



**Kiptarus & 3 others v Rono; Director of Surveys & 2 others (Interested Parties) (Environment and Land Appeal 34 of 2022) [2023] KEELC 18031 (KLR) (6 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18031 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ITEN  
ENVIRONMENT AND LAND APPEAL 34 OF 2022**

**L WAITHAKA, J  
JUNE 6, 2023**

**BETWEEN**

**PETER KIPTARUS ..... 1<sup>ST</sup> APPELLANT  
CHARLES KIPTARUS ..... 2<sup>ND</sup> APPELLANT  
ISAAC KIPTARUS ..... 3<sup>RD</sup> APPELLANT  
REUBEN KIPTARUS ..... 4<sup>TH</sup> APPELLANT**

**AND**

**KIMAIYO ARAP RONO ..... RESPONDENT**

**AND**

**DIRECTOR OF SURVEYS ..... INTERESTED PARTY  
LAND REGISTRAR, ELGEYO MARAKWET COUNTY .. INTERESTED PARTY  
ATTORNEY GENERAL ..... INTERESTED PARTY**

*(Being an appeal against the Judgment of Hon. C. A. Kutwa in  
Iten SPMC ELC No. 7 of 2018 delivered on 28th May, 2020)*

**JUDGMENT**

**Background**

1. By a Plaint dated 15<sup>th</sup> January 2015 and amended on 29<sup>th</sup> October 2018, the plaintiff (now respondent) instituted a suit to wit Eldoret ELC Case No.15 of 2015 seeking judgment against the defendants (now appellants) jointly and severally for:-



- a. An order directing the 5<sup>th</sup> defendant (Director of Surveys) to alter and/or amend the area map (RIM) to revert to the original position and/or original map prior to the creation and/or amendment sought to be rectified;
  - b. An order directing the 5<sup>th</sup> defendant (Director of Surveys) to alter and/or amend the records at the lands registry and all registration documents to reflect the actual acreage owned by him as 5 acres and the acreage owned by Kiptarus Komen as 6 acres;
  - c. A permanent injunction to restrain the 1<sup>st</sup> to the 4<sup>th</sup> defendants (now appellants), their agents, servants, assigns, employees and/or any other persons acting under their instructions from entering, trespassing, tilling, grazing, constructing upon and/or in any other manner dealing and/or interfering with his parcel of land;
  - d. Damages for the destruction of the fence and/or cutting down, breaking window panes assessed at Kshs. 2,000,000/-;
  - e. Costs of the suit;
  - f. Any other relief the court may deem fit to grant in the circumstances.
2. The respondent's case was premised on the grounds that he is the registered proprietor of all that parcel of land known as Cherengany/Koitugum/465 measuring 5 acres (the suit property); that he acquired the suit property by way of purchase from Busanga; that he had lived peacefully in the suit property since 1971 and that the parcel of land known as Cherengany/Koitugum/13 owned by the appellants' father borders the suit property and that it measures 6 acres.
  3. The respondent contended that the 5<sup>th</sup> and the 6<sup>th</sup> defendants (Director of Surveys and the Land Registrar, Elgeyo Marakwet County), without any colour of right and/or without following due process and/or according him hearing, purported to alter and/or amend the map with regard to the suit property thereby understating the area of the suit property by 2 ½ acres.
  4. The respondent complained that on 10<sup>th</sup> September 2014, the 1<sup>st</sup> to the 4<sup>th</sup> appellants trespassed into the suit property and committed tortorous acts thereon.
  5. Terming the actions of the appellants complained of fraudulent, illegal, null and void, the respondent urged the court to grant him the reliefs/ orders listed herein above.
  6. The 1<sup>st</sup> to 4<sup>th</sup> defendants filed a joint statement of defence and counterclaim denying the allegations levelled against them and contending that the respondent's land measures 1.1 hectares while that of their father measures 3.4 hectares.
  7. The appellants further contended that the respondent without their father's knowledge and consent, curved off 2 ½ acres out of their father's land; that it is not true that the respondent had lived peacefully in the suit property since 1971 and that there were discussions concerning the respondent's possession of the suit property since 1984 which discussions the respondent had been evading.
  8. The appellants acknowledge that they trespassed into 2 acres of the land claimed by the respondent but contend that they were justified in doing so, as the portion does not form part of the land owned by the respondent.
  9. Terming the respondent's claim baseless and the orders sought therein incapable of being granted, the appellants, through the counterclaim, sought judgment against the respondent for:-



- a. A declaration that the plaintiff is a trespasser on the 2 ½ acres of plot No. Cherangany/Koitugum/13 within Elgeyo Marakwet county that he occupies;
  - b. A mandatory injunction to compel the plaintiff to vacate the 2½ acres part of plot No. Cherangany/Koitugum/13 which he occupies failing which he be evicted therefrom;
  - c. Costs
  - d. Any other relief the court may deem fit and just to grant.
10. The respondent filed a reply to defence and a defence to counterclaim denying the allegations contained in the defendants' defence and counterclaim and reiterated the averments contained in his amended plaint.

## **HEARING**

### **The Plaintiff/Respondent's Case**

11. When the case came up for hearing, the respondent who testified as P.W.1, relied on his witness statement dated 19<sup>th</sup> January, 2015 after it was adopted as his evidence-in-chief. He produced the documents contained in his list of documents dated 19<sup>th</sup> January, 2015 after they were adopted as his exhibits; Pexbt 1 to 6 respectively. In his statement, the respondent basically reiterates the averments contained in his pleadings.
12. The respondent informed the court that the appellants are his neighbours and that he had lived in the suit property for 40 years before the appellants trespassed into it. After the appellants invaded the suit property, he presented a dispute to the relevant authorities.
13. In cross examination, the respondent admitted that he had no agreement to show that he bought the suit property and acknowledged that the land records show that his land is 1.1 hectare.
14. In re-examination, he asserted his pleaded claim that his land is 5 acres.
15. Pius Kandie, relied on his statement dated 18<sup>th</sup> November, 2014 after it was adopted as his evidence in chief. The evidence is to the effect that the land occupied by the respondent and the appellants originally belonged to his father. His father sold the land to the respondent and the appellants' father.
16. He supported the respondent's claim that he bought 5 acres of land from his father while the appellants' father bought 6 acres.
17. In cross examination, he asserted that the respondent bought 5 acres of land from his father before the title deed was issued and stated that they used surveyors to sell the land. He did not witness the sale agreement between his father and the respondent.

### **The Defendant's/ Appellants Case**

18. D.W.1, Peter Kiptum, relied on his statement dated 13<sup>th</sup> April, 2015 after it was admitted as his evidence in chief. He produced the documents in his list of documents dated 13<sup>th</sup> April 2015 after they were adopted as Debt 1-7 respectively.
19. In cross examination, he stated that they made a report to the area chief who alongside a surveyor came to the land.



20. He admitted that the land registrar visited the land and prepared a report which he did not see. He stated that the land registrar did not resolve the dispute between the respondent and them over the suit property.
21. At close of hearing, parties filed submissions.

### **Determination**

22. On the basis of the foregoing evidence and the submissions filed by the parties, the learned trial magistrate (TM) entered judgment in favour of the respondent and against the appellants. In so doing he stated:-

“In the instant case I find that the land registrar has determined the boundary of which the 1<sup>st</sup> and 4<sup>th</sup> defendants are dissatisfied with hence this present suit. This court therefore has jurisdiction to determine the matter.....

In the present case it has come out in evidence that, the 1<sup>st</sup> to 4<sup>th</sup> defendants were invited for the identification of the boundaries scheduled on 9<sup>th</sup> September 2014 (Dexbt 4) and they were represented by 1<sup>st</sup> defendant (as per the minutes and the ruling of the land registrar, Dexbt 4). The exercise was conducted and the land registrar in his ruling and/report, marked Dexbt 4, found that the plaintiff is the owner of parcel number Cherengany/Koitugum/465 and parcel number Cherengany/Koitugum/13 was found to have encroached on the plaintiff's parcel of land. the 1<sup>st</sup> defendant testified that the area map showed the 2 ½ acres was theirs and does not agree with the boundaries fixed by the land registrar because it was not a boundary dispute.

.....

In the present case also, the court does not have the technical knowledge to determine the dispute and/or boundary. Section 18 and 19 of the [Land Registration Act](#) is clear that resolution of boundary disputes has always been in the purview of the land registrar. It is only the land registrar who is mandated to do so and not the surveyor. The surveyor is only mandated to fix the boundaries and the land registrar makes a determination of the boundary dispute. Land registrar's report dated 1<sup>st</sup> October 2014 is accepted and has dealt conclusively with the boundary dispute in question. I find no evidence of bias against the 1<sup>st</sup> to the 4<sup>th</sup> defendants by the land registrar. I find that the plaintiff has proved on a balance of probability that he is the owner of 5 acres and the 1<sup>st</sup> to 4<sup>th</sup> defendants have encroached on his piece of land.....

From the evidence, I am in no doubt the defendants' title was obtained illegally, unprocedurally or through a corrupt scheme. The documents that conveyed title to the defendants and awarded 2 ½ acres to the defendants were forged. The title could not therefore have been obtained legally or procedurally.... I am satisfied that the provisions of Section 26(1)(b) have been met and that the 1<sup>st</sup> to 4<sup>th</sup> defendants' title is liable to be cancelled. I therefore proceed to cancel the 1<sup>st</sup> to 4<sup>th</sup> defendants' title and make the following orders...”

### **The Appeal**

23. Aggrieved by the above decision, the defendants/appellants appealed to this court on 17 grounds that can be reduced to one broad ground namely that the learned trial magistrate erred by allowing the plaintiff's case and dismissing their defendants' defence and counterclaim.



24. The appeal was disposed off by way of written submissions.

### **The Appellant's Submissions**

25. In his submissions, the appellants submitted:-

- i. That the respondent did not prove that the title given to them is indeed a forgery;
- ii. That the learned trial magistrate erred by failing to find that the land registrar's report was doctored. That submission is premised on the ground that the land registrar did not avail himself in court to give evidence on his report;
- iii. That the respondent's evidence did not support the pleaded case. He submitted that it did not explain how the 5<sup>th</sup> and the 6<sup>th</sup> interested parties failed to follow due process and altered or amended the Registry Index Map (RIM);
- iv. That there was no evidence of when and where alteration and/or amendments were done.
- v. That the respondent made blanket allegations without proof whatsoever;
- vi. That particulars of fraud were neither pleaded nor established as required by law;
- vii. That the survey map cannot be altered without authority of land owners.
- viii. That the respondent did not tell the court whether the appellants and/or their father participated in the alteration of the map and if so, when.
- ix. That evidence adduced shows that the appellants bought their parcel of land and surveyed it in 1973 before the respondent purchased his in 1975;
- x. That the plaintiff's witness, P.W.2, contradicted himself during cross examination by stating that he did not witness any sale agreement and payment regarding the suit property;
- xi. That the respondent had no authority to be on the suit property he is a trespasser on the portion of the suit property he claims from the appellants;
- xii. That the dispute was one of trespass to land as opposed to a boundary dispute;
- xiii. That the learned trial magistrate misdirected himself by considering extraneous factors and converting a trespass issue into a boundary issue.
- xiv. That the land registrar had no authority to deliberate on an issue touching on trespass to land; and
- xv. The respondent did not discharge the burden placed on him of proving that the suit property belongs to him.

### **The Respondent's Submissions**

26. The respondent has submitted that there is evidence that the appellants were unprocedurally registered as proprietors of plot No. Cherangany/Koitugum/13; that the appellants did not produce any evidence to show that their father bought 3.8 Hectares.
27. Based on the decision in the case of *Munyu Maina v. Hiram Gathiha Maina* (2013)e KLR, where it was held that when a title deed issued in respect of land is under challenge, it is not enough to dangle



it as proof of ownership. It is submitted that the burden was on the appellants' to show that their title was legally obtained.

28. Further, based on the decision in the case of *Ali Farah v. Moses Ole Nasisit & 6 others* (2016)e KLR, where the report of the land registrar was relied on in determining the dispute presented before the court, it is submitted that the learned trial magistrate came to the correct conclusion that the land registrar having resolved the boundary dispute, the role of the court was to implement the land registrar's decision by ordering cancellation of the impugned title and issuing protective orders.
29. Concerning the appellants' contention that the dispute presented before the land registrar and the court was not a boundary dispute but one for trespass to land; reference is made to the case of *Ali Farah v. Moses Ole Nasisit & 6 others supra* and submitted that the learned trial magistrate was right in relying on the land registrar's report.
30. With regard to the contention that the land registrar's report was doctored and the reason proffered for that argument, it is submitted that the argument has no basis because the report was produced without any objection regarding its authenticity. It is further submitted that the burden was on the appellants to prove that the report was doctored and/or compromised.
31. It is pointed out that the defendants/appellants confirmed that they attended and participated in the boundary fixing exercise and submitted that if they had a different report, they would have produced it.
32. On the alleged biasness on the part of the learned trial magistrate, it is submitted that the appellants have done little to pinpoint with some degree of precision the incidents or acts that point to biasness. The test of biasness espoused in the case of *Attorney General v. Anyang Nyong & others* (2007) 1 E.A 12 are said to have not been satisfied.
33. In the end, it is submitted that no evidence capable of sustaining the appellants' counterclaim was adduced.

#### **The Respondent's further submissions**

34. In his further submissions filed on 25<sup>th</sup> April 2023 in response to the appellants' contention that the respondent did not prove fraud, reference is made to the report of the land registrar which was produced in evidence and submitted that the respondent pleaded fraud.
35. It is further submitted that the land registrar having confirmed that the registration was irregular and ought to be rectified; the question as to whether the appellants participated in the irregular registration is a none issue. In that regard, reliance is placed on the case of *Elijah Makeri Nyangw'ra v. Stephen Mungai Njuguna & another* (2013)e KLR where it was inter alia held that under Section 26 (1)(b) of the *Land Registration Act, 2012*, it is not necessary that the title holder be a party to the vitiating factors for the section to be operative.
36. With regard to the contention that the land registrar dealt with a land dispute instead of a boundary dispute, it is submitted that there is no ground in the appeal challenging the proceedings before the land registrar and the issue was not raised before the trial court.

#### **Analysis and determination**

37. The issues arising out of the appeal and the submissions filed are:-
  - i. Whether the pleadings by the respondent met the standard of pleading fraud and/or illegality;
  - ii. Whether the pleaded fraud or illegality in registration of the suit property was proved;



- iii. Whether the nature of the dispute presented before the court was one of trespass to land as opposed to a boundary dispute;
  - iv. Whether the learned trial magistrate erred in allowing the respondent's case and dismissing that of the appellants;
  - v. What orders should the court make?
38. As the first appellate court, it is the duty of this court to examine and re-evaluate the evidence on record, assess it and make its own conclusion, bearing in mind that this court has neither seen nor heard the witnesses and make due allowance for that. This court has also to take into account the circumstances upon which this court may differ with the Trial Court on findings of fact namely, if it appears either that the Trial Magistrate has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. See the case of *Selle & Another v. Associated Motor Boat Co. Ltd & others* (1968) EA 123 where the Court of Appeal stated:-

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

39. On whether the pleadings filed by the respondent met the standard of pleading fraud and/or illegality, based on the decision in the case of *Vijay Morjaria vs. Nansingh Madhusing Darbar & another* (2000)e KLR quoted in the case of *Kuria Kiarie & 2 Others vs. Sammy Magera* (2018)e KLR, the appellants have submitted that the pleadings by the plaintiff do not meet the legal standard of pleading fraud.
40. In the case *Vijay Morjaria vs. Nansingh Madhusing Darbar & another* (2000)e KLR, relied on by the appellants, the Court of Appeal stated:-

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts. See *Davy v Garrett* (1878) 7 Ch. D 473 at 489. In my view the complaint by the appellant is well-merited since the plaint and the re-amended plaint were defective on their faces. The ground of appeal grounded on failure to specifically plead fraud must succeed.”

41. With regard to that issue, the plaintiff/respondent in his amended plaint, paragraphs 5B to 5E thereof, pleaded thus:-

“5B. The acts of the defendants, in particular, the 5<sup>th</sup>-7<sup>th</sup> defendant were fraudulent, illegal, null and void.

5C. Creation of a boundary and/or new boundary was done without regard to actual position on the ground and/or individual share on the ground as to actual acreage;

5D. The survey works were carried out before the 1<sup>st</sup>-defendants father, Kiptarus Komen, fully paid for the parcel of land in issue;



5E. That the plaintiff purchased part of the parcel of land which had been reserved for the 1<sup>st</sup> -4<sup>th</sup> defendant's father on account of none payment for the same”.

42. It is clear from the foregoing pleadings, that the alleged fraudulent and/or illegal acts of the appellants are provided on the face of the plaint but on separate paragraphs namely 5C and 5E. A reasonable litigant looking at the pleadings would know what actions or omissions of the appellants are complained of as the same are provided for on the face of the plaint. In the circumstances, I do find that the pleadings substantially complied with the requirement of pleading fraud and/or illegality. For that reason, I find and hold the pleadings filed by the respondent met the legal standard of pleading fraud/illegality.
43. As to whether the pleaded fraud and/or illegality was proved, upon review of the totality of the evidence adduced, I find that it reveals a case of a mistake or error in the survey of the suit property that was not corrected when the final registry index map was prepared. No evidence of any fraud, illegality or corrupt scheme was proved as against the appellants and/or their father.
44. The error in the registration of the suit properties occurred because as at the time the respondent acquired the portion of the suit property in dispute, the land had already been surveyed showing the portion bought by the appellants' father as 11 acres as opposed to 6, which he ended up having after the portion he failed to complete paying for was subsequently sold to the respondent.
45. Although no sale agreement was produced capable of proving that the respondent bought the 2½ acres in dispute, the conduct of the parties lives one without doubt that he had bought the parcel. The respondent and the appellants' father lived peacefully on the portions of the suit properties they occupy on the ground for so many years, over 40 years, before the appellants started laying claim to the suit property; apparently after they discovered that the area captured in the title deed and the registry index map differed with the area parties occupied on the ground. In view of the foregoing, I return a negative verdict on the issue as to whether the plaintiff proved the pleaded fraud and/or illegality.
46. On whether the nature of the dispute presented before the court was one of trespass to land as opposed to a boundary dispute, upon analyzing the case urged by the parties, I do find that it was neither a case of trespass to land nor a boundary dispute but a case for determination of entitlement to 2 ½ acres of land comprised in L.R No. Cherengany/Koitugum/13 registered in the name of the appellants' father. In determining the issue of entitlement to the 2 ½ acres, an issue of whether the boundary between L.R No. Cherengany/Koitugum/465 and Cherengany/Koitugum/13 arose. The court was presented with evidence showing that the land registrar was invited by the parties to determine the boundary between the two parcels of land. Evidence was adduced showing that the land registrar visited the parcels of land and established that there is a difference between the acreage captured in the RIM and the title deeds held by the parties and the land they occupy on the ground. Being of the view that there was a mistake in the registration of the parcels of land, as the land records do not reflect the parties entitlement of the land on the ground, the land registrar recommended that the boundaries be rectified to reflect actual entitlement of the parties on the ground. That determination by the land registrar is the one that the respondent had moved to court to implement.
47. Whilst it is true that the land registrar does not have power and/or jurisdiction to determine a case of trespass to land, it is the view of this court that there is a thin line between a case of trespass to land and a boundary dispute as in determining a boundary issue, the land registrar may end up with evidence capable of showing that one party to the dispute has encroached and/or trespassed into land belonging to another. In my view, such finding/determination, unless controverted by other evidence or it is demonstrated to be unreliable, is good evidence for purposes of determining a case of trespass or ownership of the area of land said to have been encroached onto.



48. In the circumstances of this case, I do find that the report of the land registrar was relevant and good evidence for purposes of proving that there was a variance of 2 ½ acres between what is captured in the land records (title deeds and RIM) and the land sizes on the ground. The issue as to who is entitled to the 2 ½ acres was for the court to determine based on the totality of the evidence adduced before him, part of it being the report of the land registrar. The upshot of the foregoing is that the issue before the lower court was not a boundary dispute but a case of entitlement to the 2 ½ acres comprised in Cherengany/Koitum/13 which were in dispute.
49. As to whether the learned trial magistrate erred in allowing the respondent's case and dismissing that of the appellants' on the strength of the evidence showing that the parties' entitlement to the suit properties is different from that captured in the land records, and there being evidence showing that the differential was occasioned by a mistake or error in the RIM arising out of the fact that by the time the respondent acquired the 2½ acres, survey works had been carried out indicating the appellants' entitlement as 11 acres as opposed to 6, I am of the considered view that the learned trial magistrate did not err by finding that the respondent had proved his case, of course not based on the pleaded fraud but on the aspect of the pleaded error/mistake in the survey which resulted in the differential of the parties entitlement to the suit properties captured in the land documents. The fact of that error is apparent from the conduct of the parties; the parties had lived in their respective portions of land as demarcated on the ground, which portions do not reflect what is captured in the map or title documents they hold.
50. The upshot of the foregoing is that the appellants have not made up a case for setting aside the overall determination of the lower court.
51. On costs, as the appellants' have succeeded to have some aspects of the judgment overturned, for instance, the section determining that the transfer was effected fraudulently, illegally and through a corrupt scheme, I award the respondent half costs of the Appeal.
52. Orders accordingly.

**JUDGMENT DATED, SIGNED AND DELIVERED AT ITEN THIS 6<sup>TH</sup> DAY OF JUNE 2023.**

**L. N. WAITHAKA**

**JUDGE**

**Judgment delivered virtually in the presence of:-**

Ms. Chebii for the Appellants

Ms. Cherotich holding brief for Ms. Odwa for the Respondents

Christine Towett: Court Assistant

