



**Ethuru v Thumatia & 2 others (Environment & Land Case
5 of 2019) [2023] KEELC 17375 (KLR) (10 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17375 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 5 OF 2019**

CK NZILI, J

MAY 10, 2023

BETWEEN

ANDREW KOBIA ETHURU PLAINTIFF

AND

THANARA THUMATIA 1ST DEFENDANT

LAND REGISTRAR, MAUA 2ND DEFENDANT

ATTORNEY GENERAL 3RD DEFENDANT

JUDGMENT

1. Through a plaint dated 26.2.2019, the plaintiff who is the registered owner of LR No. Meru North/Athinga/Athanja 4408 sued the defendants claiming that they had illegally reduced his parcel number by 0.928 ha, short of what had been dully gathered, demarcated and recorded during the land adjudication process. As a consequence, the plaintiff averred that the 1st defendant has purported to evict him from his land including lodging charges of forcible detain. The plaintiff averred that the defendant's acts violated his right to acquire and own the actual 4.348 ha which is equivalent to 10.74 acres as provided under Article 40 of *the Constitution*. He, therefore, sought a permanent injunction against the 1st defendant from entering or in any way interfering with his rights to own, possess, occupy and develop the land and an order directed at the 2nd defendant to issue to him a title deed in respect of the suit land reading its correct size as per the demarcation and the adjudication documents and as it is on the ground. The plaint was accompanied by a list of witnesses, witness statements and a list of documents all forming part of his paginated bundle of documents dated 19.5.2021 and 12.2.2020.
2. The 1st defendant opposed the suit through a statement of defence and a counterclaim dated 29.4.2019. While admitting that the plaintiff is the owner of the suit premises, the 1st defendant averred that he is the registered owner of LR No. Meru North/Athinga/Athanja/4408 measuring one acre which he had bought from a third party in 1076 with distinct boundaries but which the plaintiff trespassed in



- to, cut away the fence and coffee plants existing therein and in eventually built his home on the land in 2000 by force, amalgamated the two parcels of land despite clear documentation from the land registrar and surveyor that the two parcels of land are distinct, separate and each with its title deed.
3. As a consequence, the 1st defendant averred that there have been a series of protracted proceedings at the requisite offices including a criminal case against the plaintiff all of which are undetermined due to the plaintiff's lack of cooperation.
 4. The 1st defendant alleged occupation of his land since 1967 since the seller handed over vacant possession in 1976.
 5. By way of a counterclaim, the 1st defendant sued the plaintiff seeking an order of eviction from his land and permanent injunctions topping the plaintiff from in any way interfering with his land and mesne profits from 1976 to date for his illegal occupation.
 6. The defence and the counterclaim was accompanied by a list of witnesses, witness statements and a list of documents all of which forms part of the 1st defendant's paginated bundle of documents dated 19.11.2021.
 7. The 2nd and 3rd defendants opposed the claim through a statement of defence dated 20.9.2019, denying in total the veracity of the allegations contained in paragraphs 6, 7, 8, 9, 10, 11, 12 & 13 of the plaint. In particular, the 2nd & 3rd defendants averred that the allegations in paragraphs 12 & 16 of the plaint are untenable, premature, an abuse of the court process and offend Section 19 of the [Land Registration Act](#) while the allegations in paragraph 16, offend Section 28 of the [Land Adjudication Act](#).
 8. The 2nd & 3rd defendants' defence was not accompanied by any witnesses' statements or a list of documents. Similarly, no paginated bundle was filed according to orders granted on 28.10.2021 and 15.12.2021.
 9. The plaintiff in a reply to the 1st defendant's defence and counterclaim dated 8.5.2019 denied in entirety its contents including the existence of LR No. 3351, anywhere near his land Parcel No.4408. He stated that there had been no demand notice regarding the counterclaim. He maintained that his defence raised no triable issues, was lacking merits and ought to be dismissed.
 10. As concerns the 2nd and 3rd defendants' joint defence by a reply to the defence dated 13.2.2020, the plaintiff averred that Section 19 of the [Land Registration Act](#) did not apply since his land has always had fixed boundaries from the time of demarcation and adjudication process hence there was no necessity to define them again.
 11. Similarly, the plaintiff averred that Section 28 of the [Land Adjudication Act](#) was inapplicable since the operative law in the area was the [Land Consolidation Act](#) (Cap 283).
 12. At the trial, Andrew Kobia Atheru the plaintiff testified as PW 1. He adopted his witness statement dated 26.2.2019 as his evidence in chief and produced photographs showing his developments on the land as P. Exh No. 1 (a) – (d), a letter dated 13.1.2011 confirming ownership of the land as P. Exh No. (2) a demarcation record as P. Exh No. (3), sketch map of the area dated 13.1.2011 as P. Exh No. (4), the statutory notice to sue sent to the defendants as P. Exh No. (6), a copy of his title deed as P. Exh No. (5), a demand letter to the 1st defendant as P. Exh No. (7) ruling in Tigania Criminal Case No. 1359/2018 as P. Exh No. (8). His evidence was that on the ground the land demarcated in his favour is 10.74 acres as reflected in the demarcation and Adjudication records, where he has been in occupation since 1967 and made several developments as shown in the photographs.



13. PW 1 told the court that nobody else had laid a claim on his land until September 2018 when the 1st defendant threatened to invade his land and forcibly evict him leading to charges at the Tigania law courts. It was only after that, that he realized his title deed from the 2nd defendant had less acreage as opposed to the land he is occupying on the ground.
14. Regarding the documents contained in the 1st defendant's paginated bundle, PW 1 denied either receiving the alleged summons dated 6.11.2011 or attending to any proceedings at the land adjudication offices. PW 1 also confirmed that no land surveyor visited his land as alleged by the 1st defendant. Additionally, PW 1 disputed the letter on page 18 of the 1st defendant's bundle. He denied the allegations that he grabbed the 1st defendant's land in 1986 and also made developments thereon in 2000 otherwise the 1st defendant would have lodged a claim against him before this suit. As regard the 1st defendant's listed witnesses, PW 1 told the court that John M'Thiruaine as his cousin and a one-time member of the land Adjudication Committee who during the adjudication had demanded Kshs.20,000. PW 1 acknowledged that he was from the same clan as the 1st defendant. Shown the area map on page 25 of the 1st defendant's bundle, PW 1 pinpointed where his home was situated as falling under Parcel L.R No. 3351.
15. According to him, he gathered four acres of land and eventually bought some more from his cousin and a step farther at a ratio of 1.28 acres. PW 1 said that the 1st defendant had never bothered him till 2018 when he lodged wild criminal allegations about him at Tigania Law Courts. He denied receiving, ignoring and refusing to attend to the summons from the land adjudication officer allegedly served on him. Similarly, PW 1 denied attending any of the alleged meetings and or being party to any land surveyors' scene visits or a report to that effect as appearing on page 18 of the 1st defendant's bundle of documents.
16. PW 1 termed the documents held by the 1st defendant as misleading since the government could not have issued a title deed for land not existing on the ground. It was the plaintiff's evidence that if the reliefs sought were not granted, he stood to lose close to 2 acres and more since the original documents at pages 13-14 of his bundle were clear on the land he was entitled to as per the demarcation and adjudication records. PW 1 also admitted that he was not able to get a land surveyor's report ascertaining the anomaly otherwise, the original record from which the title deed arose was clear that he was the original demarcated owner of the land.
17. Cross-examined by the 2nd and 3rd defendants, the plaintiff admitted that before the issuance of the title deed he had signed the adjudication record as per the adjudication register number and therefore expected what is on the title deed to tally with the aforesaid records. He also admitted that he did not apply for the rectification of the register before moving to court nor did he seek and obtain a land surveyor's report showing the difference in acreage which difference came to his knowledge in October 2018.
18. In re-examination, PW 1 said that some of the documents shown to him by the 1st defendant, especially the map were not authenticated, certified or dated. Similarly, PW 1 said that the alleged summons from the District Land Adjudication and Settlement Officer was neither received by him nor were they dated or carrying any official government logo. He termed a land surveyor's report as unnecessary because of the original A/R records before the court which ideally would be more authentic. PW 1 insisted that the 1st defendant has never been his neighbour at the time that he bought the land and that the suit at Tigania Law Courts was dismissed. His evidence was that had there been any genuine claim over the land the 1st defendant would have taken him through the five stages under the [*Land Adjudication Act*](#)



otherwise the court should order for his rightful share as demarcated and adjudication as measuring 10.74 acres of land.

19. Isaiah M'Mubwika and Peter Nchebere testified as PW 2 and PW 3 respectively. They adopted their witness's statements dated 26.2.2019 as their evidence in chief. Affirming the evidence given by the plaintiff, PW 2 and PW 3 told the court that they were present during the demarcation and adjudication process and witnessed the measuring of the plaintiff's land as 10.74 acres and so was the position when residents were called out at Muriri shopping centre to ascertain the contents of the adjudication register before the issuance of a title deed. PW 2 and 3 further told the court that thereafter confirmation letters were issued to them and the plaintiff and no objection at the time was raised by the 1st defendant who never appeared during the demarcation and adjudication process.
20. As a neighbour of the plaintiff, PW 2 told the court he relied on what the demarcation officers told him as the exact acreage of the plaintiff's land. He was emphatic that the 1st defendant was not a neighbour to the plaintiff and neither was entitled to any such land in the locality. PW 2 could not however tell what percentage cut was applied to the plaintiff's land but said that 10.74 acre must be the size after any percentage cut was applied. PW 2 was emphatic that no A/R objection was raised against the plaintiff's land by the 1st defendant.
21. PW 3 told the court that as the 1st occupant of land in the area, he would have known if the 1st defendant was interested in any land in the area, unlike the plaintiff who has been occupying the land since 1967.
22. Thanara Thumatia the defendant testified as DW 1 and adopted his witness statement dated 19.11.2021 as his evidence in chief. He produced an adjudication book for his land as D. Exh No. (1); adjudication officers dated 6.11.2011, as D. Exh No. (2), a land adjudication surveyor's notes dated 22.9.2011 as D. Exh No. (3), a letter dated 26.11.2011 as D. Exh No. (4), an official search for his land as D. Exh No. (5), a copy of his title deed as D. Exh No. (6), the area map as D. Exh No. (7), ID copy of Kariantu M'Muketha as D. Exh No. (8) and lastly the ID card for John M'Lithione Linthara as D. Exh No. (9). He termed the evidence given by the plaintiff as a pack of lies since he was the one who found him on the land in 2011 after he acquired some land from his uncle though he would not tell its exact acreage. DW 1 told the court that the plaintiff was severally summoned to the land adjudication officers but declined to attend. DW 1 admitted that PW 3 was a neighbour in the locality. He termed the entry into his land by the plaintiff to have occurred in 1986 while the construction started in 2000.
23. DW 1 said that he bought the land from a third party after ascertaining that he had documents from the land's office showing that he was a genuine owner of the land he was about to sell to him. DW 1, however, did not produce those documents before the court, including a sale agreement and an acknowledgement note of payments for the land. DW 1 admitted that D. Exh No. (1) was handwritten and contained two parcels of land. With different hand swings and so was D. Exh No. (2) which lacked a parcel number, the addressee's date of service and an acknowledgement signature by the recipient. Further, DW 1 admitted that he had no proceedings at either the Arbitration Board Committee A/R objection or a Minister's appeal regarding his complaint. He admitted that the plaintiff was acquitted of the charges at Tigania Law Courts, though no appeal was preferred against the judgment by him.
24. DW 1 also acknowledged that D. Exh No. (3) was handwritten lacked a land surveyor's stamp and was only signed by the Land Adjudication Officer. Similarly, the defendant told the court that he had no land surveyors report showing the position of his land parcel as regard D. Exh No. (4), where he was seeking the help of the land adjudication office to repossess his land from the plaintiff. He also admitted that he had no signed transfer form from the land office nor a copy of an adjudication register showing that he was either transferred the land or that the transferor had been demarcated or recorded as the correct owner of the land. Similarly, DW 1 said that it was the plaintiff who has planted coffee trees on



- the suit land. As to whether he had left to lodge a counterclaim outside 12 years, DW 1 told the court he had none sought or obtained. Additionally, DW 1 said that he had no survey or beacons report to show that the plaintiff amalgamated his land including the exact boundaries of his parcel of land. As to whether he attended the viewing of the adjudication register before the issuance of the title deed, DW 1 said he had no records to that effect before the court.
25. In re-examination, DW 1 said that his parcel of land exists on the ground and the map since however sold to him had account no. 15 as per D. Exh No. (1) and so his D. Exh No. (9) is a valid title deed. Despite the occur that he has been unable to access his land hence the reason he was seeking for mesne profits.
 26. Kariantu M'Muketha and John M'Muthiruane Litharia testified as DW 2 and DW 3 and produced their witness's statements dated 19.11.2021 as their evidence in chief. DW 2 testified that her late husband M'Muketha Kaburii sold the suit land to the 1st defendant for Kshs.120,000/= she was initially tilling though she had no sale agreement or adjudication records or documents to indicate that there was a sale, transfer and ownership of land by her late husband before the sale agreement. DW 3 told the court that he sold a portion of his land to the plaintiff measuring approximately 0.150 acres, apart from the disputed land which used to belong to one M'Muketha Kabiiru.
 27. DW 3 said that he was the one who looked for the 1st defendant to buy the land from the deceased though the land was currently under the occupation of the plaintiff. In cross-examination, DW 3 told the court that he used to be a land Adjudication Committee member and that he was certain that the disputed land was demarcated, recorded and boundaries fixed on the ground. Asked about P. Exh No's. 3 & 4, DW 3 said that it was indeed true that it was recorded in favour of the plaintiff and therefore what the 1st defendant was claiming could not have been within the plaintiff's parcel of land. He however admitted that he was the one who bought M'Muketha's land in favour of the 1st defendant for Kshs.120,000/=. DW 3 could not confirm being privy to any disputes touching the two parcels at the land adjudication offices. Additionally, DW 3 said that he was present when the 1st defendant and the seller went to transfer the land to the land officers. On questions posed to him by the court, DW 3 said that he was the one who bought the land on behalf of the 1st defendant and therefore it could not be true that what he bought for the 1st defendant was also what he sold to the plaintiff.
 28. Shown D. Exh No. (2), DW 3 said the document was familiar to him. He declined to answer the questions as to whether the Land Adjudication Committee visited the land in issue to handle the dispute following the issuance of D. Exh No. 3.
 29. Though the date for the further defence was taken in the presence of Mr. Kieti learned counsel for the 2nd & 3rd defendants no appearance or witnesses attended the defence hearing hence their defence was ordered as closed on 13.2.2023.
 30. At the close of the defence, parties were directed to file and exchange written submissions. In written submissions dated 1.3.2023, the plaintiff took the view that three issues for consideration arise herein. On the 1st issue on where the plaintiff has proved his case to the required standards, it was submitted that the oral and documentary evidence tendered indicates ownership of the suit land since 1967 to date exclusively and pointed out that the final register signed by the plaintiff before issuance of title deed indicated its size as 10.74 as per P. Exh No. 2 & 3. The plaintiff submitted that the version of the plaintiff was corroborated by two credible witnesses namely PW 2 & PW 3 who appeared honest, truthful, candid, forthright, steadfast and consistent.
 31. Moreover, the plaintiff submitted that his evidence was also corroborated by DW 3 who had actively participated in the demarcation and adjudication process. With this evidence, the plaintiff submitted



- that his rights or interests on the land were under threat and could be evicted from the land unless the orders of permanent injunction are granted. Reliance was placed on *James Muniu Mucheru vs NBK Ltd* (2019) eKLR, *Robert Munene Muirungi vs Kinyua Mbaya* (2022) eKLR, *Willy Kipsongok Morogo vs Albert K Morogo* (2017) eKLR.
32. As to the issuance of the correct title deed, the plaintiff submitted that no evidence was adduced by the 2nd & 3rd defendants to challenge his evidence given that the statement of defence filed was not accompanied by any witness statements.
 33. In failing to tender evidence, the plaintiff submitted that his exhibits and testimony remained intact since no justification was made why or how his acreage was reduced yet on the ground and in the adjudication register measures 10.74 acres. Therefore, the plaintiff submitted that it was in the interest of fairness and justice for a re-issuance of a title deed bearing the correct size or acreage in line with the adjudication record as provided under Sections 80 (1) of the *Land Registration Act*. Reliance was placed on *James Mathenge Munyiri vs District Lands Registrar and 2 others* (2018) eKLR, *Kipkoros Arap Soi vs Abuya Maragia Mwembe & 2 others* (2014) eKLR.
 34. On whether the 1st defendant's counterclaim was statute-barred and or proved to the required standard, the plaintiff submitted that since the defendant seeks mesne profits against him from 1976 the implication is that occupation started in 1976 so therefore, the defence and counterclaim as filed was after the end of 12 years contrary to Section 7 of the *Limitation of Actions Act*, without any leave to extend the time from the court. Reliance was placed on *Patrick Kirimi M'Nganabu vs Njeru Muchai* (2021) eKLR.
 35. On the question of proof of the purchase, acquisition and developments on L.R No. 3351, the plaintiff submitted that the names of the alleged sellers were contradictory; the 1st defendant's evidence did not specify the size of that; no official letter was produced from the land adjudication office to show any recordings of the 1st defendant as the owner of Parcel No. 3351. Additionally, it was submitted that the D. Exh No. (2) had no specified parcel number and no proceedings were produced to show any case existed over the two parcels of land and their outcome. Further, the plaintiff submitted that if the 1st defendant was shown the boundaries upon purchase of the land it defeats logic why he could have been seeking to be shown the same in 2011 as indicated in D. Exh No. (3).
 36. Additionally, the plaintiff submitted that if at all the 1st defendant took vacant possession in 1976 one wonders why he would be writing D. Exh No. (4), would not avail the sale agreement date of the agreement, the consideration and evidence of acknowledgement of the consideration.
 37. As to the identity of the land on the ground, the plaintiff submitted that the 1st defendant failed to produce any land registrar, demarcation or land survey report to establish his size, locality and neighbourhood. On mesne profits, the plaintiff submitted that no evidence was tendered to support the assertions.
 38. In sum, the plaintiff submitted that the counterclaim remained purely speculative, unsubstantiated and unproved as required under Sections 107, 108, 109 & 112 of the *Evidence Act*, more so to establish the root of his title deed. Reliance was placed on *Munyu Maina vs Hiram Gathiha Mania* (2013) eKLR, *Joseph Kiprotich Bor vs Tabutany Chepkoech Chebusit* (2021) eKLR & *Robert Munene Murimi* (supra) on the proposition that where two titles over the same land arise each of the competing parties must bring forth evidence showing the chain of acquisition without a break.
 39. The 1st defendant by written submissions dated 14.3.2023, submitted that a title may be acquired on any of the modes specified in Section 7 of the *Land Act* and once obtained Sections 24 & 26 (1) of the *Land Registration Act* insulates such a title deed unless obtained through fraud, misrepresentation



through illegal, unprocedural or corrupt scheme. As to whether the plaintiff was entitled to a permanent injunction, the 1st defendant submitted that D. Exh No. (7) indicated the two parcels of land as separate, distinct and with a clear boundary between them a fence which the plaintiff allegedly destroyed and trespassed into his land. The 1st defendant submitted that his parcel of land was lawfully acquired from a known person and owner and obtained a title deed. That the plaintiff has not proved fraud, illegal, unprocedural or obtained through a corrupt scheme.

40. On whether the plaintiff was entitled to a rectification of his title deed, the 1st defendant termed the claim as unsustainable for it was the plaintiff who destroyed the existing boundaries, trespassed into his land and allegedly violently thwarted to have the boundary re-established afresh. Reliance placed on *Macharia Mwangi Maina 87 others vs Davidson Mwangi Kagiri (2014) eKLR*, on the proposition that equity shall suffer no wrong without a remedy, no man should benefit from his wrongdoing, equity detested unjust enrichment and the court should render substantive justice rather than technical or procedural justice.
41. On whether the 1st defendant was the true owner of Parcel No. 3351, the 1st defendant submitted that his title deed was issued on 12.1.2015 was a prima facie evidence of ownership two defence witnesses substantiated his ownership claims and that the only issue at hand was the boundary between the two parcels as per the cadastral map produced as D. Exh No. 7 at page 25 of his bundle, under Section 18 of the *Land Registration Act*, following the violent entry into and destruction and interference by the plaintiff. Reliance was placed on *Hamisi Ramadhan Chibendo vs Hamisi Mwawimo and 2 others (2021) eKLR*.
42. Lastly, on the aspect of mesne profits, the 1st defendants submitted that going by the title deed whose validity and root cause were not in question, and following the wrongful occupation since 1986 the court should find him entitled to mesne profits for the denial of rights for the period he has been denied entry and occupation of the land. Reliance was placed on *Mistry Valji vs Jahendra Raichand & 2 others (2016) eKLR*, *Rajan Shah t/a Rajan S. Shah & Partners vs Bipin P. Shah (2016) eKLR*.
43. Concerning whether the counterclaim was statute barred as per Section 7 of Cap (22), the 1st defendant submitted that the issue was not raised in the reply to the defence and defence to the counterclaim and that parties are bound by their pleadings. Reliance was placed on *Daniel Otieno Migore vs South Nyanza Sugar Co. Ltd (2018) eKLR*.
44. The 1st defendant submitted that trespass to his land occurred in 1986 and reports were made to various authorities including a criminal charge against the plaintiff. Reliance was placed on *Harrison Oyari & 588 others vs Mareo Oriambu & 22 others (2016) eKLR*.
45. The court has carefully gone through the pleadings, evidence tendered by the party's issues framed and written submissions. The issues requiring my determination are:
 - i. If the dispute is properly before the court.
 - ii. If the plaintiff has proved his ownership of the suit land to be entitled to the reliefs sought.
 - iii. If the defendants violated the plaintiff's right to ownership and registration of his land.
 - iv. If the 1st defendant has proved his claim against the plaintiff.
 - v. If the counterclaim is statute-barred.
 - vi. What is the order as to costs?



46. The 2nd & 3rd defendants have averred that the allegations before the court were untenable, premature and an abuse of the court process since they offend the procedure spelt out under Section 19 of the Land Registrations Act, 2012, and Section 28 of the [Land Adjudication Act](#). In response to these claims, the plaintiff by a reply to the defence dated 13.2.2020 averred that his land has always had fixed boundaries from the time demarcation and adjudication processes hence there was no need to define those boundaries again. Regarding Section 28 of the [Land Adjudication Act](#) (Cap 284), the plaintiff averred that the same was inapplicable since the demarcation and adjudication process for the suit land was governed by the [Land Consolidation Act](#) and not the [Land Adjudication Act](#).
47. Section 18 (2) of the [Land Registration Act](#) provides that the court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of a registered land unless the boundaries have been determined under this section. Section 19 thereof provides the jurisdiction of a Land Registrar upon an application to him by a party seeking the ascertainment and the fixing of boundaries among the owners and occupiers of the land adjoining the boundaries in question.
48. In the case of *Azzuri Ltd vs Pink Properties Ltd* (2018) eKLR, at issue was whether a party had failed to exhaust the laid down grievance handling mechanism under Sections 18 & 19 of the [Land Registration Act](#). The suit land was in a general boundary area as opposed to a boundary area. The issue before the trial court was a claim on a construction commenced on a parcel but which later exceeded the legal boundaries thereby encroaching on a road reserve and onto the appellant's land which the appellant termed as amounting to actionable trespass. The respondent had raised the defence of malice acquiescence and estoppel. The services of a land surveyor had been invoked by the parties and a report was made before filing the suit which the respondent was uncomfortable with. At the appeal, the court held that boundary disputes on land falling within general boundary areas must be differed to the Land Registrar for resolution unlike in a fixed boundary which may be investigated by a land surveyor. The court said that jurisdiction was everything irrespective of the strengths and nature of evidence from the parties. The court cited with approval *Kimani Wanyoike vs ECK Civil Appeal No. 213 of 1995*, that where there was a prescribed procedure for redress of any particular grievance, such a procedure must be strictly followed.
49. In the case of *Kinyuni Nyambura & another Civil Appeal 163 of 2017 (2022) KECA 923 (KLR) 19th August (2022) Judgment*, at issue before the primary court were measurements, on the ground which were at variance with what was on paper at the lands office. The dispute had gone through the land disputes tribunal up to an appeal in the primary court. A land registrar's report was produced and adopted by the court to the extent that the titles be recalled for amendment of their respective acreages and also the amendment of the registry index map to tally with the adjudication diagrams. The court said that parties were bound by their pleadings and that the court cannot be left to guess what parties have not put across in their pleadings. The court said the claim before it was for the boundaries to be adjusted to correspond with the registry index map and an order for the recovery of land taken by the respondent. The court said before the boundary was ascertained, it had no jurisdictions to entertain such a dispute on the boundary in which case under Section 19 of the [Land Registration Act](#) it was the Land Registrar to do so based on the applicable law; after which parties may move to court if they dispute the report. The court cited with approval *Estate Sonrisa Ltd and another vs Samuel Kamau Macharia & others* (2020) eKLR, where it was held that underscoring the powers of the Land Registrar without restrictions in handling such disputes under Sections 16-19 of the [Land Registration Act](#). The court said that because a title deed was only prima facie evidence of matters shown therein, the registrar's investigations of necessity must encompass all entries in the register, rely on any other relevant documents and existing records, conduct proceedings under Section 14 (1) and cause a survey



to be carried out and determine the dispute after which parties can move to court to challenge it under Sections 79 (3) (a), 80, 86 & 91 (a) of the [Land Registration Act](#).

50. Turning to whether what is before this court is a boundary dispute, the plaintiff in paragraphs 6, 7, 8, and 9 of the plaintiff averred that he has been in occupation of LR No. 4408 since 1967, it was demarcated and recorded for him at an acreage of 10.74 only for the 1st defendant on September 2018 to purport to carve out a piece and threat him with eviction and forcible detainer charges. He averred that upon scrutiny of his title deed issued by the 2nd defendant, he realized the size of his land was less by 2.292 acres as opposed to what was on the ground and the land adjudication and demarcation record. He now seeks to have the rectification of title to his land and a permanent injunction against the 1st defendant from interfering with his land. He produced a copy of the documents in support of his claim among them the title deed, adjudication record and a demand letter to the defendants.
51. The 1st defendant opposed the claim as indicated above. In paragraph 5 of the defence, he stated that the plaintiff trespassed into his land in 1986 and started erecting permanent buildings in 2000, where he has remained therein forcefully and has amalgamated his land. He averred in paragraph 6 thereof that there have been protracted disputes both at the land adjudication and land registrars' offices which the plaintiff has ignored to attend to. Further, the 1st defendant averred that the two parcels of land were separate and distinct and had a common boundary which the plaintiff cut destroyed his coffee and gained entry to his land. The 1st defendant counterclaimed for an order of eviction and a permanent injunction stopping the plaintiff from remaining occupying or trespassing or interfering with his land.
52. From the evidence, the plaintiff's title deed was issued on 9.2.2016 while that of the 1st defendant was issued on 12.1.2015 under registry map sheet No. 108/4/7/6. The two parcels of land border each other. In P. Exh No. (8), the plaintiff had been charged with forceable detainer contrary to Section 36 of the Penal Code. The allegations were that between 13.9.2011 and 9.8.2018 in Kiatheta village, he entered into LR No. Meru North/Athinga/Athanja measuring 0.41 ha without any colour of right and breached the piece of the 1st defence who was entitled in law to the possession of the said land.
53. The court acquitted the accused due to the admitted long occupation. It found no case to answer for the plaintiff. The question then is whether from the pleadings the dispute is purely a boundary dispute or otherwise.
54. In the plaint dated 25.2.2019, the plaintiff averred that in September 2018, the 1st defendant threatened to grab a portion of his land intending to forcefully evict him following which he was charged with forceable detainer at the Tigania law courts. He then realized that there was a discrepancy with his title deed on acreage on the ground as opposed to what was demarcated and registered to him during the Adjudication process. He termed the alterations, reductions and changes as illegal and amounted to a breach of his right to acquire and own land. The plaintiff averred that he wrote to the land 3rd defendant demanding the rectification of his title. Further, the plaintiff said the Land Registrar directed him to move to court. To forestall this imminent threat, the plaintiff sought solace from the court for a permanent injunction, an order directing the 3rd defendant to rectify the title deed and or re-issue one reflective of his correct acreage. He supported his pleadings through the adjudication record, showing the history of his acquisition of the land during the adjudication process and which was not challenged by the 1st defendant.
55. In his defence and counterclaim, the 1st defendant admitted that the plaintiff owned an adjacent land but had encroached on his land, erected permanent structures since 1986 and 2000 and amalgamated his portion. He counterclaimed for the encroached portion and prayed for an eviction, permanent injunctions and mesne profits. The 1st defendant did not raise any jurisdictional issue at all.



56. The 2nd and 3rd defendants in paragraphs 9, 10, 11 & 12 of their defence stated that they were strangers to the alleged disparity on acreage, violation of the plaintiff's rights and in particular, denied receiving the statutory notice to sue. The 2nd and 3rd defendants did not respond to the 1st defendant's defence and counterclaim at all. The 2nd and 3rd defendants have nevertheless raised jurisdiction questions based on Section 19 of the [Land Registration Act](#) and Section 28 of the [Land Adjudication Act](#).
57. To counter this, the plaintiff in his reply to the defence said that the boundaries of his land and neighbourhood were not in dispute at all and therefore he did not require the services of the 2nd defendant before coming to this court. Further, the plaintiff averred that the [Land Adjudication Act](#) was inapplicable to the suit land since it fell under the [Land Consolidation Act](#). The plaintiff testified and produced documents showing that what was demarcated and adjudicated to him was not the result that the 2nd defendant indicated in the title deed.
58. The pleadings and evidence tendered before this court confirm that specific issues and questions have been directed at the offices of the land registrar who is also the 2nd defendant in the manner it exercised its statutory duty and issued the plaintiff with an alleged erroneous acreage and at the same time giving the excised portion to the 1st defendant.
59. In my considered view, the dispute before the court transcends the singular jurisdiction of the 2nd defendant as provided under Sections 16 & 19 of the [Land Registration Act](#). The court has no reason to doubt that the 2nd and 3rd defendants received a statutory notice on 25.1.2019 as per P. Exh No. (7). The 2nd & 3rd defendants failed to either respond to the same or rise to the occasion as its jurisdiction had been invoked to verify, investigate and summon the parties for the appropriate action.
60. The plaintiff was charged in Tigania PCM No.1359 of 2018 for forcible detainer as indicated in P. Exh No. (8). The acquittal came on 27.6.2019. The title deeds were issued by the 2nd defendant on 9.2.2016 and 12.1.2015 respectively. Once the issue of the rectification or anomalies and irregularities with what was on the ground was raised, the 2nd defendant ought to have acted and provided any information in its custody about the same. Unfortunately, the 2nd and 3rd defendants failed to act contrary to the provision of Article 47 of [the constitution](#).
61. In my view, the plaintiff and the 1st defendant were left with no option but to move to court to seek the court's intervention. All these facts and the evidence before the court touch on matters beyond a mere fixing and the ascertainment of the common boundary.
62. The next issue is whether both the plaintiff and the 1st defendant have proved their respective claims. Tied to this is also whether the counterclaim is time-barred. It is trite law that parties are bound by their pleadings and issues flow from pleadings. The plaintiff never pleaded in the reply to the counterclaim aspect of a statute-barred claim. He only raised it in the written submissions, which in law do not amount to evidence. Evidence was also not led to support such a point of law. Trespass is a continuing tort. Even if the entry to the land was in 1986, still the claim would not be stale in law.
63. To counter these submissions, the 1st defendant submitted that adverse possession was not caught by limitation. The 1st defendant did not plead adverse possession. So I find the said written submissions more of statements from the bar, which under the dicta of *Stephen Murithi vs Daniel Toroitich Arap Moi* (2014) eKLR, cannot amount to a pleading or evidence.
64. The plaintiff's claim as indicated above was based on illegal alterations and or changes to his land size, different from what was demarcated and adjudicated to him and is on the ground, to a size smaller as per the title deed issued on 9.2.2016 and which was produced as P. Exh No. (5). The plaintiff did not tell this court what other efforts he made soon after he collected the title deed. Three years had



- elapsed after doing so by the time he filed the suit. Even after he was charged in a case of the forcible detainer, there is no indication that he submitted to the jurisdiction of the Land Registrar and or the Land Surveyor for investigations to ascertain his correct acreage and for the need to harmonize the same with P. Exh No's 2, 3 & 4.
65. Further to this, the plaintiff was unable to produce any certified copy of the Adjudication Register or records and the certificate of finality which was transmitted to the Chief Land Registrar by the Director of Land Adjudication before the titling.
 66. It is trite law that illegality, fraud and impropriety must be pleaded and proved to the required standards. This was the holding in *Arithi Highway Developers Limited vs West End Butchery Limited & 6 others* (2015) eKLR and *Virjay Morjaria vs Nasingh Madhusingh Darbar* (2000) eKLR.
 67. It was not enough for the plaintiff to allege an encroachment, threats to be evicted and illegality without providing particulars as required under Order 2 Rules 7 and 10 of the Civil Procedure Rules. No Land Surveyor's reports or Land Registrar's findings were filed before the court ascertaining that the registry index map was different from what was contained in the adjudication register, that there was interference with the demarcation book/register and above all, to show that it was the 2nd defendant who caused alleged the reduction of the acreage.
 68. The plaintiff did not bring before the court an authentic record to support P. Exh No's 2, 3 and 4. P. Exh No. 4 is indicated that it is not an authority on boundaries. So, the court cannot base its decision on a document which indicates that it lacks probate value.
 69. As much as the plaintiff and the 1st defendant had title deeds which in law must be taken as prima facie evidence of ownership, much more had to be provided by way of a paper trail to rule out any illegality, impropriety and unprocedural process of their procurement and issuance.
 70. There is no indication that the plaintiff made a follow-up with the Director of the Land Adjudication to confirm that what was received by them from the District adjudication and of Land and Settlement Officer about the suit parcel of land was as per P. Exh No. (2). There must be a legal and factual basis for why the plaintiff took the view that and believes that there was interference with the official documents prepared at the demarcation and adjudication stage and that the buck stops with the 2nd & 3rd defendants. That nexus is missing before this court.
 71. The alleged breach of the right to own and occupy land by the 2nd & 3rd defendants in favour of and for the benefit of the 1st defendant has to be established through cogent and tangible evidence. It was not enough to produce uncertified P. Exh No's. 2, 3 & 4 without either certification, verification and or production by the makers of the documents to find liability.
 72. In the same vein, the 1st defendant made a counter-accusation over the plaintiff's title. He admitted that the entry into his land occurred in 1986 and that the permanent structures were erected in 2000. D. Exh No. (1) has some alteration. It was not certified, verified or produced by the maker. D. Exh No. (2) is neither an objection notice nor is it certified or authenticated from the office that issued the same.
 73. D. Exh No. (3) lacks details on what it was and the action taken. D. Exh No. (4) has no acknowledgement stamp and the nature of the complaint. The two do not show what the outcome was. They do not refer to any pending objections or complaints falling under the [Land Consolidation Act](#) or the [Land Adjudication Act](#). There is also no indication if the 1st defendant sought consent to sue the plaintiff either in 1986 or 2000 yet going by P. Exh No. (2) the land was still at A/R stage by 13.1.2011. The 1st defendant did not subject himself to the available alternative dispute resolution mechanism as provided by the referenced statutes.



74. The 1st defendant obtained his title deed on 12.1.2015. There is no indication if he reported to the relevant authorities since the land was already registered hence falling outside the purview of the District Land Adjudication and Settlement Officer. There is no evidence that the 1st defendant sought the formal re-fixing and the ascertainment of his boundaries with the plaintiff before the 2nd defendant. In as much as the 1st defendant says in his evidence that it was the plaintiff who frustrated the process of intervention by the relevant authorities, no evidence was tendered to show that summons were issued to the plaintiff by the 2nd defendant on its statutory mandate under Sections 16 & 19 of the [Land Registration Act](#).
75. The two parties herein now want this court to determine that there is an encroachment and breach of the right to own and occupy their respective parcels of land before they subjected themselves to the relevant authorities, who have the expertise and mandate to determine and file boundaries. As held in *Azzuri Ltd* (supra), general boundaries to land must be determined by a land registrar. None of the parties has availed to this court reports to that effect for it to make a definite finding on encroachment by any of them. The court cannot act and issue the reliefs sought without a land registrar's report establishing either reduction in the size of the land, the disparity with the official records held by it, superimposition or overlaps of the two-title deeds and lastly the extent of encroachment if any by any of the parties to this suit.
76. In the premises, I make find that both the plaintiff and the 1st defendant have failed to prove their respective claims to the required standard. This court however has the power to ensure that there is substantive justice for the parties regardless of procedural technicalities.
77. There can be no wrong without a remedy. Equity also follows the law. In the case of *Estate Sonrisa Ltd* (supra), the main issues were on who was the legal owner of LR No. Kwale/Galu/Kinondo and whether the owner of Kwale/Galu Kinondo/48 had encroached on plot number so aforesaid. The prayers sought by the plaintiff were an order directing the Land Registrar Kwale to produce the parcel file and all records about the suit land. The trial court had directed at its judgment that the land registrar ascertains and fixes the beacons to resolve the extent of the encroachment in the 1st respondent's land. The claim was based on the acreage in the title deed which was different from what was on the ground.
78. The history of the owner had been presented by the Land Registrar before the court, who had clarified the true owner of the land. The court held that the existence of a title deed per se only raises a rebuttable presumption of ownership of land and that the register should be a first reference point because it mirrors all correct active registrable interests that affect a particular parcel of land.
79. The court said that a person named in the certificate of title will not be protected by the law where the deed or certificate is obtained through fraud, misrepresentation, acquired illegally, unprocedurally or through a corrupt scheme. The parties had failed to produce the registry index map as evidence so the trial court found that the 1st appellant's claim was unproved. The court ordered that the beacons between the two-suit parcel be filed by a land surveyor under the law which orders the appellant appealed to the Court of Appeal for exceeding or assuming a jurisdiction or role exclusively reserved for the Land Registrar.
80. There was also an issue as to whether a complaint on the acreage to the land office was made and the outcome since the letters produced to that effect were not signed and or produced as evidence before the trial court. The District Surveyor who had been called as a witness had no report of his own and also disowned the letters. The Court of Appeal confirmed the order by the trial court for the beacons to be fixed as per the [Land Registration Act](#). The court said by so doing, the trial court had not exceeded its jurisdiction since the Land Registrar had wide powers which are carried without restrictions and may



rely on any other relevant document and existing record, conduct proceedings or investigations and determine the dispute per Section 14 (1) of the [Land Registration Act](#). The court cited with approval Lawrence Kairu Nyambura vs Symon Kabuai Kinyuru (2015) eKLR where it was held that it was only after determining the dispute can parties move to court to challenge it.

81. Guided by the above caselaw, in the interest of justice, I direct that the Land Registrar, who is also the 2nd defendant determines and undertakes the process of ascertainment of the boundary between the two parcels of land, and the alleged encroachment under the [Land Registration Act](#). Each party shall bear their costs to this suit.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON
THIS 10TH DAY OF MAY 2023**

In presence of

C.A John Paul

Miss Kaimenyi for Atheru for 1st defendant

HON. C.K. NZILI

ELC JUDGE

