



REPUBLIC OF KENYA



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**Ethuru v Thikanyi & 2 others (Environment & Land Case 2 of 2019)
[2023] KEELC 21254 (KLR) (1 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21254 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 2 OF 2019
CK NZILI, J
NOVEMBER 1, 2023**

BETWEEN

ANDREW KOBIA ETHURU PLAINTIFF

AND

JOSHUA THIKANYI 1ST DEFENDANT

**SUB COUNTY LAND ADJUDICATION OFFICER TIGANIA EAST SUB-
COUNTY 2ND DEFENDANT**

ATTORNEY GENERAL 3RD DEFENDANT

JUDGMENT

1. The plaintiff approached this court with an amended plaint dated 13.12.2022, (hereinafter in the primary suit). He hassued the defendants, claiming to be the lawful registered owner of LR No. Meru/North Athinga/Athanja 232, measuring approximately 1.20 acres, which he inherited from his late father before the adjudication process commenced in 1994. The plaintiff averred that he took possession of the land in 1994, fenced it off and erected a permanent residential house. It was averred that on 9.4.2010, the 1st defendant, without any justification, trespassed into the suit land and destroyed part of his fence and food crops damages assessed at Kshs.22,950/= alleging that the suit land was part of LR No. 4335.
2. The plaintiff averred that he made a report to the police, the lands office and the agricultural extension offices and that the former commenced an investigation and charged the 1st defendant in Tigania SPMCC CR Case No. 615 of 2010. It was averred that at the lands office, the allegations were that there was a dispute as to the locus in quo in which LR No.4735 was alleged to be superimposed on his land. The plaintiff prayed for Kshs.22,950/= as damages, a declaration that LR No.4735 was not located and should not be superimposed on his land, and a permanent injunction restraining the 1st defendant from superimposing his Parcel No. 4735 onto his land. The amended plaint was accompanied by a



- paginated bundle dated 24.1.2022 containing witness statements dated 1.9.2011, a list of documents dated 29.5.2011 and the plaintiff's additional witness statement dated 13.12.2022.
3. The 1st defendant opposed the suit by a statement of defence dated 20.1.2023. He stated that part of the plaintiff's developments lay on his land and, therefore, the plaintiff had encroached or trespassed onto his Parcel No 4735.
 4. Regarding the criminal charges, the 1st defendant averred that the same was a frame-up by the plaintiff, which the criminal court eventually dismissed on 5.9.2011.
 5. On the two parcels of land, the 1st defendant denied the alleged superimposition of his parcel onto the plaintiff's land. He termed the allegations in the amended plaint a belated scheme by the plaintiff to try and mutilate the land surveyor's report dated 30.6.2022, which had settled the dispute. On consolidation of the suits, the defendant admitted the same but asserted that Tigania PMCC No. 74 of 2011, having been consolidated with this suit, his counterclaim operated as such in this suit. The defence was accompanied by a paginated bundle of documents dated 15.3.2022 and an additional witness statement dated 20.1.2023
 6. In reply to the defence dated 25.1.2023, the plaintiff averred that his developments were legally on his land and not the 1st defendant's land as alleged or at all, which he termed as non-existent. As to the trespass, the plaintiff averred that the 1st defendant had committed a crime and, though acquitted, civil liability subsisted.
 7. Regarding the pleadings in the secondary suit, namely Tigania PMCC No. 74 of 2011, the 1st defendant, together with Andrew Kiunga Thinkanyi as plaintiff, sued Andrew Kobia Ethuru by a plaint dated 29.8.2011, according to a consent to sue dated 25.8.,2011. They alleged that the plaintiff in the primary suit had trespassed into their parcels 4735 and 7670 Athinga/Athanja. They sought eviction and permanent injunction against him. Witness statements and exhibits accompanied the plaint.
 8. The primary plaintiff opposed the suit through a defence dated 1.9.2011, because the plaintiffs were out to defraud him of his land. He averred that he had sued them in Meru Chief Magistrate Civil Case No. 224 of 2010, on the subject matter. The defence was accompanied by witness statements and a notice of preliminary objection dated 1.9.2020. The primary plaintiff averred that the suit had been stayed since 29.5.2012 in the High Court Misc. No. 43 of 2012, was sub-judice, frivolous, vexatious, incompetent and an abuse of the court process. The grounds were repeated in the notice of preliminary objection dated 15.9.2012, save to add that the suit was sub-judice and had already been stayed through a valid court order.
 9. At the trial, Joel Julius Kinyanjui Magugu, a principal surveyor at the Uru survey office, testified as PW 1. He told the court that the two disputed parcels fell under the Tigania East Sub-county. He said that as per the report dated 30.6.2022 produced as P. Exh No (1), following a court order, he visited the locus in quo in the presence of the principal land registrar, Uru. He said the report covered four parcels of land, among them Parcel No. 232, which is owned by the plaintiff, who pointed to him the extent of his land against that of his neighbours. PW 1 said the land was fully developed with permanent buildings and a shamba.
 10. Regarding Parcel No. 4735 and 7670, claimed by the 1st and 2nd defendants, PW 1, told the court that the two defendants could not precisely pinpoint their beacons and said they had never occupied their suit parcels of land. Regarding Parcel No.8474, PW 1 told the court that nobody turned up to claim the parcel, and therefore, they could not establish its extent.



11. PW 1 told the court that he did not locate Parcel No.4735 on the ground since the 1st and 2nd defendants could not pinpoint their parcels. PW 1 told the court that LR No. 233 was approximately 1.06 acres, and since the order did not include the re-establishment of beacons, he could not do so for the 1st and 2nd defendants. PW 1 told the court that he used the registry index map or diagram to establish Parcel No. 232, both on the map and on the ground, unlike the 1st and 2nd defendants' parcels of land.
12. Cross-examined by Mr. Kieti, learned litigation counsel for the 3rd and 4th defendants, PW 1 said the registry index map was a map representing ownership of land in an area inclusive of its dimensions, the abutting parcels and any other utility space such as power lines and access roads.
13. PW 1 explained that a registry index map was derived from the ground survey and transferred to the map. He said all the parcels were registered and set out in official land documents. In re-examination, PW 1 confirmed that Parcel No's. 4735 and 7670 were not located on the ground by any known beacons. He said that the L.R No. 232 corresponded with the registry index map on the paper and the ground. PW 1 said that errors may ordinarily occur when a number is placed on the wrong parcel of land during the cartographic activity, which ideally would be solved by a land registrar.
14. Andrew Kobia Ethuru testified as PW 2 and adopted his witness statement dated 24.1.2022 and 13.12.2022. He told the court that he was the registered owner of LR No. 232, measuring 1.20 acres, which initially belonged to his late father, who used to till the land alongside his late mother, Mumbi M'Ethuru. PW 2 told the court he took possession of the land in Laare and has developed it as per the permanent structures therein. He said that he sued the 1st and 2nd defendants after they trespassed on his land on 9.4.2010 and committed acts of destruction assessed at Kshs.22,950/=, after which the 1st defendant was charged and acquitted in Tigania SPMC Cr. Case No. 615 of 2010, but acquitted on a technicality. The plaintiff told the court a report was made to the 3rd defendant about a dispute involving his land and that of the 1st and 2nd defendants, which they could not resolve.
15. Further, PW 2 testified that after he sued the 1st and 2nd defendants in Meru CMCC No. 224 of 2010, he obtained an injunction against them, but they connived and filed Tigania PMCC No. 74 of 2011. He produced a copy of the confirmation letter dated 16.4.2010 as P. Exh No. (2), receipt dated 16.4.2010 as P. Exh No. (3), police order dated 23.4.2010 as P. Exh No. (4) damage assessment as P. Exh No. (5), consent to sue dated 18.5.2010 as P. Exh No. (6), title deed as P. Exh No. (7), adjudication record register as P. Exh No. (8), physical planning map as P. Exh No. (9), judgment in Tigania criminal case as P. Exh No. (10) and twelve photographs as P. Exh No. 11 (iv – xi).
16. PW 2 told the court that before the adjudication register was closed, he signed the same at Muriri market and established his acreage as 1.20 acres. He insisted the adjudication register then did not show the existence of the parcels claimed by the 1st and 2nd defendants and could not, therefore, tell how they were created since there was never any objection brought against him by the 1st and 2nd defendants over the said parcels at the adjudication stage.
17. Similarly, the plaintiff said that the 1st and 2nd defendants never stopped or objected to any of his developments on the land, nor were they his neighbours. Additionally, the plaintiff said that the source of the 1st and 2nd defendants' land documents was unclear and suspect.
18. In cross-examination by the 1st and 2nd defendants, PW 2 said that his title deed translated to 0.96 acres while on the ground, it was 1.20 acres, which ideally should be what he was entitled to as per the adjudication register dated 16.4.2010. He denied that P. Exh No. 2 was a forgery. Regarding how his acreage was reduced to 0.39 ha as opposed to what he was occupying on the ground, PW 2 clarified



- that the case was filed before the title deeds were issued after realizing the anomaly since the 1st and 2nd defendants had threatened to take away his land.
19. PW 2 told the court that A/R objections had already closed, hence why a consent to sue was issued to him. His view was that the errors allegedly occurred during the adjudication process, hence why he sued the 3rd defendant, not the Land Registrar. PW 2 acknowledged that he had not sought to rectify the errors in the title deed through the land registrar.
 20. Regarding the acreage on his land, PW 2 told the court that some of his land was taken up during the expansion of Muriri-Isiolo Road construction work. PW 2 told the court that it started in 1994 after acquiring all the requisite approvals. He could not remember issuing a statutory notice to the 3rd defendant.
 21. Cross-examined by counsel for the 3rd and 4th defendants, PW 2 told the court that his amended plaint was not specific on the claim against the 3rd defendant. However, PW 2 said that he signed the adjudication register before it was certified the final as per P. Exh No's. 8 & 9 and the existing rights record indicating all he had gathered was his land. PW 2 stated that he had gathered two consolidated plots, but the one under dispute was a separate parcel.
 22. In re-examination, PW 2 told the court that what was in dispute was Parcel No. 4735 and not his Parcel No. 232 going by P. Exh No. (6), since the said parcel was missing in P. Exh No. (9). His evidence that it was the 3rd defendant who inserted the said parcels on top of his land or map, yet the 1st defendant was neither a neighbour nor the owner of the said land as per the record of existing rights dated 28.6.2010.
 23. Julius Kangote testified as PW 3 and adopted his witness statements dated 26.5.2011 and 1.9.2011 as his evidence in chief. He confirmed that LR No. 232 belonged to the plaintiff and that the 1st defendant had never been a neighbour in the area.
 24. Joshua Thiane Thikanyi testified as DW 1 and adopted his witness statement. His evidence was that based on the survey map, his parcel no. 4735 and his brother Andrew Thinkanyi's No. 7670 fell within the plaintiff's land, who allegedly or irregularly enclosed the two plots by occupying more land equivalent to 0.24 acres than was in his title deed.
 25. The 1st defendant stated that instead of keeping to his 0.96 acres or 0.39 ha, the plaintiff has encroached on an additional 0.24 acres whose source he does not explain. Therefore, the 1st defendant testified that developments by the plaintiff on the extra land are illegal and have surpassed his brother's land. He termed the criminal case at Tigania Law Courts as a frame-up, and the claim for Kshs.22,950/= unsustainable leading to his acquittal in the trial court.
 26. Additionally, the 1st defendant testified that he became the registered owner of LR No. 4735, measuring 0.14 ha on 19.7.2015, while his brother's was 0.03 ha. He said the plaintiff, as a former Kenya Tea Development Agency director, used his influence to try and steal their lands, which were distinct and separate from the plaintiff's land as per the official tracking record. The 1st defendant said that the development on the portion was undertaken after the plaintiff obtained an injunction on 28.5.2010, without government building approvals. He denied the alleged trespass or destruction since the plaintiff has been making unnecessary complaints at Kirindine Police Station. The 1st defendant did not produce the documents in his paginated bundle dated 15.3.2022.
 27. In cross-examination by the plaintiff's counsel, DW 1 told the court that the plaintiff had sued him in Tigania Civil Case No. 224/2011, and he also sued the plaintiff in Tigania PMC Civil Suit No. 74/2011 which two files were consolidated with the instant file. He confirmed that the title deeds for the area came out in 2015, long after the suits were filed.



28. DW 1 admitted that the plaintiff had been occupying the land since 2011. Further, DW 1 said he had no record of existing rights showing him as a demarcated owner of Parcel No.4735 or anything to show that he had filed either an arbitration, committee or Minister's Appeal against the plaintiff over the suit land. Regarding the police complaints or injunctive orders, the 1st defendant said he did not file any before the court. With this, the defendant closed his defence without calling his brother the 2nd defendant. Despite the hearing notice served on 7.3.2023, the 2nd and 3rd defendants did not attend court nor offer any evidence opposing the plaintiff's claim.
29. With leave of court parties except the 2nd & 3rd defendant's field written submissions dated 18.7.2023 and 26.7.2022. On pleading and consolidation of the suits, the plaintiff submitted that he sued the 1st defendant in Meru CMC No.224 of 2010 while the 1st defendant and his brother sued him in Tigania PMCC No. 74 of 2011, which suit was consolidated vide Meru HC Misc No. 43 of 2012 and transferred to this court, giving rise to this suit and the primary pleadings, namely amended plaint dated 13.2.2022, the 1st defendant's defence dated 20.1.2023 and a reply to defence dated 25.1.2023. As to the 2nd and 3rd defendants, the plaintiff submitted that a defence was filed hence the claim should be deemed as unopposed by the two parties.
30. Similarly, the plaintiff submitted that his Tigania PMC No. 74 of 2011 was not opposed by the 1st defendant since there was no filed defence to his plaint dated 1.9.2011. The plaintiff isolated three issues for the court's determination.
31. On whether he has proved his claim, the plaintiff submitted that going by the pleadings, evidence tendered both orally and through the land registrar/surveyors report, P. Exh No. (1) confirmation of ownership letter P. Exh No. (2), receipts P. Exh No. (3), police order P. Exh No. (4), damage assessment P. Exh No. (5), consent to sue P. Exh No. (6), title deed P. Exh No. (7), register extract P. Exh No. (8), map P. Exh No. (9) and photographs P. Exh (11) (i – xii), his claim was proved to the required standard. Further, the plaintiff submitted that his evidence was corroborated by PW 1 and PW 3.
32. As to whether the 1st defendant and his brother had proved their case as pleaded in the plaint in Tigania PMCC No. 74 of 2011 to warrant the reliefs they sought and sustain their defence in this suit, the plaintiff submitted that the 1st defence evidence did not shake or outweigh his documentary evidence since;
- a. Parcel No. 4735 was missing in the original map produced as P. Exh No. (9),
 - b. Record of gathering/demarcation or existing rights were not availed, contradicting P. Exh No. (8).
 - c. He had not been in occupation of the land
 - d. No objection was made to his developments on the land.
 - e. The surveyor's report confirmed the plaintiff's land and could not trace any fixed boundaries or beacons in favour of parcel No. 4735.
33. On reliefs sought, the plaintiff submitted that he had explicitly pleaded and proved special damages as stated in *Richard Buddy Okemwa & another vs Kenya Power & Lighting Company* (2013) eKLR.
34. On the declaratory order and permanent injunction, the plaintiff submitted that Article 40 of *the Constitution* protects his right to land, and since he had produced documentary ownership documents, the court should come to his aid against the 1st defendant's non-existent land. Reliance was placed on *Peter W. Chikati & others vs John Obote Wamalwa and another* (2021) eKLR, *Joseph Ogola Asiago and*



another vs Joseph Abongo Apudo and 3 others (2021) eKLR, *Festo Sewe Obiero vs Caleb Omondi Opiyo & others* (2020) eKLR.

35. On whether the 1st defendant and his brother had proved the suit in Tigania PMCC No. 74 of 2011, the plaintiff submitted that the suit was filed without consent under Section 8 of the *Land Consolidation Act* (Cap 283) and Section 30 of the *Land Adjudication Act* (Cap 284) and hence was legally incompetent. Reliance was placed on *Noordin Bhajee & another vs Nondi and another* (2022) KECA 1/9 (KLR) (18th February 2022).
36. Regarding the surveyor's report produced as P. Exh No. (1), the plaintiff submitted that he first put up construction on the ground and occupied the land, unlike the 1st defendant and should be protected as held in *Peter W. Chikati & others* (supra).
37. On lack of paper trail as proof of acquisition, the plaintiff submitted that the origins of the Parcel No's. 4735 and 7670 were not availed and guided by *Munyu Maina vs Hiram Gathiba Maina* (2013) eKLR; the claim by the 1st defendant was unsustainable. Further, the plaintiff submitted that the 1st defendant's evidence was unsupported or corroborated by any documentary or oral evidence.
38. The 1st defendant, by written submissions dated 26.7.2023, submitted that in a surveyor's report dated 30.6.2022, the plaintiff proceeded to amend his plaint while the 1st defendant had filed a suit in Tigania PMC No. 74 of 2011, together with his brother seeking for eviction form LR No. 4735 and 7670. The 1st defendant submitted that the plaintiff has no claim against the 2nd plaintiff in Tigania PMCC No. 74 of 2011 following consolidation. The 1st defendant submitted that the plaintiff's suit appears as based on a discrepancy in his title deed, whose mandate was through the land registrar who could rectify or adjust, yet no prayers were before this court other than the plaintiff seeking the court to assist him to grab his land by adding to it some extra acreage.
39. Without a prayer for rectification and increment of his register or cancellations of Parcel No.4735 or evidence of fraud or illegality, the 1st defendant submitted that the court had no powers to register or cancel his title.
40. The 1st defendant submitted that the acreage, as per the title deed, should remain as such on the ground but not what PW 1, 2 and 3 want the court to order. The 1st defendant submitted that the court should not substitute the extra acreage not sought in the pleadings and the reliefs sought.
41. On the question of consent to file Tigania PMCC No. 74 of 2011, the 1st defendant submitted that he filed a consent dated 25.8.2011 and that it was the plaintiff's suit which should be struck out for not complying with Sections 13A of the *Government Proceedings Act*.
42. The 1st defendant submitted that possession was secondary to ownership, and, given Sections 25 and 26 of the *Land Registration Act*, the irregular occupation of excessive acreage on the ground, including his land, based on a different map, unlike document number (8) renders the plaintiff's case unsustainable.
43. The court has carefully reviewed the pleadings, evidence tendered, written submissions and the applicable law. The issues calling for the court's determination are:
 - i. If the plaintiff has proved his claim to the required standard.
 - ii. If the 1st defendant has proved his defence to the required standards.
 - iii. If the 1st defendant was justified in trespassing into the plaintiff's land.
 - iv. Whether the parties are entitled to the reliefs in their respective claims.



v. What is the order as to costs?

44. The primary pleadings in this case after the order of consolidation made in Meru HC Misc No. 43/2012 are the plaintiff's amended plaint dated 13.12.2022, 1st defendant's defence dated 20.1.2023, reply to the 1st defendant's defence dated 25.1.2023, the 1st defendant's plaint dated 29.8.2011 in Tigania PMCC No. 74 of 2011, the written statement of defence by the plaintiff as the defendant dated 1.9.2011 and a notice of preliminary objection dated 15.9.2012.
45. From the two plaints, the plaintiff in the main suit is alleging trespass onto his land by the two plaintiffs in the secondary suit while the plaintiffs in the latter are alleging that it is the plaintiff in the main suit who has trespassed into their Parcel No's 4735 and 7670.
46. Trespass consists of acts done on someone's land without justification, consent or approval, as under Section 3 of the Trespass Act. In *John Kiragu Kimani vs R.E.A* (2018) eKLR, the court cited with approval the 10th edition of the Black Laws Dictionary that trespass was an unlawful act against the person or property of another, especially wrongful permanent entry on another's real property. The court further cited Clark and Lindsell on Torts 18th Edition page 923, that trespass was an unjustifiable intrusion by one person upon the land in possession of another. See also *Kenya Power and Lighting Company vs Ringera and others* (2022) KECA 104 (KLR) 4th February (2022) (Judgment).
47. In trespass to land, a party must prove the existence of facts showing that there has been an invasion of a land belonging to him. Section 26 of the Land Registration Act provides that a certificate of title is conclusive evidence of proprietorship subject to the encumbrances, consent, restriction and conditions endorsed therein. Section 24 (a) thereof provides that the registration of a person as the proprietor shall vest in that person absolutely with all rights and privileges belonging or appurtenant thereto.
48. A title to land may be challenged on inter alia fraud, misrepresentation and wrongful acquisition to which the owner is proved to be a party as held in *Dr Joseph Ngok vs Justice Moiwo Ole Keiwua & others* (1997) eKLR. In *Gateway Insurance Co. Ltd vs Jamilla Suleiman & another* (2018) eKLR, the court cited with approval *Trust Bank Ltd vs Paramount Universal Bank Ltd and 2 others* (2019) eKLR, that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact which are unsubstantiated.
49. In *Samuel Mwangi vs Jeremiah M'Itobu* (2012) eKLR, the court cited with approval Winfield & Jolowiz on Tort 12th edition Page 361/362 that possession confers no actual right of property. However, a possessor may nevertheless maintain a claim on trespass against anyone who interferes and cannot himself show that he has a right to recover possession immediately. Further, the court observed that a stranger cannot rely in his defence upon another person's right to possess (the jus tertii), unless he can prove that he acted with that person's authority. Additionally, the court observed that even wrongful possession, such as that acquired by a squatter, would be protected except against the owner of the land or someone acting lawfully on his behalf.
50. The burden of proof of any particular fact lies on the person who wishes the court to believe in its existence. The plaintiff in the main suit alleged that the 1st defendant entered into his land and committed acts of damage without consent, permission or justification. He said the 1st defendant purported to superimpose his land onto LR No. 232. The plaintiff produced a copy of his title deed and tracing documents to show its origins from the gathering stage, adjudication register and the land surveyor/registrars report, showing its existence on the ground based on a registry index map.



51. On the other hand, the 1st defendant denied the alleged title held by the plaintiff and its acreage. The 1st defendant believes the plaintiff should stick to the land as indicated on his title deed; otherwise, what he has occupied and developed on the ground encroaches on LR No. 4735.
52. Section 112 of the *Evidence Act* provides that in civil proceedings, when any fact is primarily within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him. In this suit, the plaintiff disclosed all the facts and produced all the documents related to those facts on who, when and why he was entitled to the protection of the law as regards his proprietary rights to the suit land.
53. The 1st defendant filed the secondary suit, yet failed to produce exhibits supporting his claim to counter the evidence produced by the plaintiff in the primary suit. The 1st defendant alleged that the plaintiff had encroached into his land and was out to use the court to increase his acreage irregularly grab his land, yet he had not sought the rectification, cancellation or increment of his land in the land register.
54. It is a trite law that parties are bound by their pleadings. Written submissions, however forceful or persuasive cannot replace evidence. In *Robert Ngande Kathathi vs Francis Kivuva Kitonde* (2020) eKLR, the court cited with approval, *Erastus Wade Opande vs Kenya Revenue Authority Kisumu HCCA No. 46 of 2007* that submissions were not evidence on which a case is decided. Further, the court cited *Nancy Wambui Gatheru vs Peter W. Ngugi NRO HCC No. 36 of 1993*, which observed that once a case was closed, a court may give a judgment with or without written submissions. The court also cited with approval *Nganga and another vs Owiti & another* (2008) 1KLR that final submissions were not evidence, and the main focus of a decision was whether the claim was laid correctly, the evidence fully presented, and the law applicable.
55. In *Daniel Toroitich Arap Moi vs Mwangi Stephen Murithi & another* (2014) eKLR, the Court of Appeal was emphatic that submissions could not take the place of evidence and where a party fails to produce evidence, anything appearing in written submissions may not come to his aid, since submissions were mere parties marketing language.
56. Further, in *Avenue Car Hire and another vs Slipha Wanjiru Muthegu C. A No. 302 of 1997*, the court held that no judgment could be based on written submissions; otherwise, it would be a nullity since submissions were not one of the modes of receiving evidence under Order 17 Rule 2, now Order 18 Rule (2) of the Civil Procedure Rules.
57. In this suit, the 1st defendant failed to substantiate his claim or call evidence. He has resorted to giving evidence and adducing unpleaded facts through written submissions dated 20.7.2023. Therefore, the written submissions do not assist the plaintiff and the defence. The 1st defendant called no evidence to support his fashion of events that the plaintiff had encroached onto his land in the main suit. He did not avail any title deed or tracing documents on the root of his title. He did not plead the sanctity of his title, its acreage, locality and occupation before 2010. The 1st defendant did not lead evidence to impeach the plaintiff's title, acreage, size, possession and occupation on the ground.
58. There was no rival land surveyors/registrars' report to substantiate the 1st defendant's allegations that his land existed on both paper and on the ground. It was not enough to waive the title and claim sanctity. Every step of acquisition becomes an issue when a title to land is under attack.
59. In *Elizabeth Wambui Githinji & others vs Kenya Urban Roads Authority and others* (2019) eKLR, the court underscored the significance of Sections 21 (2), 32, 33 and 41 of the *Survey Act*. The court cited with approval *Embakasi Properties Ltd and another vs Commissioner of Lands and another* (2019) eKLR, that authentication means to prove or show something to be accurate, genuine, certify,



substantiate, be of proof, give proof, corroborate, confirm, support, attest, to bear out give credence, back up, validate, confirm, seal, endorse, sanction or guarantee.

60. In this suit, the parties, by a consent signed on 21.7.2022, agreed for a scene visit of the three disputed parcels of land in the presence of the District Land Registrar and surveyor to establish the boundaries, locality, extent and any other developments therein. The visit occurred on 15.6.2022. The two land officers prepared P. Exh No. (1), filed and produced in court afterwards. According to the report, the 1st and 2nd plaintiffs in the secondary suit pointed out their parcels No.4735 and 7670, as within LR No.232, measuring 0.17 and 0.10 acres.
61. Exh No. (1) was issued on 16.4.2010, indicating the plaintiff's land as 1.20 acres, while P. Exh No. (7) is 0.39 ha. P. Exh No. 7 relates to the Registry Map Sheet No. 10.4.4.1.1 while LR No.4735 and 7670, relate to Registry Map Sheets No. 108/4/1/11 and 4/1/7, respectively. The three titles were issued on 21.6.2016 and 19.1.2015, respectively.
62. In Estate Sonrisa Ltd and another vs Samuel Kamau Macharia & others (2020) eKLR, the court said that under Sections 16-19 of the Land Registration Act, a land registrar is required to determine boundaries after giving parties a notice upon investigations on all entries in the register and may rely on other relevant documents and existing records as per Section 14 (1) thereof after which any party aggrieved would appeal to court under Section 79 (3) (a), 80, 86 & 91 (a) of the Act.
63. It is a trite law that the acreage depicted on the title should be reflected on the ground, especially in fixed boundaries. In Samuel Wangu vs Attorney General and others (2007) eKLR, the court observed that registry index maps are not authorities on boundaries. The court said that where there was a dispute as to the position and location of a boundary, unless the same was fixed, one had to move beyond the registry index map in solving the dispute, other than the first registration of title to any land made as per Cap 283 and 284 a survey shall be carried out under and under a Director of Survey.
64. The plaintiff went beyond the title and produced documents showing his root of title, which tally with what he was occupying on the ground. The 1st defendant, on the other hand, has not produced any documentation to counter or sustain his defence and counterclaim. Similarly, the 2nd and 3rd defendants, despite directions given on 16.3.2022, never put in any defence or availed any evidence to shed light on what may have happened to the acreage despite the adjudication register and gathering book, showing 1.20 acres and what was in occupation by the plaintiff on the ground.
65. The 1st defence did not produce anything to substantiate how and when he gathered and was recorded as the owner of LR No. 4735. The 2nd plaintiff in the secondary suit did not attend court to support his claim and give credence to the 1st defendant's evidence.
66. The court in Munyu Maina vs Hiram Gathiha Maina (supra) said a party must move beyond the instrument to prove the legality of how he acquired the title and if it was free of any encumbrances. The 1st defendant has not given evidence on whether he took possession of his land after being recorded as the land owner.
67. In the plaint dated 29.8.2011, he does not state when the plaintiff herein trespassed onto his land. He does not state whether he reported anywhere to stop the encroachment or invoked Section 18 of the Land Registration Act on determining the boundary. In Municipal Council of Eldoret vs Titus Gatitu Njau (2020) eKLR, the court said that legal title was relevant and where there were several competing claimants on possession, it was on him who could prove title to show possession, and in the absence of evidence to the contrary, the owner of the land with the paper title was deemed to own the land.



68. Given the foregoing, therefore, I find the plaintiff in the established ownership of his parcel of land to be entitled to protection under Article 40 of *the Constitution* as read with Order 40 of the Civil Procedure Rules on issuance of a permanent injunction and damage for trespass. See Richard Buddy Okemwa & another vs KPLC (supra), Peter W. Chikati and others vs John Obote Wamalwa (supra) Joseph Ogola asiago & another vs Joseph Obongo (supra).
69. As to the 1st defendant's claim of trespass and overlap of his land by the plaintiff in the main suit, the 1st defendant did not call a land surveyor to substantiate his claim under the *Survey Act* (Cap 299) that an error occurred both on paper and on the ground for the land of the plaintiff to occupy part or all of his land parcel. The 1st defendant did not invoke the land surveyor's services to take any triangulation of his land against that of the plaintiff. See Zedekiah Evans Nyamogo Achira vs National Land Commission & another Kitale EGC Petition NO. 6 of 2017. See Nordin Bhajjee & another vs Damaris Akinyi Nondi (supra)
70. The upshot is that the plaintiff's claim in the main suit is allowed, and the 1st defendant's defence and suit in the secondary suit are dismissed with costs.

Orders accordingly.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON
THIS 1ST DAY OF NOVEMBER 2023**

HON. CK NZILI

ELC JUDGE

