibo who was not a county surveyor but is a relative to Kevin Wasike. He placed reliance in the case of Prafulla Enterprises Limited Vs. Norlake Investments Limited & Another (2014) EKLR where the Court held that:
- “...the fact that documents are produced by consent of the parties to a suit is not in itself proof of the contents of these documents. It only means that parties agree that those are the documents the contents of which are to be canvassed, or are in controversy but as to the proof of the same contents...”
57. He left it to this court to determine how best justice will look like and proceed to dismiss the suit with costs to the Defendants.
58. Gabriel Muindi Simiyu’s (1st Defendant in ELC 161 of 2014 and Plaintiff in ELC No. 91 of 2013) submissions are dated 18th August, 2023 and filed on even date. He submitted on the following issues for determination:
- a. Whether the Plaintiff joined as a new party to the suit improperly;
 - b. Whether the 1st Respondent challenged the validity of the title of the Applicant; and
 - c. Who should bear the costs?



59. On the first issue, he relied on the case of *Kingori Vs. Chege & 3 Other* (2002) 2 KLR 243 where the Court held that:
- “...parties cannot be added so as to introduce quite a new cause of action or to alter the nature of the suit. Necessary parties who ought to have been joined are the parties who are necessary to the constitution of the suit without whom no decree at all can be passed...”
60. He submitted that the Plaintiff’s act of joining one Ali Mombo without seeking leave of court especially since the suit had been concluded is an abuse of the court process. Consequently, he urged this Court to strike out the said Defendant and any of his submissions.
61. On his second issue, he submitted that his case was purely on encroachment and boundary dispute and he did not challenge the validity of any of the Plaintiffs’ titles. He contends that the Plaintiff has a problem with Desterio because they failed to ascertain their respective acreages of their parcels of land within suit parcel number 1979.
62. On whether there was encroachment, he submitted that the Plaintiff did not plead the issue of requiring the regional surveyor to reconstruct the land boundaries and as such he is bound by those pleadings. He urged this Court to disregard the prayer to call the surveyor and not place reliance on the survey report.
63. Gabriel Muindi filed other submissions dated 28th June, 2023 and filed on the 29th of June, 2023. On the issue of the boundary between land parcels number Bukhayo/Lupida/1979, 3210, 2491, 2490 and 2306. He stated that the boundary between the said parcels is a straight line running alongside the road and directly extending towards the river and the same does not transverse the parent parcel. He submitted that the power to lay out fresh boundaries lies with the demarcation officer under the Land Adjudication Act and a surveyor as directed by the Director of Survey could lay out fresh boundaries in the surveyor’s report. He submitted that the survey report has no probative value as the land intended to be hived from 2491 does not form part of the parent land 1979 as the boundary is clear and discernible from all the maps and mutations.
64. He concluded by submitting that suit number ELC No. 86 of 2017 and ELC No. 161 of 2014 are defeated by subjudice because they were filed with the knowledge that another suit, ELC No. 91 of 2013, was pending in Court over the same subject matter.

Determination

65. A perusal of the parties’ pleadings, submissions and the applicable law raise the following issues for determination:
- a. Whether the Desterio Barasa Ondwasi Kulundu is the sole proprietor of suit parcel number Bukhayo/Lupida/1979;
 - b. Whether Kevin Morris Wasike Matumbayi and Joseph Wanjala are co-owners of suit parcel number Bukhayo/Lupida/1979 with Desterio Barasa Ondwasi Kulundu;
 - c. Whether the Defendants (Gabriel Muindi Simiyu, Abdalla Tabata, Benjamin Melekenyi Otyang’a, Jacob Etyang’ Ekasiba and Asumani Mbayi Wambani) have trespassed onto land parcel number Bukhayo/Lupida/1979 and;
 - d. Whether Desterio Barasa Ondwasi Kulundu has trespassed onto land parcel number Bukhayo/Lupida/2491 belonging to Gabriel Muindi Simiyu;



- e. Who caters for the costs of the consolidated suits?
66. The first and second issues are related and hence its only right that they are discussed together. Desterio is the Plaintiff in suit number 86 of 2017 and the Defendant in ELC No. 91 of 2013. In his plaint he states that he is the sole registered owner of land parcel number BUKHAYO/LUPIDA/1979. Kevin Morris Wasike is the Plaintiff in ELC No. 91 of 2013, ELC No. 161 of 2014 and ELC Case No. 99 of 2019. In all his plaints, Kevin has stated that together with Desterio and one Joseph Wanjala, they are co-owners of the said parcel of land.
67. While testifying as DW6, Desterio emphatically denied the aversions that he was a co-owner of the land with Kevin and Joseph. He stated that he purchased the suit land from one Clement Ekasiba in the year 1992 and when he got his title he noticed that the title had been issued in his name, Kevin's and Joseph's. He emphasized that he bought the entire land and one of his prayers was that this court removes Kevin and Joseph from the land because they had obtained possession thereof fraudulently. It is important to clarify that Desterio has not preferred any suit against Kevin and Joseph seeking this specific prayer. The title he produced as part of his documents indicates that the land parcel has been registered in the names of the three of them.
68. Desterio did not provide any proof that Kevin and Joshua obtained the suit parcel fraudulently. Joshua Wanjala did not participate in these proceedings. Kevin on his part produced as part of his evidence in ELC No. 161 of 2014 a handwritten agreement for sale dated 12th March, 2005. The agreement indicated that Clement Ekasiba Munyane sold land to;
- a. Kevin M. W. Matumbayi 7 acres of the land at KShs. 40,000 per acre,
 - b. Desterio Barasa 4 acres at KShs. 25,000 per acre.
 - c. Joshua Adedi 4 acres at KShs. 26,000 per acre.
68. The agreement seemed to have been amended on the 14th of March, 2005 and the acreage for all the purchasers were reduced to 6 acres, 2.5 acres and 3.5 acres for Kevin, Desterio and Joshua respectively. The total acreage bought by the three was 12 acres of the land parcel number.
69. Section 26 of the *Land Registration Act* categorically provides that a certificate of title is prima facie evidence that the person named therein is the proprietor of the land but the same can be challenged where the Certificate of title has been acquired fraudulently, unprocedurally or through corrupt practice. The Court of Appeal in the case of Embakasi Properties Limited & Another Vs. Commissioner Of Lands & Anor [2019] Eklr stated as follows:
- “Although it has been held time without end that the certificate of title is: “...conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof”, it is equally true that ownership can only be challenged on the ground of fraud or misrepresentation to which the proprietor named is proved to be a party. See section 23 of the repealed Registration of Titles Act. Section 26 of the *Land Registration Act*, 2012 though not as emphatic as section 23 aforesaid on the conclusive nature of ownership, confirms that the certificate is prima facie evidence that the person named as proprietor is the absolute and indefeasible owner. It adds that apart from encumbrances, easements, restrictions to which the title is subject, there is no guarantee of the title if it is acquired by fraud or misrepresentation or where it has been acquired “illegally, unprocedurally or through a corrupt scheme”.



68. In the case of Barasa, he has not provided evidence that he purchased the entire suit title Lupida/1979. Neither did he provide any evidence that the transfer registering the title into three names was a forgery. It is trite law that allegations of fraud must be strictly proved and the burden of proof lies on the person who alleges. It is my finding that the Plaintiff in this claim (Desterio Barasa) has not discharged that burden.
69. The third issue forms the foundation of ELC Case No. 161 of 2014, ELC No. 99 of 2019 and ELC No. 86 of 2017. The Plaintiffs in these cases, Kevin Morris Wasike and Desterio Barasa Kulundu have pleaded that the Defendants: Gabriel Muindi Simiyu, Abdala Tabata, Jacob Etyang Ekasiba, Asumani Mbayi Wambani and Benjamin Melekenyi Otyang'a have encroached on their land parcel Bukhayo/Lupida/1979.
70. Gabriel Simiyu Muindi in his defence to ELC No. 161 of 2014 denied that he entered into the suit parcel in 2012 and averred that he has been on the suit portion since 1989. That his land is parcel number Bukhayo/Lupida/2491 which he stated comprised of land which his father Peter Simiyu Muindi (deceased) bought 2ha from Ekasiba Engari in 1989 and he got title to the said portion in the year 2013. The suit parcel number 2491 was a subdivision of L.R. No. Bukhayo/Lupida/2302.
71. Abdalla Tabata in his defence stated that he was the owner of land parcel number Bukhayo/Lupida/2306 which he stated does not border land parcel number 1979.
72. Asumani Wambani on his part stated that he was the owner of land parcel number Bukhayo/Lupida/2305 which did not border land parcel number 1979.
73. Benjamin Melekenyi Otyang'a stated that he was the registered proprietor of land parcel number Bukhayo/Lupida/2306 and that the said parcel did not border suit parcel number 1979.
74. During the hearing, Kevin testified that the suit parcel number 1979 has been subdivided into land parcels number 3210, 3211 and 3212 and he now owns parcel number 3210 with the other two owned by Desterio and Joseph respectively. The main issue here is whether there is encroachment onto land parcel number Bukhayo/Lupida/1979, (now subdivided into 3210, 3211 and 3212). The [Land Registration Act](#), no 12 of 2012 at section 18 provides 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 be deemed to indicate the approximate boundaries and the approximate situation only of the parcel;
 2. 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 this section;
 3. Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to the boundaries and situation as may be necessary;
- Provided that where all the boundaries are defined under section 19(3), the determination of the position of any uncertain boundary shall be done as stipulated in the [Survey Act](#) (Cap.299).



68. From this section, the Land Registrar is the first point of contact when it comes to the resolution of boundary disputes as held by the court in the case of *George Kamau Macharia Vs. Dexka Limited* [2019] EKLK

“...The framers of section 18(2) of the *Land Registration Act* placed this matter before the Land Registrar who has the technical advice and resources of the District Surveyor to determine and ascertain the boundaries. It is trite law that where the law has given a legal obligation to a department of Government, it is important for the Court to let that department proceed to meet its legal obligations. In this case the office of the Land Registrar is mandated to deal with the general boundary dispute first before the same is escalated to the Court.”

68. There are two survey reports filed as part of the evidence of the Plaintiff's claiming ownership of L.R. 1979. The first one was filed in ELC No. 86 of 2017 where the District Survey Office was implementing an order in ELC No. 78 of 2007 for Bukhayo/Lupida/1979. Kennedy M. Ngome was the Surveyor therein. In the report dated 4th October, 2013 (REF No. BSA/LS/8/VOL III/97) the Surveyor stated that:

“RE: Court Order Implementation

Land Case No. 78 Of 2007-Bukhayo/Lupida/1979

The exercise was to restore the boundaries of the above parcel as it is on the Registry Index Map.

Map distances were scaled off and the same effected on the ground in order to re-establish the boundaries.

Measurements were taken from stable orientation points to determine the extent of the parcel in question as a per the map. This was successfully carried out. However, an encroachment to the property was realized on the lower Southern Eastern Side, a stretch of about 150 meters towards the river. See diagram attached.

I am therefore requesting the court to address this encroachment issue as the users claim to have interest in the property.

68. The second report was done years later by the same Surveyor, Kennedy Masibo and is dated 10th June, 2021. The surveyor states that he visited the site on the 17th of February, 2021 with the purpose of identifying the boundaries of L.R No. Bukhayo/Lupida/3210. He stated that:

“...P/no 2494 and 2306 were created by mutation of P/No. 787 and 3210 originated from the mutation of p/no. 421. The boundary in dispute is therefore this old boundary between the then LR. No. Bukhayo/Lupida/787 and 421 whose old boundaries on their opposite ends are still intact and undisputed. These old boundaries were therefore adopted as reference lines from where measurements were taken to identify the said boundaries and encroachments if any.

68. The findings of the Surveyor were as follows:

“There is no conformity of boundaries between the map and ground on the upper western side of parcels 2491 and 3210. Conformity begins at the middle of p/no 2491, eastwards to the lower end of p/no 2306 and 3210.



Since there is no conformity between map and ground on the upper side, measurements taken from either side of p/no 3210 and 2391 overlap onto each other.”

68. While referring to the sketch map the Survey report explains thus:

“There is an existing disputed boundary running from point ‘a’ through ‘b’ ‘c’ ‘j’ ‘k’ ‘l’ ‘m’ to ‘n’ at the river. This is the boundary separating p/no.s 2491, 2306 and 3210.

Existing old boundaries b1 and b2 were adopted as reference lines from which measurements were taken to identify the boundary in question and encroachments if any.

Offset distances from boundary b1 identifies line A’ B’ C’ D’ E’ F as the boundary between parcel p/no 3210 and 2491 and 2306. A section enclosed from the existing boundary at k, through D’ C’ B’ A’ a’ b’ c’ j’ to k’; (approximately 0.98Ha) is therefore the area overlapping to p/no 3210 by p/no 249.

On the other hand, measurement from boundary b2 finds existing boundary a’ b’ c’ d’ through D’ E’ F’ to G’ as the boundary between p/no 3210 and 2491 and 2306. This is an approximate area of 0.30Ha enclosed within k’ D’ d, j to k being encroached to p/no 3210 by p/no 2491.

Measurements from both boundaries b1 and b2 brings to line D’ E’ F’ G’ as the common boundary between p/no 3210 and 2306. An encroachment approximately 0.78Ha by p/no 2306 onto p/3210 was realized. That the area enclosed within E’ F’ G’ n’ m’ l and E’.

68. The Defendants objected to the said report with Gabriel Muindi Simiyu even filing an objection to the report dated 16th July, 2021 and filed on even date. He accused the Surveyor of coming with intentions of solving a historical boundary dispute between parcels number 787 and 421 which he claimed was not of concern to the parties. He disputed the Surveyor’s claims that parcel number 2491 was a subdivision of parcel number 787 and stated that it was a subdivision of parcel number 2302. He stated further that those two parcels did not share a boundary because there was a six meter public road of access between the two which road was on the map and that this disparaged the allegations of encroachment he had fronted.

69. Gabriel requested this Court to object to the report and to order a regional surveyor Kakamega to revisit the site and prepare a conclusive report. The law allowed him to appeal directly to the Regional Surveyor and although he sought the intervention through court, the proceedings indicates that no formal application was brought before Court, whether orally or in writing and thus was never actioned upon.

70. Even though the Land Surveyor is the authority on the maps and surveys of land, it is very critical to investigate and compare the sketch he provided as against the Registry Index Map filed and produced by the Defendants in ELC No. 86 of 2017 alongside other documents also produced by the parties. In ELC 86 of 2017, the Plaintiff filed a list of documents which included a mutation form for L.R. No 2254 and its green card. The green card stated that parcel number 2254 was measuring 5.13ha and that it was a subdivision of L.R. No. 2017 (or 2047). L.R. No. 2254 was further subdivided (according to this green card) into numbers 2302-2306.

71. Some of the resulting numbers is what is owned by Abdalla Tabata-2306 and Asumani mbayi-2305 (3rd and 5th Defendants in ELC 86/2017). In this subdivision, the size of L.R. No. 2302 was given as 2.15ha. (as shown in the mutation prepared on 15.9.2007). L.R. No. 2302 was eventually subdivided on 30th September 2011 to create parcels numbers 2489, 2490, 2491 and 2492. The mutation for both



2254 and 2302 were filed by Gabriel Muindi Simiyu who is the Plaintiff in ELC 91 of 2013. The size of land number 2302 is given as 2.15ha in the initial mutation form of the year 2007 but during its subdivision, there is added words “computed area 4.0ha.” with no explanation on the meaning and import of computed area. This computed area increased the size of the land no. 2302 and it appears the resulting subdivision was premised on this size.

72. This is seen when the total area for the four resulting numbers adds to 4.0ha with L.R. number 2491 measuring 1.65ha and title issued shows it measures 1.70ha. DW3 is the one who did the subdivision of L.R. No. 2302 and transferred 2491 to Gabriel Simiyu who now has been sued for trespass but who also accuses Desterio Barasa for trespassing on his land. It is indeed true from the evidence led that both parcels (1979 and 2491) trace their roots to different parcels of land (L.R No 421 and 787 respectively) but the two parcels shared a boundary before subdivision as shown by the Registry Index Map for Bukhayo/Lupida location produced by the Defendants.
73. The sketch produced by the surveyor relied on old parcellation where the suit parcels were still part of parcels number 421 and 787 and which in my opinion gave a true picture of where the boundary should lie. The encroachment is a creation of the surveyors who undertook the subdivision. The question is, which plot is on the wrong. In view of my analysis of the documents presented in evidence, I am persuaded to find that the possible encroachment is by L.R. 2491 as reported by the County Surveyor. My holding is premised on the increment of the size of land during the subdivision of L.R. no 2302 that created L.R 2491 amongst others. The area of overlap by this parcel is put at 0.3ha by the surveyor and the owner of L.R. No. 2491 did not present an alternative report to corroborate his evidence on alleged trespass to his land.
74. The owners of parcel numbers 2305 and 2306 was also sued for trespass, however I am unable to enter judgement against them for trespass because the documents presented do not indicate any anomaly on their sizes of land. None of the parties produced green cards for parcel Lupida/787 and Lupida/421 and the survey report did not compare ground positions/sizes vis-a-vi the mutations which created the two titles (2305 and 2306). The burden laid on the plaintiffs to prove encroachment going by the history as presented by the green card and the mutation form which was the first in time before L.R. No 1979 was curved out from L.R. No 421. The survey report perse was not sufficient and the witness did not indicate that the boundaries in place when he purchased were interfered with.
75. The Court of Appeal in the case of Azzuri Limited Vs. Pink Properties Limited [2018] EKLR declined to depart from the findings of the trial Court in the case of Azzuri Limited Vs. Pink Properties Limited [2017] eKLR, where Hon. Angote J. while making a decision relating to general boundaries had this to say:
- ‘ In his paper, “The Role of the Registry Index Map (RIM) in Land Management in Kenya”, Peter K. Wanyoike has stated that the Registered Index Map is a very useful document in registration and management of land in Kenya within the context of “General Boundaries” or “approximate boundaries.”
- The paper defines “General Boundaries” as follows:
- “A boundary of which the precise line is undetermined in relation to the physical features which demarcate it.... However, it is clear on the ground where the parcel is situated and where the boundaries are, for they are clearly visible and unmistakable physical features, though they do not indicate the exact location of the line within the breadth which such physical features necessary process.”
68. The fourth issue is whether Desterio Barasa Kulundu has trespassed onto land parcel number 2491 belonging to Gabriel Muindi Simiyu. I believe that the discourse above on the second and third issues sheds light on this issue as well. Mr Gabriel Simiyu did not even prove the extent of the encroachment



by Desterio Barasa. Having found there is a problem with the document creating his land and guided by the survey report, his claim fails in totality.

69. Consequently, I enter judgement in the following terms:

- a. The Plaintiffs case in ELC Case Nos. 161 of 2014, 99 of 2019 and 86 of 2017 (Kevin Morris Wasike Matumbayi and Desterio Kulundu Barasa Ondwasi) is proved only as against Gabriel Muindi Simiyu who is the registered owner of L.R. No. Bukhayo/Lupida/2491. The extent of the encroachment is 0.30ha as established in the survey report dated 10th June 2021.
- b. The claim of encroachment as against Asumani Mbayi, Benjamin Otyanga and Abdala Tabata is dismissed.
- c. Following finding in (a) above, the Plaintiff in ELC Case Number 91 of 2013 (Gabriel Muindi Simiyu) against Desterio Kulundu Barasa Ondwasi for encroachment onto his land parcel number Bukhayo/Lupida/2491 fails. It is dismissed.
- d. An order is issued that L.R. number Bukhayo/Lupida/1979 is co-owned by Desterio Kulundu Barasa Ondwasi, Kevin Morris Wasike Matumbayi and Joseph Wanjala Adedi until the process of subdivision is complete.
- e. The Busia County Land Registrar in conjunction with County Land Surveyor be and are hereby directed to visit the suit parcels and restore the boundaries between L.R. NO. 1979 (3210) and L.R. No. 2491.
- f. A permanent injunction be and is hereby issued to the Plaintiffs (Desterio Kulundu Barasa Ondwasi and Kevin Morris Wasike Matumbayi), against Gabriel Muindi Simiyu, and Jacob Etyang' Ekasiba, their representatives or persons claiming through them from interfering with possession of L.R No Bukhayo/Lupida/1979 and any numbers arising from it.
- g. Each party shall bear their respective costs of the consolidated suits.

DATED, SIGNED AND DELIVERED ONLINE ON THIS 7TH DAY OF MAY, 2024

A. OMOLLO

JUDGE

