



**Ngaremani v Katete (Environment & Land Case 49 of 2017)
[2023] KEELC 17770 (KLR) (7 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 17770 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 49 OF 2017**

FO NYAGAKA, J

JUNE 7, 2023

BETWEEN

KORI NGAREMANI PLAINTIFF

AND

WILSON KATETE DEFENDANT

JUDGMENT

1. The Plaintiff and Defendant acknowledge one fact: they are brothers. By a Plaint dated 16/03/2017 and filed the same date the Plaintiff averred that he was the registered owner of all that parcel of land known as West Pokot/Chepkono/82 and the Defendant West Pokot/Chepkono/80. He pleaded that the two parcels of land were adjacent but had no physical boundary between them.
2. He averred further that since the year 2012 the Defendant completely refused to resolve the boundary dispute between them despite the fact that the both the County Land Registrar and the County Surveyor visiting the land to do their work and the Defendant blocking them from doing their work.
3. The Plaintiff prayed for an order that the County Land Registrar and the County Surveyor do visit the disputed parcels of land and establish the boundary in order to permit each party to occupy their respective parcels. He also prayer for the costs of the suit.
4. Having entered appearance on 30/03/2017, the Defendant filed a Defence dated 20/04/2017 on 21/04/2017. In it he admitted the averment about the ownership of the parcels of land. He denied the averment that there was no physical boundary between the two parcels of land and stated instead that there was one defined by posts which were placed during the subdivision of the parcels in 1977. He pleaded that it was the Plaintiff who in the recent past had attempted to interfere with the boundary of posts. While denying the allegation that since 2012 he refused to agree to the boundary being established and also that he barred the County Surveyor and Land Registrar from doing their work he pleaded that it is an offence to interfere with boundaries of registered land. He averred that the



certificate of title issued was conclusive evidence on who the proprietors of the parcels were and was absolute and indefeasible. He pleaded that they had lived peacefully with the Plaintiff without interference since 1977 and that there was a known physical boundary distinguishing the parcels of land. He pray for dismissal of the Plaintiff's suit.

5. In the Reply to Defence filed on 05/05/2017 the Plaintiff pleaded that there was no dispute on the ownership of the two parcels of land but a boundary dispute over them. He averred that the boundaries be established according to the official map in the lands office. He stated that the boundaries on the ground did not reflect the proper boundaries as per the department of lands.
6. On 12/05/2021 the Defendant applied to Amend his Defence and include a Counter claim. The Application was granted on 07/06/2021. The Defendant then filed an Amended Defence and Counterclaim on 16/06/2021. He averred in the pleading that he did not block the County Surveyors from surveying the land but that the said officers actually subdivided the land unequally hence giving the Plaintiff approximately 12 acres more thereby greatly prejudicing him rather than having to divide it equally.
7. He raised a Counterclaim in which he averred that on 05/12/2019 the Plaintiff together with the County Surveyors and Land Registrar visited and subdivided the Defendant's parcel of land known as West Pokot/Chepkono/80 and added 12 acres to the Plaintiff's parcel No. West Pkot/Chepkono/82. He pleaded further that the activities of that date interfered with the Defendant's ability to access the water point at River Mjirit for his home use and livestock.
8. The Defendant further claimed that the Plaintiff had been using the illegally subdivided land and was now occupying huge chunks of land leaving him with a small piece while part of his land, parcel No. West Pokot/Chepkono/80, was used also as a public road. He pleaded that his rights of ownership of the parcel of land registered in his name had been infringed. He prayed for a resurvey of the entire parcel of land occupied by the Plaintiff and that both be given equal shares as per their deceased father's bequeath to them. He prayer for the revocation of the respective titles and issuance of others reflecting the proper position.
9. In the end he prayed for the following reliefs:-
 - a. The Plaintiff's suit be dismissed with costs to the Defendant.
 - b. The Counterclaim to be allowed for:-
 1. An order be issued for the County Surveyor and County Land Registrar to resurvey land parcel numbers West Pokot/Chepkono/80 and West Pokot/Chepokono/82 and each party to access water point at River Mjirit.
 2. An order cancelling the title deeds of West Pokot/Chepkono/80 and West Pokot/Chepokono/82 and the new title deeds be issued indicating equal ownership of the respective parcels of land by the parties.
 3. Costs
 4. Interest.
 5. Any other reliefs this honourable Court may deem fit and just to grant.
10. On 30/06/2021 the Plaintiff filed a Reply to the Amended Defence and Defence to Counterclaim. He repeated the contents of the Plaint in entirety. He stated that the dispute between them was a boundary dispute which as resolved by the County Surveyor of West Pokot. He pleaded that he was



a first registered owner of the title he had and did not commit any fraud in obtaining it. He averred that both the Land Registrar and the County Surveyor did not interfere with the boundaries but only established the boundaries between the parcels and fixed them as per the records in the Land Department.

11. He averred that both parcels of land accessed a river which cut across them hence the Defendant accessed water. He averred that he was using his rightful part of the land and had not encroached the Defendant's. He stated that the Counterclaim was barred and there was no basis of revoking the titles in issue. He stated further that there was no basis for resurvey of the parcels since there were no objections at the time of adjudication.
12. He pleaded that from the County Surveyor's Report dated 17/12/2019 filed on 13/01/2020, the Plaintiff owned 14.70 Ha and the Defendant 14.33 Ha, making a minimal difference of 0.43 Ha. He stated further that the Report found that the Plaintiff occupied an excess of 3.20 Ha.
13. The Defendant filed a Reply to Defence to Counterclaim on 23/07/2021. He denied that the dispute was resolved between them. He repeated that the issue between him and the Plaintiff was acreages and each one was supposed to get equal shares because both were sons of the deceased. He averred, contrary to the averment that the County Surveyor identified and fixed the boundaries, they were interfered with and affected the acreages of the parties. He denied that he could access River Mjirit. He reiterated that the Plaintiff had encroached his parcel of land, curving out 0.43 Ha or 1.075 acres. He pleaded that the Counterclaim was properly before Court and the Limitation of Actions did not apply. He averred that there was need to revoke the title deeds of each party and re-issue new ones to reflect the true picture on the ground. He repeated the need to resurvey the parcels of land since he did not participate in the one which gave rise to the Report dated 17/12/2019.
14. He admitted that there was a difference in the acreages of the two parcels of land and that the difference was much bigger than the 0.43 Ha and that the Report dated 17/12/2019 favoured the Plaintiff. He averred that he occupied the parcel of land in issue according to how their father gave it to them and that each party was supposed to access River Mjirit. After the close of the pleadings the suit proceeded to hearing.

Evidence

15. The Plaintiff testified and called only one witness. The Defendant testified and called three witnesses.

a. The Plaintiff's Evidence

16. The Plaintiff testified as PW1. His other witness, a Surveyor by name Henry Muhui Lumasai, testified as PW2. The Plaintiff adopted as his evidence in-chief the witness statement which he wrote on 16/03/2017. Besides his oral testimony, his written statement contained the fact that the Defendant was his brother. He testified orally that he was a farmer who lived in Chepkorio in West Pokot. He stated that he owned land parcel No. West Pokot/Chepkono/82. He produced a copy of the title deed of the land as P. Exhibit 1. He produced as P. Exhibit 2 a copy of a map showing the disputed parcels of land. His evidence was that the Defendant was his younger brother. He stated that there was a dispute which, when they failed to agree, they took it to the Land Registrar, following a referral by the Area Chief. He produced as P. Exhibit 3 the letter dated 23/11/2016 which the Chief wrote to the Land Registrar. He registered the dispute with the Registrar on 24/11/2016 by paying Kshs. 3,000/=. He produced as P. Exhibit 4 the receipt for payment.
17. The Land Registrar went to the ground on 15/12/2016 but the Defendant barred him from doing his work. He then issued another notice for 29/11/2016. He produced the notice as P. Exhibit 5. He



- postponed the visit to 17/01/2017 when he finally went to the ground. He testified that the Defendant protested but the Land Registrar wrote a letter dated the same date. He produced the letter as P. Exhibit 6.
18. After the exercise the Plaintiff reported the matter to his lawyers who wrote a demand letter dated 5/02/2017. He produced it as P. Exhibit 7. He said there were six people who received the letter but the other five vacated the land but the Defendants responded to the demand through a letter dated 13/02/2017. He produced the response as P. Exhibit 8. He testified that the Defendant had been threatening him. He reported the matter to Kabichibichi Police Station on 28/01/2017. The police issued an order to arrest. He produced it as P. Exhibit 9.
 19. Later, the County Land Registrar and County Surveyor visited the land vide an order of the Court. He produced the letter as P. Exhibit 10. The surveyor issued notices to visit the land. They were dated 17/09/2019 and 28/11/2019. He produced the invitations as P. Exhibit 11 and P. Exhibit 12 respectively. They issued another one on 29/10/2019. He produced the notice as P. Exhibit 13. Upon visiting they wrote reports, one dated 17/12/2019 by the Land Registrar. He produced it as P. Exhibit 14(a). The other one dated 05/12/2019 was by the Surveyor. He produced as P. Exhibit 14 (b). He said the officers fixed the fence of barbed wire. It was then the Plaintiff started to complain about a watering point yet he has one. Later he started to complain that he wanted more acreage.
 20. He testified that at one time a mediator was called. He made a report, dated 15/02/2022, which the Plaintiff marked as PMFI 15. He produced as P. Exhibit 16 photographs of the boundary put in place. He denied interfering with the boundary but rather blamed the Defendant.
 21. He testified that the boundary was fixed by the Land Registrar and Surveyor. The defendant went and destroyed the boundary and moved it after their father died. Later after the Plaintiff instituted suit, the Surveyor and Land Registrar fixed the boundary where the late father had fixed it. He did not agree to the cancellation of the titles or fixation of the new boundaries. He testified that the defence witnesses were not there when his father put the boundaries in place: they live far from the two parties' homes.
 22. Upon being cross-examined he said that the boundaries were put with him and his father together with elders. He admitted that his witness statement indicated that there was no physical boundaries and that in 2012 he asked his brother that they fix it. He admitted that indeed there was no clear boundary. He said his father died in 1988 and he was issued with his title, P. Exhibit 1 in 1997 but the boundaries were put in place in 1979.
 23. His evidence was that the two parcels of land were given by their father. He stated that initially the parcel was one under trust land but demarcation took place and he was given his share and his father remained with his. He admitted the title deed indicated he owned 12.77 Ha yet the Surveyor found out that he occupied 13.39 Ha. He stated that on the ground the land was bigger than indicated in the title. He admitted that as for his brother the title deed indicated 12.45 Ha yet the ground acreage was 15.65 Ha. He testified that he did not collude with the Surveyor to increase his land. He disagreed with P. Exhibit 14(b).
 24. On re-examination he stated that the Reports produced as P. Exhibit 14 (a) and 14(b) were made as a result of court process. He stated that the reports showed that his land was bigger in size than his brother's land by 3 acres. He said that his claim was over a boundary dispute and not the acreage.
 25. PW2, Henry M. Lumasai, testified that he was the West Pokot County Surveyor. He stated that upon receiving the order for his to visit the land parcels, he wrote to the parties on 17/09/2019 and copied to the Officer Commanding Station (OCS) Kapenguria to provide security. He wrote another one on 28/11/2019 and visited the land on 3/12/2019. He compiled a report. The Defendant raised a



- complaint about it. He stated that the Defendant's complaint was that the Plaintiff did not fence the land as they fixed the boundary on 03/10/2019. He said that when they received the complaint he wrote on 29/10/2019 to the parties again that they would re-visit the site. He copied the OCS Kapenguria. He revisited the site on 05/12/2019. At the second visit he was accompanied by the Land Registrar in the presence of the parties. They fixed the boundaries again using the RIM and the Global Positioning System (GPS). His evidence was that the complaint by the Defendant was therefore not correct. He said that he and the Land Registrar then did the report. In early 2022 a mediator sought an opinion from him and he gave a report dated 15/02/2022.
26. His evidence was that both parties have access to a stream. A photograph was done to show the position of the stream. He then gave the details of the findings and the manner in which they fixed the boundaries. He testified that after fixing the boundaries the Plaintiff was to have 14.70 Ha while the Defendant was to have 14.33 Ha. He stated that they used the ratio of the registered acreages to fix the boundaries on the ground as they did since the acreage was bigger than was registered. He gave the ratios as 12.77 Ha and 12.45 Ha to 14.70 Ha and 14.33 Ha. He proposed only the amendment of the acreages on the titles but not cancellation.
 27. He recounted that initially the Land Registrar wanted to fix the boundaries on 17/01/2017, he conducted a hearing but they did not fix the boundaries because the Defendant became violent and could not allow them to do so. He produced the Report by the Land Registrar as P. Exhibit 14(a), his Report as P. Exhibit 14 (b), the one by the National Surveyor in charge of the County as P. Exhibit 15, and the photograph of the stream as P. Exhibit 16.
 28. When cross-examined, he stated that the order served on him was to establish the true boundaries between parcels No. West Pokot/Chepkono/80 and 82. He testified that P. Exhibit 14(b) showed that the boundary was disputed and he fixed it. He repeated the measurements of the parcels as they were when he finally fixed the boundary. His evidence was that he reduced the ground acreage of parcel No. 80 and added it to No. 82. He used the RIM and GPS.
 29. His testimony was that the land was acquired by way of inheritance. His evidence was that before doing that there was a boundary on the ground but it was disputed. He termed the boundary as a general boundary created by the late father of the parties. He noted that there was no beacons on the ground. He only established but not created the boundaries. He stated further that he sought the opinion of the Chief and the elders and these were captured by the Land Registrar in his report. He surveyed and confirmed the acreage of the entire land. He said he did not deduct any acreage from anybody. He admitted that the acreages on the ground did not match those on the title deeds and there was need to amend the title deeds to reflect the right acreages.
 30. On re-examination, he stated that the persons in attendance were 16 in number. He repeated the acreages as were on the title deeds and as on the ground after fixing the acreage. He defined the meaning of establishing a true boundary which he said was using the existing records to find the true one. He stated that it did not mean identifying that which is in existence. He stated that he did the exercise in presence of other Surveyors. That marked the close of the Plaintiff's case.

b. The Defence Evidence

31. The Defendant testified as DW1. He first adopted the witness statement he wrote on 21/02/2020. Besides his oral testimony which follows below, his written statement included the fact that their father was known as Maglab Katetea. He divided the land for them using posts as the boundary. He said that since the brother moved the boundary he (Defendant) lost about 12 acres of land. The Plaintiff blocked him from accessing the Kamashan river.



32. He identified his parcel of land as West Pokot/Chepkono/80. He testified that he and his brother were given the parcels of land by their late father upon inheritance and not as a result of adjudication. He stated that his late father and some elders who were still alive gave them the land. He did not agree with the surveyor's finding that his land stretched to the stream and also on fixing the title acreages to be 14.70 Ha for the Plaintiff and his to 14.33 Ha. He stated that as at the time of testifying there was only a seasonal stream where his land stretched to. He stated that the title deed acreages did not agree with the ground occupation. He prayed for cancellation of the title deeds.
33. His evidence was that the ground acreages for parcel No. 80 was 15.65 Ha and for No. 82 it was 13.39 Ha. He said the surveyors do not use the boundaries put by their late father. To him that was contrary to the Court order. He accused the surveyors of giving more land to the Plaintiff. He relied on P. Exhibit 2 the RIM of the area.
34. He produced as D. Exhibit 1 the copy of his title deed for parcel No. 80 and D. Exhibit 2 a letter dated 17/01/2017 by which the Chief summoned them to a meeting. He repeated that in the meeting held, the elders decided that the land remains the way his late father divided it in 1977. He also produced as D. Exhibit 3 a letter dated 02/06/2020. He stated that there was a meeting held in 06/03/2020 at Kapyongen where it was resolved that his land should stretch to the water point. He produced the resolution as D. Exhibit 4 and a letter dated 7/02/2020 as D. Exhibit 5. He produced as D. Exhibit 6 a demand letter by his advocate dated 03/02/2020.
35. His evidence was that the Plaintiff closed the road of access that passed through his portion and blocked him to the water point. He said it happened when the Plaintiff brought the Surveyors to the ground to survey the land. He stated that the stream referred to by the Plaintiff was no longer in existence but dried up. He stated that his brother did not complain while their father, mother and even elder brother were alive. He stated that his father gave land to his three sisters too who were since married. But when they got married they did not claim any share from the land. He stated that he had used the land for over 40 years. He testified that the Surveyors should re-survey the land so that he accesses the waterpoint and that the titles be rectified.
36. On cross-examination he admitted he was born in 1966 though his identity card read as 1970. He admitted also that adjudication was done in 1977 by which time he was young. He stated that the parcel now registered as his was supposed to be registered in his father's name after adjudication. He said his father died before completion of the adjudication register.
37. His evidence was that when adjudication was done his father instructed the adjudication officers that the land be registered in his name. So, the Plaintiff was given parcel No. 82 and he No. 80. He said the instructions were given in 1980 when he (Defendant) was 16 years old and in Class 7. He was given only the parcel No. as 80 but not title deed thereto. He stated that his eldest brother was known as Daniel Pkumun Petareng. He did not know how much acreage he was given. His brother, the Plaintiff began complaining about the boundary in 2016. They took the case to the area Chief but could not agree. Therefore, they went to the Land Registrar's office. He stated that the Chief wrote D. Exhibit 2 saying that he complained the Surveyors were being used to grab his land. Regarding P. Exhibit 5 he testified that it was done on 17/01/2017 after the Surveyors accompanied by police went to the ground and there were a number of people. He stated that he refused a survey being done since the map was done in 1977.
38. When he was referred to P. Exhibit 7, he said it was a demand letter asking him to rectify the boundary or he would be sued. He stated that he approached his lawyers who too wrote P. Exhibit 8 and the lawyers wrote agreeing to a survey being done. He insisted that the use of the RIM of 1977, P. Exhibit 2, was the solution to the issue at hand. In regard to the acreage on his title deed he stated that it was 12.45



- Ha which was an approximate size. He did not have an issue with his brother's approximate size of land being 12.77 Ha as per P. Exhibit 1. He stated that from the two titles, his brother's land was bigger than his. He admitted that the two title deeds in issue showed that his brother's land was bigger than his.
39. DW1 stated that surveyors demarcated the land in 1977 and that was how the RIM (P. Exhibit 2) was generated. He admitted that it had not been amended since then. He also admitted that the Surveyors found that he and his brother occupied more land than that indicated on the title deeds. He got his title deed in 2016 and all along since then he knew his size of land was approximately 12.45 Ha. He testified that he refused the change of the boundary until the order, P. Exhibit 10, of the Court was issued because to him survey was done in 1977. He did not know the Surveyor was to go to the ground to identify the boundary fixed in 1977. He admitted that after the survey the size of his land was increased to 14.33 Ha which was more than 12.45 Ha. He admitted that both the Plaintiff's land and his were increased after the survey when compared with the figures on the title deeds. He said that according to the proposed sizes after the survey the sizes of the parcels would differ by 0.43 Ha. He still insisted that his parcel was supposed to be 15.65 Ha and the Plaintiff's 13.39 Ha hence his would be bigger than the Plaintiff's.
40. When referred to the Amended Defence he filed he stated that he pleaded that they be given equal sizes of land. He admitted that if the land was subdivided the way he proposed in evidence it would not be equal. He denied hearing the Plaintiff's and the Surveyor's evidence that his land stretched to the river. He stated that there was a road of access leading to the tarmac which formed a T-Junction. He stated that there was another main road that runs through his land and joins the marram road. He did not have a problem with the road being re-opened because he was not the one who closed it.
41. Upon re-examination, he stated that he pleaded for equal ownership which meant 15.65 Ha to be due to him. He denied that the adjustment of the sizes proposed by the Surveyor to the title deeds to reflect the ground acreages after the boundaries were fixed did not in any way mean he was given more land yet he was getting less than 15.65 Ha. He stated that the Surveyors were wrong because they took away his 3.2 Ha.
42. DW2, Esther Chepokunur Emmanuel, adopted her statement. She stated that the two parties were her blood brothers. In the statement she was the 3rd born of their family. She stated further that their father divided the land between the sons in 1979 by placing a boundary between them. She was surprised that the Plaintiff moved the boundary. She wished the Court to restore the boundary.
43. On cross-examination she stated that her late father subdivided the land for her three brothers. She stated that she did not know the extent or sizes of the land given to her two brothers who were parties in the matter. She said she saw where the late father put the boundaries between the two brothers and Mr. Kori was the one who moved them after he brought Surveyors to the ground.
44. DW3, Merinyang Lotula, also adopted his witness statement dated 21/12/2020 as evidence in-chief. In it he stated that he associated himself with the statement of one Lokir Kakuri. Then he stated that he was surprised that the Plaintiff was going against the will of his father because according to the Pokot customs, a decision of the fore-fathers is final. He asked the Court to restore the boundary between the two parties. He testified orally that he was an elder and committee member of the area of Chepkono and he knew both parties in the suit.
45. On cross-examination he stated that according to the Pokot culture none of the sons receives more land than the other upon inheritance. In re-examination he stated that according to the culture, the father distributes land equally to all his children. They only "use eyes" to estimate the size.



46. DW4, Limasia Momon, adopted his witness statement dated 21/12/2020. Besides his oral testimony, in his statement he stated that Adjudication in the area was began in 1977. The Plaintiff was the first one to fence his land and they lived peacefully until recently. His oral evidence was that he knew the father of the parties. His name was Lotongulia Maglab Katetea. He testified that he was present in 1977 when his father divided the land in question. He stated that he was a casual labourer of the surveyor who marked the boundaries then. On his part he used to assist in putting a compass and beacons. He did so for Mzee Maglab's three sons. He testified that the beacons erected were of posts. They were put from the hill top to the river and nobody questioned it. Then the map was drawn. It took care of each son accessing a watering point.
47. His testimony was that it was recently that complaints arose and he being the 'Mukasa' (village elder) of the area and a neighbor went to the suit land. He said that he found Kori Ngareman had removed the boundary they had erected in 1977. By so doing he blocked the watering point for the Defendant.
48. When DW4 was cross-examined, he said he was part of the Adjudication team. They fixed the boundary by erecting posts. The map (RIM) was drawn according to the way posts were erected. The posts had since been destroyed. He stated he never heard of the Plaintiff complaining that his land size was smaller on the title deed than on the ground. He admitted that he was not involved when title deeds were issued. That in 2017 the Defendant forbade surveyors from surveying the land but he was not present at the time. He admitted having written in his witness statement that when the surveyors visited the land he showed them where the boundary was. He said they visited the land twice and the one he referred to was the first visit. He stated that if someone did not know how posts were erected at the time of demarcation he would bring a dispute. He admitted it was the Court to determine the sizes of the land.
49. On re-examination he stated that if the surveyors erected a wrong boundary than was at first, the Court should not follow their report.
50. That marked the close of the Defence case. The matter was set for submissions which the parties filed, with the Plaintiff doing it on 01/03/2023 and the Defendant on 14/03/2023.

Submissions

51. After summarizing the reliefs sought by both parties and giving the background of the case, and both his and the Defendant's case, the Plaintiff, in the submissions dated 28/02/2023, submitted on how the Surveyor that visited the land and found the ground acreages to be different from both the title deed and the actual size that he ought to have occupied. Relying on the cases of *Stephen Wang'odu v The Ark Limited* [2016] eKLR and *Daniel Otieno Migore v. South Nyanza Sugar Co. Ltd* [2018] eKLR he prayed for the Court to confirm the claim.
52. The Defendant too, in the submissions dated 13/03/2023, summarized the background, the case and the evidence. He relied on the case of *James Anali Alary v. John A. A. Ikokony*, ELC. No. 172 of 2015. He gave three issues which the court was to consider. He prayed for the suit to be dismissed and the counterclaim to be allowed.

Issue, Analysis & Determination

53. Having considered the pleadings herein, the law, the evidence of the parties, and the rival submissions, I formulate the following issues for determination:
 - a. Whether the Land Registrar and Surveyor should visit the suit parcels and fix the boundaries;



- b. Whether the land should be resurveyed and land parcel numbers West Pokot/Chepkono/80 and West Pokot/Chepkono/82 and each party to access the water point at River Mjirit;
- c. Whether the title deeds of West Pokot/Chepkono/80 and West Pokot/Chepkono/82 should be cancelled and new ones indicating equal ownership should be issued;
- d. Who to bear costs.

54. I shall now determine the dispute in the manner set out above herein as hereunder:

a. Whether the Land Registrar and Surveyor should visit the suit parcels and fix the boundaries

55. The starting point for determination of this issue is to note that the boundary in issue is a general boundary and not a fixed one. It means that the areas or sizes of the parcels of land to which they attach or which they bound are merely approximate. They can never be exact unless the boundaries have been fixed. It goes without saying that it is possible then to find that the acreage borne by the title deed is different from the actual size on the ground. What is merely representative of the true position of things is the shape of the parcel of land as shown on the Registry Index Map (RIM). Therefore, when the boundaries are to be fixed, the shape of the ground area will follow the general shape of the same as shown on the RIM.

56. From my finding above, it is clear that while the RIMs are a good source of raw information they are not conclusive evidence of the exact boundary positions on the ground. As was held in *Samuel Wangau v AG & 2 others* [2009] eKLR, I too would hold that,

“However, it is common ground that such maps (R.I.M) are not authorities on boundaries. Both the District Land Registrar and the District land surveyor said as much.....It means therefore that when and where there is a dispute as to the position and location of a boundary as in this case, unless the same is a fixed boundary, one has to go beyond the R.I.M in solving the dispute.”

57. General boundaries were defined by Peter K. Wanyoike in his paper, “*The Role of the Registry Index Map (RIM) in Land Management in Kenya*” as follows:

“A boundary of which the precise line is undetermined in relation to the physical features which demarcate it ... However, it is clear on the ground where the parcel is situated and where the boundaries are, for they are clearly visible and unmistakable physical features, though they do not indicate the exact location of the line within the breadth which such physical features necessary process.”

58. Similarly, in *Ali Mohamed Salim v Faisal Hassan Ali* [2014] eKLR, it was held:

“The type of survey that generated the Registry Index Map is what was known as “general boundaries” which has been defined in Section 18(1) of the *Land Registration Act, 2012* to mean “the approximate boundaries and the approximate situation only of the parcel.” Indeed, most of the titles under the repealed Registered Land Act were issued on the basis of the general boundaries, meaning that such parcel of land had no fixed beacons. On the other hand, land registered under the Registration of Titles Act required a cadastral survey to be prepared, which is based on a fixed boundary principle. Such a survey has an accurate



linear and angular measurements to aid the registration of a title of a plot. The boundaries of land registered under the Registration of Titles Act can easily be identified by any surveyor because of the fixed nature of its beacons.”

59. The Plaintiff testified that the suit land was demarcated in 1977 and that his late father, who is said to have died in 1988, showed the boundary between him and his brother. PW1 testified that he owned land parcel No. West Pokot/Chepkono/82 which measured approximately 12.77 Ha. as per the title deed already issued. He produced as P. Exhibit 1 a copy of the title deed and P. Exhibit 2 a copy of a map (RIM) showing the disputed parcels of land. He stated that when he and his brother failed to agree on the boundary they were referred by the Area Chief to the Land Registrar. This was through a letter 23/11/2016 which he produced as P. Exhibit 3. He registered the dispute by paying Kshs. 3,000/= as evidenced by P. Exhibit 4.
60. The Land Registrar visited the ground on 15/12/2016 but the Defendant barred him from doing his work. He produced as P. Exhibit 5 a copy of the notice for 29/11/2016. The Registrar postponed the visit to 17/01/2017 when he finally went to the ground. The Defendant protested forcing the Land Registrar to refer the matter to Court as P. Exhibit 6 of the same date. After that he instructed his lawyers to issue a demand letter produced as P. Exhibit 7 on 5/02/2017. The Defendant responded through P. Exhibit 8. After that the Defendant had been threatening him and he reported the matter to Kabichibichi Police Station on 28/01/2017 as shown vide P. Exhibit 9, an order to arrest issued by police. After the matter was filed Court issued an order produced as P. Exhibit 10 to the County Land Registrar and County Surveyor to visit the land. The evidence of the visit due to the Court order was confirmed by PW2 and DW1 (the Defendant).
61. DW1 also confirmed through his evidence that before the matter was filed in Court he and his brother had a dispute over a boundary of their parcels of land, with the Defendant’s parcel being West Pokot/Chepkono/80 measuring approximately 12.45 Ha. as per the title deed which he produced as D. Exhibit 1. He testified as to how they lived peacefully until the demise of both his father and elder brother, and how the dispute was referred to the Area Chief who too referred it to the Land Registrar. He produced as D. Exhibit 2 the letter dated 17/01/2017 by which the chief summoned them to a meeting. His complaint was that the brother had taken 12 acres of his land and blocked him from accessing Kamashan River.
62. I acknowledge the fact that the issue herein revolves a boundary dispute. This Court is by virtue of Section 18(2) of the *Land Registration Act*, Act No. 3 of 2012 prohibited from entertaining any matter relating to a boundary dispute until the same has been determined by Land Registrar. The Section provides:-
- “The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.”
63. The issue before me, though relating to a boundary dispute is a unique one. From the evidence of both the Plaintiff and the Defendant, the Land Registrar did visit the suit lands in 2016 but he could not complete his work. The Plaintiff blamed it on the Defendant. The Defendant denied it. But the Land Registrar recorded in P. Exhibit 6 that during the visit he could not complete his work because the Defendant became very unruly and could not permit him or the Surveyor to complete their work. Thus, he referred the matter to Court. The Plaintiff did not in essence call on this Court to determine the issue of the boundary at first, but wanted the assistance of the Court to do so because, according to him and PW2, it was impossible for the exercise to be done for reason of the Defendant’s non-



cooperation and unruly actions. Thus, in my view, by virtue of the very relief sought and in the interest of justice this Court had jurisdiction to grant the relief sought.

64. The Plaintiff subsequently filed this suit and made the prayer for the Land Registrar and Surveyor to visit the land and determine the boundaries between the parties. From the Court record and the evidence of PW1, PW2 and DW1 indeed this Court issued an order, produced as P. Exhibit 10 for the Land Registrar and Surveyor to visit the land and establish the boundaries.
65. According to the three witnesses, the exercise was conducted on 05/12/2019. PW1 produced the Reports of both the Land Registrar and the Surveyor in charge of West Pokot as P. Exhibit 14(a) and 14(b) dated 17/12/2019 and 05/12/2019 respectively, to show that indeed the visit was made, the survey done and boundaries established and fixed. Thus, it is this Court's view that the prayer by the Plaintiff that the Land Registrar and County Surveyor both in charge of West Pokot County to visit the suit parcels of land and establish the boundary between them is spent.

b. Whether the land should be resurveyed and land parcel numbers West Pokot/Chepkono/80 and West Pokot/Chepkono/82 and each party to access the water point at River Mjirit

66. I now turn to the next issue as identified herein. The complaint by the Defendant herein was two-fold. One was that the parcel of land he had been occupying until the time the Plaintiff raised the dispute was being taken by the Plaintiff who, if I understood well the Defendant's evidence and that of the witnesses he called, was given more land through the assistance of the West Pokot County Land Registrar and Surveyor when they first tried to fix the boundary and even at the second time when they did so after being ordered by the Court to visit the land and establish the same. The second complaint was the by the parcels of land being demarcated as was established by the Land Registrar and the Surveyor.
67. The Defendant stated in evidence that the boundary was put in place by his late father, in 1977 and instructions given by him in 1980 when he (Defendant) was 16 years old and in Class 7. He called on DW2, DW3 and DW4 who stated as much. However, DW2 who was one of the sisters of the parties who should have helped the Court to establish the truth did not assist it much. This was because she stated that the land was divided by the late father amongst the brothers in 1979 but she did not know the extent of the parcels of each. Her evidence means, and it confirmed that of the Plaintiff, that the boundaries were not fixed, as was claimed by the Defendant. DW2's evidence was mainly a lament that the Plaintiff was going against the wishes of the father regarding where he put the boundary between the two brothers, and that according to the Pokot customs it was not acceptable. While saying that according to the customs none of the sons or children would receive more land than the other, he testified that the fathers used to distribute their land using "eyes": "they use eyes" to show the extent. The Court understood that to mean that in distribution of land, the parents could only approximate the extent.
68. DW4 on his part stated that he took part in the planting of the boundary by way of digging posts. He stated that it was done in 1977. This evidence, though useful regarding the demarcation time or beginning point, was not satisfactory as to how the late Maglab, the parties' father subdivided the land in 1980 or 1979 when it was stated in evidence by DW1 and DW2 that the two parcels of the two brothers were set apart for them.
69. PW1 stated that when he surveyed the land in the presence of the Land Registrar the time the Court ordered that the exercise be done once more, he established that the Defendant's land was served by a small stream that emptied its waters to the river Mijirt. He stated that contrary to the Defendant's claim that his land was not 'watered' it was served by a river.



70. Lastly, PW2 testified that when he and the Land Registrar visited the two parcels of land and established the boundaries on 05/12/2019, they found that the ground occupation by the Plaintiff and the Defendant was 13.39 Ha and 15.65 Ha respectively. He stated further that when he re-surveyed the parcels using the RIM and the GPS he found that the parcels were bigger in size than was recorded in the title deeds and that after adjustment the proper acreage for the parties would be 14.70 Ha in respect of the Plaintiff title and 14.33 Ha in respect of the Defendant's ownership. I am satisfied that both the Land Registrar and the County Surveyor both in charge of West Pokot duly complied with the order of the Court by their exercise done on 05/12/2019, and they used the proper tools to guide them to arrive at the findings they did. Similarly, from the oral testimony of PW2 and the reading of the entire content of P. Exhibit 6, P. Exhibit 14(a) and 14(b), I am satisfied on a balance of probabilities that besides their interviews of the parties and witnesses on the ground, the two experts herein, namely PW2 and the Land Registrar, used the best reasoned judgment and analysis of both the situation on the ground and the sources of information, namely the RIM and the GPS, regarding the acreages and positions of the parcels of land said to be due to and owned by the parties.
71. Therefore, similarly as I found in regard to the first issue, the prayer by the Defendant that an order be issued for the County Surveyor and County Land Registrar to resurvey land parcel numbers West Pokot/Chepkono/80 and West Pokot/Chepokono/82 and each party to access water point at River Mjirit is not merited. Therefore, the second issue is resolved as the first, and in particular, that there is no need for the parcels of the land to be resurveyed to adjust them to conform to accessing River Mjirit.

c. Whether the title deeds of West Pokot/Chepkono/80 and West Pokot/Chepokono/82 should be cancelled and new ones indicating equal ownership should be issued

72. The second last I have to determine whether the titles of the respective parties should be cancelled and new ones indicating equal ownership should be issued. To begin with, it is noteworthy that the Plaintiff and DW1 did not propose equality of ownership of the parcels of land. The Defendant in evidence in-chief testified that his prayer was that the land be resurveyed so that he accesses the water point, and the title deeds be rectified accordingly. In cross-examination he stated that he had pleaded in his Amended Defence the land be divided equally but he was quick to state that if that was done there would be no equality. He shifted the paradigm completely on re-examination by stating that by pleaded for equal ownership he being given the 15.65 Ha he occupied in the ground to be due to him not be equal.
73. DW2's evidence did not route for equality. She only testified that the parties occupy the portions given to them by their late fattier. DW3 testified likewise. DW4 testified that the Court should not follow the boundary the surveyors fixed but that which he and the other casual labourers put in 1977 at the time of demarcation. If the totality the evidence of DW2, DW3 and DW4 is anything to go by, it does not support the Defendant's pleading for equal division of the land. It supports only, but without any convincing or satisfactory basis, the Defendants position of being awarded by the Court the ownership of the portion of land he occupies whose size is 15.65 Ha.
74. It is worth of note that a party is always bound by his pleadings. He cannot be permitted to lead evidence, and the said evidence be accepted as to modify his claim or defence, beyond his pleadings. On this point, I am guided by the case of *Raila Amolo Odinga & Another v IEBC & 2 Others* [2017] eKLR, where the Supreme Court of Kenya held as follows:

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely



to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....”

75. Also, in the case of *Adetoun Oladeji (NIG) v Nigeria Breweries PLC* SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

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

...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

76. I therefore find that since the Defendant amended his Defence to plead for cancellation of the two titles, namely, West Pokot/ Chepkono/80 and West Pokot/Chepkono/82 and issuance of new ones in equal sizes, he could not rightly lead evidence otherwise. Even then, I find no evidence to support the fact of cancellation of the titles. This is because, Section 79 and 80 of the *Land Registration Act*, 2012 provide for Rectification of the Register. Particularly, Section 80(2) provides for the circumstances the Register may be rectified by the Court. I will not delve much into its import and interpretation. But I find that the prayer for cancellation of the title does not merit.

77. However, having found that the issue above fails, the evidence of PW1, PW2 and DW1 is in agreement that the acreages of the title deeds for West Pokot/Chepkono/80 and West Pokot/Chepkono/82 to no accord with the ground sizes of the land owned by the parties. The title acreages are 12.45 Ha and 12.77 Ha respectively while according to PW2 and P. Exhibit 14(a) and 14(b) the ground occupation is 15.65 Ha and 13.39 Ha respectively.

78. PW2 gave elaborate evidence as to how he and the Land Registrar established the boundaries to give the proposal of the rectification of the Register to be 14.33 Ha for parcel No. West Pokot/Chepkono/80 and 14.70 Ha for parcel No. West Pokot/Chepkono/82 to reflect the ground occupation after adjustment and survey to match with the proper title acreages. He stated that he and Land Registrar subdivision. He testified that they used the ratios of the acreages on the title deeds to match with the actual ground size to adjust the occupation to fit to the new boundaries fixed. That was sound reasoning and equitable on their part as I have found above.

79. This Court considered the evidence of PW2. Whereas the Court is guided by expert evidence in matters of a specialized nature, it can depart from it for good reason because the Court is bound to evaluate the evidence and make its own opinion based on the law, pleadings, facts and evidence. PW2 testified that the acreage on the titles differed by 0.32 Ha. He also testified that in proposed rectification the difference between the two parties' ownership would, if the increment by the equal ratio is maintained shall be, as seen from P. Exhibit 14(a) and 14(b) 0.37 Ha.

80. I am of the considered opinion that since the title acreage difference as is currently is 0.32 Ha, to avoid further complaints by the Defendant that the use of the ratio would end up giving more land to the Plaintiff than he was entitled, it would be in the interest of justice that the difference between the sizes of the parcels of land hence their acreages be maintained at 0.32 Ha. Thus, this Court directs that the Land Registrar of West Pokot amends the Register to reflect ownership of an acreage of 14.675 Ha in respect of West Pokot/Chepkono/82 and 14.355 Ha in respect of West Pokot/Chepkono/80.



The Survey office, after conducting the exercise, but at the expense of the Defendant because he never funded the initial survey of the parcels, shall amend the RIM accordingly.

d. Who to bear the costs

81. I have found that the Counterclaim has not succeeded and it is dismissed. The Plaintiff's claim succeeded but to the extent that the Land Registrar and the County Surveyor both of West Pokot do visit the suit lands and re-survey them in the manner and extent the Court has found, but not the Defendant had prayed in relation to his parcel of land reaching the river. Therefore, the Plaintiff will have the costs of both the suit and Counterclaim.
82. Consequently, I enter judgment for the Plaintiff against the Defendant as follows:
- a. The Defendant's Counterclaim is hereby dismissed with costs to the Plaintiff.
 - b. An order be issued for the County Surveyor and County Land Registrar both in charge of West Pokot County to resurvey, at the cost of the Defendant, land parcel numbers West Pokot/Chepkono/80 and West Pokot/Chepokono/82 and fix the boundaries of the parcels so as to contain the approximate acreages of 14.355 Hectares and 14.675 Hectares respectively.
 - c. An order be and is hereby issued to the Land Registrar, West Pokot County to rectify the Register to reflect the acreages of West Pokot/Chepkono/80 as approx. 14.355 Ha and West Pokot/Chepokono/82 approximate 14.675 Ha and cancel the title deeds thereof and issue new ones accordingly, at the cost of the parties.
 - d. The Plaintiff to have costs of both the suit and the Counterclaim.
83. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 7TH DAY OF JUNE, 2023.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE

