



REPUBLIC OF KENYA



KENYA LAW
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**Rono v Mosonik (Environment & Land Case 139 of 2015)
[2023] KEELC 16093 (KLR) (2 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16093 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 139 OF 2015**

MC OUNDO, J

MARCH 2, 2023

BETWEEN

STEPHEN KIMUTAI RONO PLAINTIFF

AND

JOSEPH KIPYEGON MOSONIK DEFENDANT

JUDGMENT

1. By a Plaint dated the 13th May 2010, the Plaintiff herein seeks for the following orders;
 - i. An Order of Eviction against the Defendant by himself the agents, servants, employees or otherwise to forthwith vacate the Plaintiff's parcel of land known as No. LR Kericho/Kaitet/577.
 - ii. An Order of permanent Injunction restraining the Defendant by himself, agents, servants, employee and/or otherwise from trespassing onto, grazing thereon, constructing thereon any semi-permanent structures or doing any other acts which are prejudicial to the Plaintiff/Applicants proprietary in interest No. LR Kericho/Kaitet/577.
 - iii. Mesne profit from the date of illegal entry till (sic) the date the Defendant vacate (sic) the land.
 - iv. Costs and interest.
 - v. Any other relief that the court may deem fit and just to grant.
2. Pursuant to the service of the pleadings upon the Defendant herein, he filed his Defence dated 28th June 2010 wherein he denied the contents of the Plaint stating that he had been in occupation of land parcel No. LR Kericho/Kaitet/412 and had never trespassed onto the Plaintiff's land. That the Plaintiff's case was premature, vexatious, bad in law and an abuse of the court process and that they would raise a preliminary objection at the earliest opportunity for the matter to be struck out with costs.



3. On the 6th July 2010, by consent parties sought that the Bomet District Land Registrar together with the District Surveyor do visit the site and mark the boundaries of No. LR Kericho/Kaitet/557 and the adjacent lands No. Kericho/Kaitet/663 and 662, which were sub-divided from No. LR Kericho/Kaitet/412, in the presence of all the parties and thereafter file a comprehensive report regarding the alleged trespass on parcel number No. LR Kericho/Kaitet/557. A report dated 20th July 2011 was then filed.
4. The matter did not proceed for hearing and on the 25th July 2018, when the court summoned the officers to attend court to shed light on the existence of an access road on parcel No. Kericho/Kaitet/663 and 557, there was a second visit on the suit premises wherein a report dated 23rd July 2018 had been filed in court on 21st November 2018.
5. On the said date, the Plaintiff's case took off with the hearing of the evidence from Samwel Langat, the District Surveyor Bomet who testified as PW1 on their filed report dated the 23rd July 2018 to the effect that there was a 10 meter strip of land between parcel No. 663 and 557. That the Plaintiff herein who was the owner of parcel No. 577 had lay claim that the 10 meter strip was a road access which passed through parcel number 411 to the water point on parcel number 633 which was the Defendants land. That on the other hand, the Defendant had lay claim that this trip of land/road was part of his parcel of land and that there had been no road of access.
6. His evidence was that on the Registry Index Map (RIM) there had been no road of access between the two parcels of land being No. 633 and 577 although they had noted that indeed the 10m strip had been used as a road which led to the water point. His further evidence was that parcel number 662 did not boarder parcel number 577. The witness sought to produce the report as Pf exh 1.
7. There was an objection to the production of the report to the effect that the Samwel Langat, the District Surveyor Bomet, was not its maker. The defence sought that the maker be called to produce the same. This witness was then stood down by the court.
8. On 15th May 2019 the District Land Registrar Bomet, Athman Otime Juma, testified as PW2 to the effect that although he had only been at the Bomet Land registry for three weeks, yet he was the custodian of the documents pertaining to land parcels in Bomet. That whereas No. Kericho/Kaitet/577 was registered to Stephen Kimutai Rono on the 1st February 1990, No. Kericho/Kaitet/663 was registered to Justina Chelangat Chelule on the 6th November 1990 and that he could not tell whether the two parcels of land bordered each other because this could be ascertained by the district surveyor. That he could also not ascertain the status of No. Kericho/Kaitet/662 or its owner and neither did he know the location of No. Kericho/Kaitet/663 on the ground. He produced the copies of the green card as Pf exh 2 and 3.
9. On the 23rd September 2019, PW1 was recalled wherein he had reiterated the evidence he had adduced on 21st November 2018, and produced the report dated 23rd July 2018 as Pf exh 1.
10. On cross examination by the defence Counsel, the land surveyor confirmed that although there was a road of access on the ground between parcels of land No. Kericho/Kaitet/662 and 577, the same did not exist on the map, which had an official access road for parcel number 577 to the water point. That the disputed strip of the access path was on parcel No. 633 which land was owned by Justina Chelangat Chelule.
11. In re-examination the witness confirmed that the Defendant did not have a right on the strip of land and that he did not understand the basis under which the Defendant as the owner of parcel number



- 662 was using the said strip of land. That the issue if any, would have been between the owners of parcel number 663 and 577.
12. PW3, one Alfred Kiprono Rotich testified on 18th November 2019 to the effect that he knew both parties herein who were his neighbors. That he also knew about their dispute which was in relation to a boundary. He confirmed that whereas parcel number 577 belonged to the Plaintiff, parcel no. 663 belonged to Justina Chelule, and parcel number 662 belonged to the Defendant. That indeed there had been a road that was on the ground which passed through parcels of land no. 577 and 663 but did not exist in the map. That the said road was used to take their animals to the cattle dip. His evidence was that the said road did not pass through parcel number 662.
 13. In cross examination he confirmed that parcel number 663 and 662 bordered each other. That the Defendant had sold parcel no 663 to Chelule. That the Plaintiff had a road that he uses and the cattle dip was on the lower part of that area. That they all used the upper part of the area to take their cattle to the cattle dip which was used by many people. That there was no maize growing on the disputed road but he had found some beans growing on part of the road.
 14. In re-examination, he confirmed that the road on the map was on parcel number 633 and that he did not know why the Defendant had closed the road as it was used by many people.
 15. By consent parties agreed to have Justina Chelangat Chelule the proprietor of land parcel number 663 testify without recording her statement.
 16. However on 29th September 2021 the court had been informed that the Plaintiff was injured and was on crutches and therefor he wouldn't be in a position to testify. On 24th January 2022 the court was informed that the Plaintiff had recovered and a hearing date was taken for the 21st March 2022 on which day the Plaintiff's Counsel decided to close its case.
 17. On 21st May 2022 the defense opened its case with the testimony of the Defendant Joseph Kipyegon Mosonik who testified as DW1 to the effect that his and the Plaintiffs land shared a common boundary. That his land was initially parcel number 412 wherein he had subdivided it resulting into parcels number 662 and 663, he had sold 663 wherein he had remained with parcel number 622. He produced the original title deed as Df exh 1.
 18. That parcel number 663 which was on the right side of 662 had been sold Justina and this was the parcel of land that bordered the Plaintiffs land. That after he had sold the land to Justina which was before the case was filed in court, and wherein she had been issued with a title, he had kept aside ½ acre.
 19. That it was not true that he had trespassed on the Plaintiff's land, as there had been a barbed wire placed by one Francis on the land. That it was also not true that he had closed/blocked a road and that the Plaintiff had lied when he informed the court that there had been a road which he (Defendant) had blocked. He produced the mutation forms as Df exh 2 and marked the Map for Kaitet as Df MFI 3.
 20. He also confirmed that indeed the surveyor had visited the suit land and that the 10 m road he had talked about was not on the map. He marked the surveyors report dated 20th November 2011 as Df MFI 4. His evidence was that the Plaintiff ought to have filed the trespass suit against Justina. He thus sought that the suit herein be dismissed.
 21. On cross-examination, the Defendant reiterated that Justina's land bordered the Plaintiffs land. That the second visit to the disputed land was conducted by the surveyor and the Plaintiff in his absence, however upon his arrival, they had gone on to look at the land. That the public road was still in existence but that the Plaintiff and Justina continued to plough on that piece of land that was said to be a road. He confirmed that his land had no road and that he had not trespassed on anybody's land.



22. He proceeded to testify that the Plaintiff had his own title to land parcel number 577 which initially used to border parcel number 412 before he sold part of it in 1987.
23. The court noted that he was truthful.
24. The next defence witness, Richard Kipkemoi Kimetto testified as DW2 to the effect that he was a retired Chief and that he knew both parties herein as he had lived in Kaitet for more than 40 years. He confirmed that the suit lands herein had initially belonged to a Co-operative society wherein each of them had been given 16 acres. That the Defendant had sold part of this portion to Justina and two other persons. He confirmed that Justina's land, which she had bought more than 20 years ago and before the suit was filed, bordered the Plaintiffs land.
25. He also confirmed that there had been a path between the Plaintiff and the Defendants land but which path was on the Defendants land and which had been used by cattle had now been converted into a "shamba." after a road had been opened at Arap Too's land. That both the parties herein were in occupation of their respective parcels of land and there was no road in between the said parcels of land which both touch on the main road.
26. He also testified that there was a public utility and which had a special road and confirmed that when the Plaintiff had raised the dispute wherein they had called the Land Registrar and Surveyor who had visited the site with a map that had indicated the nonexistent of a road. That had been when the Defendant had started ploughing.
27. On cross- examination, the witness confirmed that he had retired in 2007. He also confirmed that the parties herein were his neighbors and that the Defendant was now ploughing the land that used to be a road, and this was after there had arisen a dispute between the two parties wherein the land registrar had informed them in a baraza that had been held in 1986 and 1989 that the path they used to use belonged to the Defendant as it was on his land.
28. He confirmed that whereas the Plaintiff had planted trees at the end of this strip referred to as a road, the Defendant also had planted nippier grass and that at the end of the said strip, there was a public utility which could be accessed through two different directions.
29. Cheruiyot Kosgei testified as DW3 to the effect that he was a village elder and that indeed the Plaintiff and Defendant's land bordered each other. That they had been having the land dispute issues but that the land which the Plaintiff lay claim to was on the Defendant's side. He also confirmed that although the Defendant had sold part of the land to Justina, yet there was a piece of land that still bordered the Plaintiff's land. He also confirmed that each of the parties land touched on the main road, and there was no road passing through the Defendant's land.
30. When cross examined, the witness confirmed that the Defendant uses the road between the Plaintiff and Justina's land and that there was no road before the case was brought to court. He confirmed that there is no road between the Plaintiff and the Defendant's parcel of land but that the parties shared a common boundary.
31. In re-examination he reiterated that the disputed piece of land was the piece of land that remained bordering the Plaintiff and Justina's land after the Defendant had sold land to Justina.
32. Charles Kipkemoi Mutai, a Land Surveyor by profession testified as DW4 to the effect that he could interpret the map which had been marked as DF MFI 3. That the same was Map Sheet 6 in reference to Ndalai/Manaret-block 1 (Kaitet). He confirmed that parcels of land number 577 and 663 bordered



each other and that there was no access road in between them other than a common boundary. That the map was dated 13th July 2022 and was a final map. He produced it as Df exh 3.

33. In cross examination, he confirmed that he had not visited the suit land but that he had been summoned to testify on the Map regarding the two parcels of land. That there were no public utilities around the borders of the two parcels of land despite the fact that there were public utilities in the said map.
34. The defence closed its case and parties were directed to file their written submissions.

Plaintiff's submissions.

35. The Plaintiff's submission was to the effect that on or about the month of April 2010 the Defendant unlawfully and without any legally justifiable reason trespassed onto his parcel of land being Kericho/Kaitet/577 and took possession thereof wherein he had persisted in its occupation, ploughing, grazing thereon and constructing semi-permanent structures with an intention of permanently occupying the land. That the Plaintiff now seeks for among other orders, an order for eviction against the Defendant by himself, agents, servants and or employees.
36. The Plaintiff framed his issue for determination as to whether he was entitled to the orders sought, wherein he proceeded to submit that he was the registered proprietor of land parcel No. Kericho/Kaitet/577 as per the certificate of official search and title deed produced before court showing that he was registered as such the year 1990.
37. The Plaintiff relied on Section 24(a) and Section 25 (1) of the Land Registration Act to submit that he was entitled to enjoy absolute ownership and all rights and privileges to it and therefore as a legal owner of the Kericho/Kaitet/577, the court was invited to protect his interests and rights.
38. The Plaintiff referred to Clerk and Lindsell on Torts, 18 edition at Pg.23 which defined "Trespass" as well as the provisions of Section 3 (1) of the Trespass Act that provided for the repercussions for the act of trespass, to submit that he had never authorized the Defendant to enter his land, plough, graze and construct the semi-permanent structures on it.
39. That the Bureti Surveyor's report dated 20th July 2011 clearly indicated that there was a 10 meter road of access which separated the two parcels of land being No. Kericho/Kaitet/577 and 663 and that the same was meant to serve a public utility on parcel No. Kericho/Kaitet/631. Further, the Bomet District Surveyor also confirmed through his report dated 23rd July 2018 that on the ground there was a 10 meter strip access road which had been existence and was used by the locals for many years.
40. That it had been confirmed from the reports, that the Defendant had unlawfully and illegally blocked the said access road by ploughing it and planting crops on it thus inconveniencing the public as evidenced from the letter by the Chief dated 9th December 2014 and the Plaintiff's witnesses. That the Defendant ought to be estopped from denying that indeed there existed an access road.
41. Reliance was placed on the decided case in *McIlkenny vs Chief Constable of West Midlands*, [1980] All ER 227 that gave the history of the evolution of the doctrine of estoppel from French origins where it had been compared to a house with many rooms, to submit on the estoppel by conduct and estoppel by election or waiver which was an intentional relinquishment or abandonment of a known right or privilege as was held in the case of *Banning vs Wright* (1972) 2 All ER 987.
42. By further placing reliance in the decided case of *Kenya Power & Lighting Co. Limited v Sheriff Molana Habib* [2018] eKLR, the Plaintiff submitted that the Defendant be perpetually restrained from continuing to trespass and to block the access road so as to protect the rights of the Plaintiff.



That the Plaintiff having proved his case on a balance of probabilities, there be judgment against the Defendant as highlighted in the Plaintiff.

Defendant's Submissions.

43. The Defendant submitted that he has been on his land parcel number No. Kericho/Kaitet/412 (presently No. Kericho/Kaitet/662). He denied trespassing in the Plaintiff's land and the Plaintiff's entitlement to Eviction Order. That during the hearing, he had produced the RIM, the Surveyor's report and title deed wherein he had called two witnesses. That the Plaintiff had also produced a title deed to No. Kericho/Kaitet/577, a Surveyor's report and had called witnesses including himself in support of his case where he had lay claim of a road of access having been blocked or taken by the Defendant and not that the Defendant had trespassed upon his land. Evidence of his witness's dealt with a road of access but did not prove any existence of a road of access which the Defendant had all along denied was in existence between his parcel No. Kericho/Kaitet/662 and 577.
44. The Defendant framed his issues for determination as follows;
 - i. Whether the Plaintiff pleaded and proved his claim.
 - ii. Whether the Honorable Court has jurisdiction to determine a matter not pleaded.
 - iii. Who is to pay costs
45. In his submission, the Defendant stated that pursuant to the filing of the Plaintiff's Plaintiff where he had alleged that the Defendant had trespassed upon his land parcel number No. Kericho/Kaitet/577, the Plaintiff had sought for eviction, injunction, mesne profit and costs against him.
46. However the Plaintiff in his testimony in Chief had claimed that the Defendant had interfered with a road of access wherein his witnesses had also testified on the same. That the Plaintiff never bothered to amend his pleadings to deal with a road of access and as a whole, the Plaintiff shifted his claim from that of trespass to that of blockage of a road of access. He thus did not prove what he pleaded in the Plaintiff and neither did he prove the existence of a road of access.
47. The Defendant relied on the decided case in *Vijay Marjoria vs. Naimising Madhusing Darbar* Civil Appeal No. 106/2000(sic) and the holding in *John Njenga vs. Bata Shoe Company Ltd* Nairobi High Court Civil Case No. 2332 (sic) to submit that a point that was not pleaded, even if canvassed at the hearing could not be a basis of determination. That the pleaded issue herein was trespass but the hearing was canvassed on the blockage of a road of access and therefore the Court had no power (sic) to determine on an issue not pleaded.
48. That in the case of *Galaxy Paints Company Limited vs. Falcon Guards Ltd* Civil Appeal No. 219 of 1998 (2000) 2 EA 385, it had been held that issues for determination in a suit generally flowed from the pleadings and unless the pleadings were amended, that the court could only pronounce judgment from the issues arising from the pleadings or such issues as the parties had framed for the Court's determination. That the Plaintiff's claim offended the provision of the *Civil Procedure Act* and the Law of Evidence and should be dismissed with costs.

Determination.

49. I have considered the evidence herein adduced, the submissions and authorities cited. Indeed it is not in contention that the suit was filed by the Plaintiff against the Defendant for an act of trespass on land parcel being Kericho/Kaitet/577 wherein he had sought for orders of eviction to issue against the Defendant, a permanent injunction restraining the Defendant by himself, agents,



servants, employee and/or otherwise from trespassing onto, grazing thereon, constructing thereon semi-permanent structures or doing any other acts which were prejudicial to his proprietary interest No. LR Kericho/Kaitet/577, mesne profit from the date of illegal entry until the date the Defendant vacated from the land, costs and interest thereon as well as any other relief that the court would deem fit and just to grant.

50. It is interesting to note however that the Plaintiff herein did not testify nor adduce any evidence in support of his claim. The evidence on record in support of the Plaintiffs claim was that of PW1 the Bomet land Surveyor, PW 2 the Bomet Land Registrar and PW3 one Alfred Kiprono Rotich a neighbor to both parties. The evidence adduced by these witnesses was to the effect that indeed whereas parcel No. Kericho/Kaitet/577 belonged to the Plaintiff, parcel No. Kericho/Kaitet/ 663 belonged to Justina Chelule, and parcel No. Kericho/Kaitet/662 belonged to the Defendant. Further evidence was that although there was a road of access on the ground between parcels of land No. Kericho/Kaitet/662 and 577, the same did not exist on the Registry Index Map (RIM) which had an official access road for parcel No. 577 to the water point.
51. According to the evidence of the land surveyor who produced a report dated the 23rd July 2018, as Pf exh 1, the 10 meter strip of land that had been used as a road which led to the water point, was on parcel No. 633 which land was owned by Justina Chelangat Chelule. His further evidence was that parcel number 662 did not boarder with parcel No. 577.
52. The Defendant's case was also to the effect that there had been a dispute on a road that led to a public utility that had apparently been blocked. That the dispute had then been solved after the Land Registrar and Surveyor had visited the site with a map which had indicated the nonexistent of a road.
53. Indeed a look at the recommendation part of the report dated the 23rd July 2018 that had been produced as Pf exh 1, was as follows;
- “The court to give a way forward on the following; The issuing claim by the Plaintiff that a road of access exists joining point D and C and that if the same is granted, then an amendment be carried out in order to depict the same.”
54. Having considered the pleadings, the evidence and the submissions filed herein I find the issue arising for determination as being;

i. Whether the Plaintiff has proved his case on a balance of probability.

55. Trespass has been defined by the 10th Edition of Black's Law Dictionary as;
- “an unlawful act committed against the person or property of another; especially wrongful entry on another's real property.”
56. Section 3 (1) of the *Trespass Act*, also defines trespass as follows;
- “Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”(Emphasis mine)



57. The Court in *John Kiragu Kimani vs Rural Electrification Authority* [2018] eKLR in defining trespass relied on *Clark & Lindsell on Torts*, 18th Edition on page 923 which defines trespass as;

‘any unjustifiable intrusion by one person upon the land in possession of another. The onus is on the Plaintiff to prove that the Defendant invaded his land without any justifiable reason’.

58. From the holding herein above and the definition of trespass, the court has considered the evidence herein adduced by the witnesses for both parties herein who confirmed that indeed whereas there was a road of access on the ground between parcels of land No. Kericho/Kaitet/662 and 577, the same did not exist on the Registry Index Map (RIM). That in fact the 10 meter strip of land that had been used as a road which led to the water point, was on parcel No. 633 which land was owned by Justina Chelangat Chelule.

59. In essence therefor there was no evidence confirmed by the witnesses including the experts that the Defendant had trespassed onto the Plaintiff’s parcel of land and/or that the matter herein concerned trespass at all.

60. The evidence that seems to flow all throughout the proceeding was one that concerns the use and/or blockage of a road that passed or did not through both the parties’ parcels of land.

61. In the case of *Independent Electoral and Boundaries Commission & another vs. Stephen Mutinda Mule & 3 others* [2014] eKLR which cited the decision of the Malawi Supreme Court of Appeal in *Malawi Railways Limited vs. Nyasulu* [1998] MWSC 3, in which the learned judges quoted with approval from an article by Sir Jack Jacob entitled “The Present Importance of Pleadings.” The same was published in [1960] *Current Legal problems*, at P174 whereof the author had stated;

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”



62. Further in Joseph Mbuta Nziu v Kenya Orient Insurance Company Ltd [2015] eKLR the Court of Appeal in making a reference to a decision of the Nigerian Supreme Court in In Adetoun Oladeji (NIG) Limited vs. Nigerian Breweries PLC S.C. 91/2002, agreed that;

‘... it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.’

63. That Order 2 Rule 4 of the Civil Procedure Rules sets out the matters that a party needs to plead. The Court of Appeal in DEN vs PNN [2015] eKLR elaborated on this as follows-

“Generally, the law is that the Courts would determine a case on the issues that flow from the pleadings and judgment would be pronounced on the issues arising from the pleadings or from issues framed for courts’ determination by the parties. It is also a principle of law that parties are generally confined to their pleadings unless pleadings were amended during the hearing of a case. See the Case of Chalicha FCS Ltd Vs Odhiambo & 9 Others [1987] KLR 182 for the proposition that “Cases must be decided on the issues on the record., which is outside the pleadings; the Case of Galaxy Paints Co. Ltd vs Falcon Guards Ltd EALR (2000) 2EA 385 for the proposition that the issues for determination in a suit generally flow from the pleadings and a Court could only pronounce Judgment on the issues arising from the pleadings or such issues as the parties framed for the court’s determination. The Case of Anthony Francis Wareham & Others Vs Kenya Post Office Savings Bank C.A 5 and 48 of 2002. This Court held that a court should not make any findings on matters not pleaded or grant any relief which is not sought by a party in the pleadings; Lastly the Case of Greenfield Investment Limited Vs Baber Alibhai Mainji, Civil Appeal No. 155 of 2004, for the proposition that “...A Court of law cannot pluck issues literally from the air and purport to make determinations on them. It is the pleadings which determine the issues for determination....”

64. Likewise in this case, the court is in agreement with the Defendant that since the issues for determination in the present suit did not flow from the pleadings, the Court cannot pluck issues literally from the air and purport to make determinations on them or grant any relief herein. I find that the Plaintiff has not proved his case on a balance of probability and proceed to dismiss it with cost.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 2ND DAY OF MARCH 2023

M.C. OUNDO

ENVIRONMENT & LAND, JUDGE

