



**Kamunya v Kaikai & another (Environment & Land Case  
18 of 2013) [2023] KEELC 17116 (KLR) (2 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17116 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 18 OF 2013**

**CA OCHIENG, J**

**MAY 2, 2023**

**BETWEEN**

**MICHAEL KIBOI KAMUNYA ..... PLAINTIFF**

**AND**

**MARY KAIKAI AKA KASHAMBI KAIKAI ..... 1<sup>ST</sup> DEFENDANT**

**BRIGHTSUN PROPERTIES LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. Through a Complaint dated the December 11, 2008 which was amended on September 24, 2012, the Plaintiff prays for Judgment against the Defendants as follows:

**1<sup>st</sup> Defendant:**

- a. A permanent injunction restraining the 1<sup>st</sup> defendant whether by herself, her agents, employees and/or servants from trespassing or continuing to trespass on the suit premises and from harassing the Plaintiff's agents, servants and or employees or in any way dealing in any manner whatsoever with all those pieces of land known as Kajiado/Kaputei North/12884, 12885 and 14911 or any portion thereof.
- b. Vacant possession of the suit premises.
- c. Mesne profits from the date of filing this suit.
- d. Costs.
- e. Interest on (c) and (d) above.



## 2<sup>nd</sup> Defendant:

- a. An order for the delivery of full Vacant possession of the suit premises in terms of the Sale Agreement dated November 20, 2007.
  - b. Mesne profits from completion date until possession is delivered up.
  - bb) A refund of Kshs 8,675,000 being the value of the shortfall in acreage of 17.35 acres that was misstated by the 2<sup>nd</sup> defendant.
  - bbb) In the alternative a refund of Kshs 47,200,000 being the current value of the whole of suit properties as the 2<sup>nd</sup> Defendant has fundamentally breached the entire sale agreement and has also not given vacant possession of the suit property to the Plaintiff as envisaged by the Sale Agreement of November 20, 2007.
  - c. Costs.
  - d. Interest on (b) and (c) above.
  - e. Costs of this suit.
3. The 1<sup>st</sup> Defendant filed her Statement of Defence where she denied the averments in the Plaint except the descriptive and the jurisdiction of the court. She explained that she was one of the widows of the late Kakai Shura Tatek. She denied knowledge of facts directly relating to all the parcels of land known as LR No Kajiado/Kaputiei North/12884, 12885 and 14911 respectively as the same did not affect her. She insisted that there is need for the aforementioned parcels of land to be resurveyed. She contended that the portion of land where the Plaintiff stakes claim on, is the land registered and legally owned by her late husband and of which the Plaintiff has now fenced 118 acres of the same. She averred that her late husband was a member of Embolioi Group Ranch. Further, that upon completion of the adjudication and demarcation process of the said Group Ranch, her late husband was allocated his portion being Kajiado/Kaputiei North/704 measuring 95.3 hectares and a Title Deed issued to that effect. She further explained that on October 29, 1991, her late husband subdivided Kajiado/Kaputiei North/704 into Kajiado/Kaputiei North/1598 measuring 58.68 hectares and 1599 measuring 2023 hectares respectively. She stated that their land was neighbouring Kajiado/Kaputiei North/728 and Kajiado/Kaputiei North/819 respectively. She reiterated that from the time of allocation, their family had resided on their land without any interruption having constructed their family home and reared livestock therein. She explained that beacons did exist accordingly since 1991. Further, that her late husband including two co-wives Janet Kakai and Somoine Kakai are buried on the land. She claimed that in December, 2007, the Plaintiff entered their land, trespassed thereon and interfered with their quiet as well as peaceful occupation and purported to fence the whole land claiming it. She further averred that in May 2008 a meeting took place where the Plaintiff was informed of his illegal and unlawful acts of trespass but despite that he has continued with his wild claim over their family land. She reaffirmed that it is the Plaintiff who has illegally and or unlawfully committed numerous acts of omission and commission on their land with no apparent reasons.
4. The 2<sup>nd</sup> Defendant never entered appearance nor filed a Defence despite being duly served.
5. The matter proceeded for hearing where the Plaintiff called two (2) witnesses while the 1<sup>st</sup> Defendant also had two (2) witnesses.



## **Evidence of the plaintiff**

6. The Plaintiff as PW1 claimed to be the owner of land parcel numbers Kajiado/Kaputiei North/12884, 12885 and 14911, hereinafter referred to as the 'suit lands' and have Certificates of Title to that effect. He confirmed that he purchased the said parcels of land from the 2<sup>nd</sup> Defendant and paid the full purchase price. It was his testimony that he undertook search prior to purchase which confirmed the 2<sup>nd</sup> Defendant as owner of suit lands and adhered to the due process before acquiring them. He stated that an agent of the 2<sup>nd</sup> Defendant took him to the suit lands before purchase and showed him some dwellings which he told him were outside the said suit lands. He claimed the dwellings were mostly in Kajiado/Kaputiei North/ 12884 and slightly in Kajiado/Kaputiei North/12885 and they were less than one (1) acre. He testified that he was purchasing 118 acres and fenced it and the dwellings are isolated by their fence. He admitted that the 1<sup>st</sup> Defendant's husband owned a large parcel of land next to his land which was almost 300 acres. In cross-examination he confirmed that he never bought land from the 1<sup>st</sup> Defendant. He admitted that he never went round the whole land and neither did the agent show him the beacons. He further admitted that he only saw the rough area and boundary. He never established that there were people on the suit lands.
7. PW2 Bibiana Omalla who was a licensed Surveyor from Arch Surveyors confirmed she visited the disputed land Kajiado/Kaputiei North/12884 and determined the boundaries. She confirmed that there was a family occupying the land measuring about 36.33 hectares. She explained that the boundaries of Kajiado/Kaputiei North/12884 and 12885 did not encroach on Kajiado/Kaputiei North/1599 and 1598 respectively. Further, that the boundaries were intact. In cross-examination she confirmed that the suit lands emanated from the Group Ranch. Further, that during the site visit, they never invited the elders and they relied on the Registry Index Map to determine the boundary. She explained that LR No Kajiado/Kaputiei North/12884 and 12885 emanated from Kajiado/Kaputiei North/1851. Further, that Green Card showed parcel number Kajiado/ Kaputiei North/1851 belonged to Moses Isaac. She further confirmed that she never called the neighbours at the time she was identifying the boundaries. She further explained there was a family within the suit lands but she did not ask them why they occupied it. In further cross-examination by the Court, she explained that there were general boundaries as they were not fixed. Further, they looked for existing boundaries but some had to be scaled up. She admitted that the boundaries on ground tallied with what was on the green card and Registry Index Map (RIM) except the Eastern boundary. In re-examination she clarified that it was not necessary to call the neighbours as it was not part of her brief. The Plaintiff produced the following documents as exhibits: Sale Agreement dated November 20, 2007; Certificates of Official Searches dated September 27, 2007 for LR No Kajiado/Kaputiei North/12884, 12885, 14911 and 15414; Green Cards for LR No Kajiado/Kaputiei North/1851, 4104 and 534; Various Maps; Applications for consent of the Land Control Board for LR No Kajiado/ Kaputiei North/12884, 12885 and 14911 all dated October 2, 2007; Consents to Transfer LR No Kajiado/ Kaputiei North/12884, 12885 and 14911 given by the Land Control Board; Title Deeds issued in the names of the Plaintiff for LR No Kajiado/Kaputiei North/12884, 12885 and 14911; Certificates of Official Searches for LR No Kajiado/Kaputiei North/12884, 12885 and 14911 confirming Plaintiff's registration; Demand letters dated June 16, 2008 and September 17, 2008 to the Defendants and Plaintiff's Surveyors Report on status of suit lands.

## **Evidence of the 1<sup>st</sup> defendant**

8. The 1<sup>st</sup> Defendant as DW1 testified in Maasai and stated that her late husband was a member of Emboloi Group Ranch that allocated him 300 acres of land and he was issued with a title deed which was later subdivided into LR No Kajiado/Kaputiei North/1599 and 1598 respectively. She testified



that she had lived on the said land for 32 years. Further, that some of the beacons on her land exist while some have been uprooted. She stated that the Plaintiff bought land from Moses Rakita and Leshinga Ole Koyiet and must have gotten his land from Kajiado Kaputiei North/728 which has since been subdivided. She contended that the Plaintiff should have sued Moses Rakita to get a clear solution to this matter. Further, that the Plaintiff came and fenced off her land. It was her testimony she heard that the Plaintiff bought land from an Arab or Asian but an agent called David Ole Shanga erroneously showed him her land.

9. In cross-examination, she stated the Plaintiff did not purchase her two parcels of land but it is Moses Rakita who sold him land. She confirmed her land had been fenced off and she did not know the person who did it. She insisted that the Plaintiff should have sued Moses Rakita who is her neighbour as he got into her land. She clarified that her land was still registered in the name of her late husband. Further, that the Plaintiff found her in her husband's land. She explained that Surveyors came from Kajiado, undertook measurements of the land in the presence of all the neighbours and the Plaintiff was told the land belongs to her husband Kakai.
10. DW2 Sitelu Ole Seet stated that he is an official and member of Emboloi Group Ranch as well as a one-time Chairman. He confirmed knowing all the boundaries of the land as there was no dispute during subdivision of the land. He knew the 1<sup>st</sup> Defendant's late husband. He stated that there are beacons between Moses Rakita and the 1<sup>st</sup> Defendant's land as they neighbour each other. Further, that it is Moses who sold the land to the Plaintiff. It was his testimony that Kakai has never sold his land. Further, that the Officials including DC and Surveyor came to the disputed site and he showed them the beacons.
11. In cross-examination, he said Rakita sold his land and he did not know who bought it. Further, that Kakai had never sold his land. He was emphatic that he resides in the area and showed officials the beacons. He confirmed that the Plaintiff had fenced the Defendant inside their land. The 1<sup>st</sup> Defendant produced the following documents as exhibits: National ID Card for 1<sup>st</sup> Defendant; Death Certificate for Kakai Ole Shura; Extract of the Certificate of Titles for LR No Kajiado/Kaputiei North/704; Extract of Certificate of Titles for LR No Kajiado/Kaputiei North/1598 & 1599; Extract of Certificates of Title for Kajiado/Kaputiei North/728, 1850, 1851 & 1852 in the names of Moses Isaack Rakita; Extract of Certificate of Title for Kajiado/Kaputiei North/819 in the name of Leshinka Ole Simel Koyiet; Letter dated the October 27, 2018 from the Isinya Location Chief; Proceedings and Award from the Kajiado Land Disputes Tribunal case No TC. 456/06/08 on parcels of land known as Kajiado/Emboloi/ 34, 57 & 150 of August 7, 2008; High Court Ruling dated May 7, 2010; Court Order dated July 8, 2010; Letter from District Surveyor, Kajiado dated June 23, 2010; Report by a private surveyor Oltukai Survey & Property Agencies dated August 6, 2010; District Surveyor's report dated September 28, 2010; Letter by 1<sup>st</sup> Defendant's Advocates to District Surveyor dated October 26, 2010.

## **Submissions**

### **Plaintiff's submissions**

12. The Plaintiff in his submissions reiterated his evidence and contended that he conducted due diligence prior to the purchase of the suit lands. He explained that he lawfully acquired the suit lands and he is hence a bona fide purchaser for value. Further, that the 1<sup>st</sup> Defendant did not controvert any evidence to prove it did not undertake due diligence nor adhere to other lawful processes while purchasing the suit lands. He argued that there is no evidence tendered by the 1<sup>st</sup> Defendant to challenge his registration or to warrant any contrary findings to that effect. He insisted that there is nowhere in the history of



the 1<sup>st</sup> Defendant's two parcels of land that has anything to do with his titles. He contended that from evidence of PW2, there is no encroachment of his parcels of land to the 1<sup>st</sup> Defendant's late husband's land. He reiterated that the 1<sup>st</sup> Defendant's claim of adverse possession is without legal basis. He argued that after fencing off the entire land, he made effective entry into it and took possession. Further, even if the 1<sup>st</sup> Defendant had occupied any part of the suit lands, such occupation was interrupted upon his entry. To support his arguments, he relied on Sections 25 and 26 of the Land Registration Act as well as the following decisions: Sangale Ole Langas v Stephen Mushish & Another (2018) eKLR; CA No 274 of 1997 KCB Ltd v Mwanzau Mbaluka & Others (1998) eKLR; J A Pye (Oxford) v Graham (2003) 1 AC \_ 419 cited in approval in ELC Case No 120 of 2011 Charles Ngaruni v Zipporah Kathengu & 3 Others (2019) eKLR and James Mwangi & Others v Mukinye Enterprises Limited.

### 1<sup>st</sup> Defendant's submissions

13. The 1<sup>st</sup> Defendant in her submissions argued that the Plaintiff had not proven his case to warrant the orders as sought as he entered into a bad bargain and should not use the court to rescue him from it. She made reference to various clauses in the Sale Agreement dated the November 20, 2007 and argued that the Plaintiff operationalized the Law Society of Kenya 1989 as the instrument providing for remedy which he should have explored. She stated that as per Clause 6 of the impugned Sale Agreement, the Plaintiff failed to conduct proper due diligence and from the dates of the Agreement, obtaining consent and executing transfer, the Plaintiff signed papers without actually verifying the properties he was buying. Further, he failed to establish beacons of the property when he was purchasing it as he admitted he was only shown one beacon. She insisted that the Plaintiff has failed to demonstrate how she encroached on the suit lands. It was her argument that vide a report dated the September 28, 2010 which was filed in Court, it confirmed that the map did not reflect on the position on the ground. She reiterated that the Plaintiff failed to discharge his burden of proof to prove his claim against her. Further, that as per the report dated the September 28, 2010, the Plaintiff fenced the land which belonged to her. She contended that even though the Plaintiff later filed a private surveyor's report, the District Surveyor's report remains unchallenged. To support her averments, she relied on Section 18 of the Land Registration Act as well as the following decisions: Fina Bank Limited v Spares & Industries Limited (Civil Appeal No 51 of 2000) (unreported); Moses Parantai & Another v Janet Muritu & 3 Others (2018) eKLR and Robert Ouma Njoga v Benjamin Osano Ondoro (2016) eKLR.

### Analysis and determination

14. Upon consideration of the Amended Plaint, 1<sup>st</sup> Defendant's Statement of Defence, testimonies of the witnesses, exhibits and rivaling submissions, the following are the issues for determination: Whether the Plaintiff is entitled to orders as sought as against the 2<sup>nd</sup> Defendant. Whether the 1<sup>st</sup> Defendant has encroached on the Plaintiff's land. Whether the Plaintiff is entitled to the orders as sought against the 1<sup>st</sup> Defendant.
15. As to whether the Plaintiff is entitled to orders as sought as against the 2<sup>nd</sup> Defendant.
16. The 2<sup>nd</sup> Defendant despite being duly being served failed to enter appearance nor file a Defence to controvert the Plaintiff's averments. The Plaintiff claims he purchased the suit lands from the 2<sup>nd</sup> Defendant and produced the Sale Agreement to that effect. He confirmed paying the full purchase price but contended that the 2<sup>nd</sup> Defendant sold him a less acreage land than what had been agreed upon. From perusal of the exhibits produced, I note the 2<sup>nd</sup> Defendant duly executed the Sale Agreement and Transfer Forms. Further, it aided the Plaintiff in obtaining the necessary consent to transfer the land after which the Certificates of Title were duly registered in the Plaintiff's name. Since it did not deny selling to the Plaintiff, the less acreage of land as had been agreed upon, I find that the



Plaintiff is indeed entitled to be compensated for it. In the circumstances, I find that the Plaintiff is entitled to the orders as sought against the 2<sup>nd</sup> Defendant.

17. As to whether the 1st Defendant has encroached on the Plaintiff's land and if the Plaintiff is entitled to the orders as sought against her.
18. The Plaintiff claims to be the owner of LR No Kajiado/Kaputiei North/ 12884, 12885 and 14911 respectively and holds Certificates of title to that effect which have been produced as exhibits. PW1 confirmed that he purchased the said parcels of land from the 2<sup>nd</sup> Defendant after undertaking due diligence and obtaining necessary consents. PW1 testified that an agent of the 2<sup>nd</sup> Defendant took him briefly to the suit lands but he did not manage to go around the whole parcel of land because of its size. Further, that he only saw a rough area of the boundary and did not establish if there were people on the ground. It was his testimony that at the point he was at the suit lands, he noted that there were some structures nearby but he was reassured that they were not on the said suit lands. He confirmed that he proceeded to take possession and fenced off his land. The 1<sup>st</sup> Defendant as DW1 confirmed that her late husband was allocated 300 acres of land by Emboloi Group Ranch. Further, he was issued with a Title Deed for LR No Kajiado/Kaputiei North/704, which was later subdivided to Kajiado/Kaputiei North/1599 and 1598 respectively. I note it is after the Plaintiff fenced off his land that a dispute ensued. From the testimonies of the parties herein, it is not in dispute that both the Plaintiff and the 1<sup>st</sup> Defendant hold Certificates of Title for their respective portions of the land and this is not an issue in dispute. I note as per the Ruling of this Court dated the 7<sup>th</sup> May, 2010, the Court identified the fulcrum of the dispute herein to revolve around boundaries to the Plaintiff's and 1<sup>st</sup> Defendant's parcels of land and advised the parties to engage the District Surveyor who was to file a report in 60 days. Further, on July 8, 2010, the parties herein agreed by consent that the time of filing the District Surveyor's report was to be enlarged by 60 days from July 6, 2010. I have no reason to depart with this finding and will hold that the main issue in dispute is the boundary between the Plaintiff and 1<sup>st</sup> Defendant's parcels of land. PW2 in her testimony stated that the Plaintiff's boundaries were as per the RIM except for the Eastern boundary. However, upon cross-examination by the Court she admitted that there was no fixed boundary between the Plaintiff and 1<sup>st</sup> Defendant's land. Further, that there were boundaries on the ground which tallied with the RIM except the Eastern Boundaries. She admitted that there were fences, hedges-barbed wires and euphorbia in some area. She said she visited the suit lands but did not involve the elders. She did not attach the Registry Index map which she relied on to identify the boundaries of the Plaintiff's land in her report. DW2 who was a former Chairman of the Emboloi Group Ranch where the suit lands had emanated from confirmed that the 1<sup>st</sup> Defendant's husband owned the parcels of land where the 1<sup>st</sup> Defendant occupied. Further, that he was well conversant with the boundaries which he pointed out to the officials. As per a letter dated the June 23, 2010 which was produced as an exhibit, the District Surveyor indicated that he would visit the suit lands on July 28, 2010. The District Surveyor prepared a report dated September 28, 2010 which was produced by the 1<sup>st</sup> Defendant as an exhibit. As per the District Surveyor's report, he observed that the map did not reflect the true position on the ground and recommended that what was found on the ground could not contain the subdivisions, unless the areas were reduced proportionally. I note after the District Surveyor's report, the Plaintiff proceeded to engage a Private Surveyor called Arch Surveyor who also prepared a report dated November 18, 2019 that was presented by PW2. She also admitted that there was a shortage of land especially on the Eastern boundary to the suit lands. Which brings me to the question that if indeed there was a shortage of land, the Plaintiff having admitted that he never saw all beacons at the point of purchase of the suit lands, then how did he proceed to fence it off without allowing the Land Registrar to determine his boundary first. In the case of [\*Azzuri Limited\*](#)



*v Pink Properties Limited* [2018] eKLR, the Court of Appeal while dealing with an Appeal emanating from an issue of general boundaries held that:

“boundary disputes pertaining to lands falling within general boundary areas must be referred to the Land Registrar for resolution; while disputes pertaining to lands with fixed boundaries may be investigated and possibly resolved simply through a surveyor. It was in appreciation of this provision that the learned Judge went on to hold in part that:

“Having found an existing dirt road, which is a physical feature, and the Defendant’s wall in place, it was incumbent on the Plaintiff, to report any issue of encroachment by its neighbours to the Land Registrar so that he could fix the boundaries and ascertain if indeed there was encroachment.

Instead, the Plaintiff resorted to reporting the issue to the Assistant County Commissioner, Malindi who summoned the Defendant vide his letter dated December 30, 2014.

When the efforts by the County Commissioner to resolve the dispute failed, the Plaintiff involved the District Surveyor who prepared a report, which is the basis of the current suit. The filing of the current suit before referring the dispute to the Land Registrar was contra-statute.”

(23) From this analysis of the law, it should be clear from the above that, we are in agreement with the learned Judge’s conclusion that the dispute ought to have been heard by the Land Registrar as stated in the statute.”

19. In this instance, the Plaintiff did not demonstrate that once he realized there was a boundary dispute with the 1<sup>st</sup> Defendant, whether he proceeded to report to the District Land Registrar to determine the same as per his legal mandate, before fencing the 1<sup>st</sup> Defendant inside the disputed portion. Section 107 of the *Evidence Act* provides that:

“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

20. At this juncture, I opine that the burden of proof was upon the Plaintiff to demonstrate how he determined his boundary and found that the 1<sup>st</sup> Defendant had indeed encroached on his land. I note the District Surveyor including PW2 found there was an anomaly on the ground in terms of the sizes of the disputed lands, with PW2 referring to the said anomaly to be on the Eastern boundary. In so far as the Plaintiff insists he undertook due diligence before purchasing the suit lands, I do not find that he has fully discharged his burden of proof to confirm the 1<sup>st</sup> Defendant indeed encroached on his land, since he failed to determine the existence of all the beacons before purchase. I note PW2 in proceeding to determine the boundaries failed to adhere to the required legal process of engaging neighbours as well as obtaining the history of the suit lands from the Emboloi Group Ranch officials where the lands emanated from. In the circumstance, while associating myself with the decision, I have cited above, I find that the 1<sup>st</sup> Defendant has not encroached on the Plaintiff’s as claimed.
21. It is against the foregoing that I find that the Plaintiff has not proved his case against the 1<sup>st</sup> Defendant on a balance of probability and will dismiss it with costs.
22. As for the 2<sup>nd</sup> Defendant, since it did not enter appearance nor controvert the Plaintiff’s averment, I find that the Plaintiff has proved his case against it on a balance probability and will enter Judgment in his favour. Further, since the Plaintiff already has his titles to the suit lands and took possession but the



only issue in dispute is the 17.35 acres which he claims from the 2<sup>nd</sup> Defendant, I will enter Judgment in the following terms:

- a. The 2<sup>nd</sup> Defendant be and is hereby directed to refund to the Plaintiff Kshs 8,675,000 being the value of the shortfall in acreage of 17.35 acres that it misstated at the point of sale.
- b. The amount of Kshs 8,675,000 to attract interest at court rates from the date of filing this suit until payment in full.
- c. The 2<sup>nd</sup> Defendant to pay the Plaintiff his Costs of the suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 2<sup>ND</sup> DAY OF MAY, 2023**

**CHRISTINE OCHIENG**

**JUDGE**

