



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT NYAHURURU**

**ELCA NO 25 OF 2017**

**(FORMERLY NAKURU HIGH COURT CIVIL APPEAL No. 145 OF 2015)**

**JAMES KIHARA WANDERI.....1<sup>st</sup> APPELLANT**

**JOHN KIMANI WANDERI.....2<sup>nd</sup> APPELLANT**

**FRANCIS NGENGA WANDERI.....3<sup>rd</sup> APPELLANT**

**SIMON NGARI KARIUKI.....4<sup>th</sup> APPELLANT**

**JOSEPH WAWERU KENDA.....5<sup>th</sup> APPELLANT**

**PETER WANJOHI.....6<sup>th</sup> APPELLANT**

**VERSUS**

**PAUL WACHIRA MUCHUNU.....RESPONDENT**

***Being an Appeal against the Ruling of the Principal Magistrate's Court at Nyahururu by the Hon. A.P Ndege (SRM) delivered on the 10<sup>th</sup> December, 2015 in SPMCC No. 105 of 2006***

**JUDGEMENT**

1. This Appeal was initially filed at the Nakuru High Court as Nakuru HCCCA No. 105 of 2003, with the establishment of this Court, the same was transferred herein. What is therefore before me for determination on Appeal is a matter wherein the honorable Senior Magistrate, delivered his judgment on the 10<sup>th</sup> December 2015 in Nyahururu PMCC No. 105 of 2006 where he found in favour of the Respondent against the Appellants to the effect that the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Appellants were to deliver vacant possession of the suit premises and in default be removed there from. A permanent injunction was also issued against all the Appellants either by themselves, their agents and/or servants from interfering in any manner with the suit land or the Respondent's dealing thereof.

2. The Appellants, being dissatisfied with the judgment of the Senior Magistrate have filed the present Appeal before this Court.

3. The grounds upon which the Appellants have raised in their 'man made' Memorandum of Appeal include

i. That the learned Senior Magistrate erred in fact and law in not giving the Appellant's a chance to call the witnesses

ii. That the learned Senior Magistrate erred in fact and law in the not considering the fact that the Respondent/Plaintiff produced documents and map sheet after the title using (sic) the Registry Index Map and if the same is disapproved then police should come in and investigate the real documents.

iii. That the learned Senior Magistrate erred in fact and law in not considering the fact that the plot was identified to the Appellant's father Joseph Wanderi Kihara (deceased) was allotted plot No. 865 Wanjohi Settlement Scheme later re-numbered as parcel No. Nya/Wanjohi/438 by Settlement Fund Trustee (SFT).

iv. That the learned Senior Magistrate erred in law and in fact by not considering the fact that the Respondent was allocated plot No. 864 Wanjohi Settlement Scheme in 1963 which was later re-numbered as parcel No. Nya/Wanjohi/438 by Settlement Fund Trustee

in 1963.

v. That the learned Senior Magistrate erred in law and in fact by not considering the fact that the Appellant's father deceased (sic) had taken actual possession of plot No. 438 and the plots share a boundary which is marked by the plot which on the road (sic) and a trench (furry) which runs from the post down to the river.

vi. That the learned Senior Magistrate erred in law and in fact by delivering his judgment and a decree order in favour of the Plaintiff/Respondent erected (sic) a fence of this dispute boundary in 1964 (sic) and that the boundary has been intact since 1964.

vii. That the learned Senior Magistrate erred in law and in fact by not considering the fact that the Development Plan which was a sketch plan was used by the Settlement Fund Trustee (SFT) to allocate the plots within the scheme and every boundary was very clear.

viii. That the learned Senior Magistrate erred in law and in fact by not considering the fact that since 1964 to 2006 there was no boundary dispute between the Appellant's father who died in 1992 and the Respondent who died on (sic) 2000.

ix. That the learned Senior Magistrate erred in law and in fact by not considering the truth (sic) fact that in 1985 the Registry Index Map (RIM) for the scheme was prepared to enable title deeds to be issued and the boundaries created by Registry Index Map (RIM) did not correspond with grounds boundary or the Development Plan and boundaries (sic).

x. That the learned Senior Magistrate erred in law and in fact by considering the fact that after the title deed were (sic) issued using the Registry Index Map, the Respondent started claiming that the Appellant's father has (sic) been occupying a portion of his land and the truth they (sic) had no dispute from 1963 up to 1990.

xi. That the learned Senior Magistrate erred in law and in fact by not considering the fact that the Appellant's father plot has (sic) identified by the Settlement Fund Trustees (sic) officers in 1963 and that there was a post that marked the boundary upon identification. The Appellant's father took possession of the said plot number 439 by erecting a house and cultivating it and there was no any boundary dispute between the Appellant's father (deceased) and the Respondent who made (sic) to accuse the children of the Appellant's father after he note (sic) that the plot owner have(sic) died.

xii. That the learned Senior Magistrate erred in law and in fact by not considering the fact that the Appellant's (sic) has a title deed while the Respondent in 1990 (sic) a dispute on the boundary was heard by the Land Registrar. In his ruling the Registrar suggested that the boundary should be the line that compared (sic) with the development and the Respondent has to date not enforced the ruling.

xiii. That the learned Senior Magistrate erred in law and in fact by not considering the fact of (sic) the Surveyor visited the disputed parcel of the land in the year (sic) after which he filed his report in Court, as the same (sic) are not conclusive because the boundaries according to the Registry Index Map do not correspond with the boundaries and Development Plan or even the ground report. According to the Surveyor (sic) reports the area of both parcel (sic) of land are less than the registered area.

xiv. That the learned Senior Magistrate erred in law and in fact by not considering the fact that between 1992 when the father of the Appellant died and 2005 when the mother of the Appellant's (sic) died. The Respondent started to take action (sic) to grab the part of the Appellant's father (sic) as plot No. 439 and he commenced the proceeding (sic) file No. 105 of 2006.

xv. That the learned Senior Magistrate erred in fact and law by not considering the fact that the father and the mother of the Appellant's (sic) is in spite (sic) of the fact that they have been in occupation of the whole land in (sic) for over 40 years.

xvi. That the learned Senior Magistrate erred in law and in fact by not considering the evidence of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants as their mother Gladys Keru was appointed as the administrator of his (sic) estate after his (sic) husband died and in 1997 the plot No. 439 was registered (sic) as the owner and she (sic) issued with a title deed.

4. The Appellant thus sought for the Appeal to be allowed with costs and the said decision/ judgment of the Senior Resident Magistrate dated 15<sup>th</sup> December 2015 and decree order issued dated 17<sup>th</sup> December 2015 be set aside.

5. The Appeal having been admitted to hearing on the 22<sup>nd</sup> May 2019 the Court directed that the same be disposed of the same by way of written submissions.

#### **Appellant's submission.**

6. It was the Appellant's submission that the proceedings in the Magistrate's Court were null and void for the following reasons.

7. That the Respondent's claim was statutorily time barred. That the size of the land said to have been established by the Surveyor was 12 acres thus this went beyond that what was termed as a boundary dispute and therefore the suit could not be sustained as provided for by the provisions of Section 7 of the Limitations of Actions Act. That the dispute had lasted (sic) since the year 1964 but the suit had been filed in the year 2006 without leave of the Court.

8. The Appellants' submission was also based on the fact that they lacked the capacity to be sued in the proceedings for reasons that although the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants' had lived on the suit land since their birth, the same belonged to their parents wherein after their demise they

had been sued in their own capacities before they had procured Letters of Administration to the Estate of their mother Gladys Keru Wanderi who had passed away in the year 2005. The Respondent herein ought to have taken out citation proceedings so as to be legally bound by the judgment.

9. That the 3<sup>rd</sup> ground of Appeal that rendered the proceedings in the trial Court null and void was that the dispute had been determined by the District Land Registrar in the year 1990 and his determination as final therefore the trial Court's judgment could not override the said determination. The filing of a new suit during the existence of the decision of the Land Registrar was therefore illegal and time barred having been brought after 16 years after the said decision of the Land Registrar.

10. The Appellants' submission further was that the report by the Land Registrar and Surveyor did not meet the threshold set under the provisions of Section 18 of the Land Registration Act in that they did not fix the boundaries as required hence the proceedings were heard and determined prematurely.

11. That because the Land Registrar's report was not consensual, a consent had been recorded by parties on the 4<sup>th</sup> March 2010 seeking that both the District Surveyor and the Land Registrar to visit the suit land and make another report. However on the 10<sup>th</sup> January 2013, the then acting Magistrate had ordered that the matter starts de novo. The consent was thus extinguished by this order and therefore the report of 1990 stood contrary to the finding of the learned trial Magistrate.

12. That further, there had been material contradiction on the finding of the Surveyor and the Land Registrar. That the RIM was alleged to have been prepared in the year 1985, in 1990 the Land Registrar pointed out the boundary using the available Map and RIM wherein he had ruled in favour of the Appellants.

13. That in the year 2015, officers from the same office had contradicted this ruling and had come up with a finding that had been adverse to the Appellants. This contradiction had however escaped the attention of the trial Court.

14. That the copies of the title deed to parcel No. Nyandarua/Wanjohi/439 produced as an exhibit in Court depicted that land was registered to one Gladys Keru Wanderi and measured 9.1 hectares approximately 22.489 acres whereas the neighboring parcel No. Nyandarua/Wanjohi/438 registered to Paul Wachira Muchunu measured 10.5 approximately 25.945 acres. That the difference between the two parcels of land was 1.4 hectares which was approximately 3.459 acres. That since the parcels of land were almost similar in size, if one of the neighbors decided to annex 12 acres from his/her neighbor's land, the situation would be visible. They thus faulted the trial Magistrate for finding that the loss of the 12 acres of land had not been known until after the Registrar had filed his report, which was biased against the Appellants as that would reduce the their Land by 12 acres.

15. Further that the Registrar neither stated how many acres each party held before his action nor how many acres each party had been allocated by the Settlement Fund Trustee, information which he concealed. That this report, which was not supported by the relevant Maps and RIM was highly compromised in that it left the Appellants' with 11.2 acres yet they held a title deed showing that their land measured 22.4 acres. On the other hand, the report had awarded the Respondent 37.9455 acres, which was quite significant, not tenable and could not be ignored. They prayed for the Appeal to be allowed.

#### **Respondent's submission.**

16. The Respondent's submission in response and in opposition to the Appeal categorized the issues to be determined into four namely;

- i. Whether or not the suit was a land dispute or a boundary dispute and whether the claim was caught up by the limitation of actions.
- ii. Whether or not the boundary was fixed in accordance with Section 21 of the repealed Registered Land Act
- iii. Whether or not the trial Magistrate properly applied the law to the facts pursuant to the entirety of the evidence presented during trial.
- iv. Who should bear the costs of Appeal?

17. On the first issue for determination, it was the Respondent's submission that the Appellants were still under the impression that the present dispute was a land dispute which was caught up by Section 7 of the Limitation of Actions Act or that since the dispute was determined in the year 1990, the suit was caught up by limitation by dint of the provisions of Section 4 (4) of the Limitation of Actions Act.

18. That the Appellants' also trace the dispute to the year 1964 and conclude that the 12 year period window within which an action may be brought was extinguished by in the year 2006 when the matter was and lodged in Court. That further, the Appellants' was under mistaken belief that since the land in issue was 12 acres, the same went beyond a boundary dispute issue.

19. The Respondent's submission was that they had never made any claim to land parcel No. Nyandarua/Wanjohi/439 registered to Gladys Keru Wanderi (deceased) which measured 9.1 hectares approximately 23 acres and neither had the Plaintiffs laid any singular claim to parcel No. Nyandarua/Wanjohi/438 registered to Paul Wachira Muchunu(deceased), measuring 10.5 approximately 26 acres.

20. By the instituting this suit, the late Paul Wachira Muchunu (deceased) had only claimed 12 acres of land that was already forming part of his land Plot No. 438 by virtue of registration. That the claim was not against the registered proprietor who lay no adverse claim of ownership, but against the Appellants who had trespassed and illegally encroached into plot No. 439 to enforce the decision of several Land Registrars as to the correct position of the boundary.

21. The Respondent associated himself with the finding of the trial Magistrate to the effect that the Land Registrar's determination was not a judgment of a Court of justice.

22. On the second issue for determination as to whether or not the boundary was fixed in accordance to Section 21 of the repealed Registered Land Act, the Respondent's submission was that determination was made by the District Land Registrar following a site visit on the 6<sup>th</sup> June 1990 which was then implemented on 31<sup>st</sup> August 2005 by the District Surveyor. That thereafter, the Appellants had interfered with the boundary features prompting the Respondent to bring the present suit after giving them a fair warning in form of a letter dated 22<sup>nd</sup> September 2005.

23. That later, it had been pleaded and proved by evidence that the area of the common boundary of plots number 438 and 439 had been determined by several Land Registrars on different occasions whereby the boundary had subsequently been fixed by the District Land Surveyor.

24. That on 19<sup>th</sup> February 2015 when the matter had been scheduled for hearing, counsel for both parties had agreed to have the District Land Registrar and the District Land Surveyor visit the disputed area and file their respective reports as per an order had been earlier issued on the 4<sup>th</sup> March 2010 (sic).

25. That what had subsequently emerged from the reports was that the disputed boundary was not in tandem with the Registry Index Map which was in accordance with the Development Plan and as such recommendations had been made to the effect that the ground position of plot 439 was 12 acres more which had the effect of reducing plot 438 with a similar acreage which was neither justified by the Registry Index Map or the registered area as noted on the title deed.

26. The Respondent combined the issues for determination 3 and 4 to submit that the trial Magistrate had allowed their claim following clear and rigorous application of all the facts to the evidence and fidelity of the law. The Appellants did not dispute that they were in occupation of the stretch of land in dispute and albeit without a license from the registered proprietor. That the dispute did not challenge the registered owner's proprietorship of Plot No. 439 or the area indicated in the titles deed so as to call for a suit against the administrator of the estate of the late Wanderi. Indeed if that was true, Respondent would have sued the District Land Registrar alongside the registered proprietor for orders of rectification of title. This was a simple boundary dispute against trespassers who were identified and sued accordingly.

27. The Respondents sought for the dismissal of the Appeal with costs to follow.

#### **Determination.**

28. I have considered the record, the judgment by the trial Magistrate, the submissions by learned Counsel, and the law. Conscious of my duty as the first appellate Court in this matter, I have to reconsider the evidence, assess it and make my own conclusions on the evidence, subject to the cardinal fact that I did not have the advantage singularly enjoyed by the trial Magistrate, of seeing and hearing the witnesses as they testified. (*See Seascapes Ltd v. Development Finance Company of Kenya Ltd [2009] KLR, 384*). I also remind myself that this Court will not normally interfere with a finding of fact by the trial Court unless it is based on no evidence or on a misapprehension of the evidence or the Magistrate is shown demonstrably to have acted on wrong principle in reaching the findings she did. (*See Ephantus Mwangi & Another v Duncan Mwangi Wambugu [1982-88] 1 KAR 278*).

29. I have considered the basis of the Appellants' claim with anxiety the Memorandum of Appeal having been prepared by the Appellants in person and filed on the 23<sup>rd</sup> December 2015 did not conform to the set down principles under order 42 Rule 1(2) to wit that:

*'A memorandum of Appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order Appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.'*

30. The present Memorandum resulted in a wandering process whereby the contents and style were not precise and did not specify the Appellants' grievances. I must confess that it has been a difficult, even torturous exercise sieving through the numerous grievances set out in the said Memorandum.

31. That said and done I was able to decipher that the Appellant's grievance, the way I understood it (with great difficulty), to be that although the Settlement Fund Trustee (SFT) had used a Development Plan which was a sketch plan, to allocate the plots within the scheme. Every boundary was very clear and the parties' deceased parents had then taken possession of their respective parcels of land

32. That it had been in 1985 when the scheme's Registry Index Map (RIM) had been prepared to enable title deeds to be issued, that the same had created boundaries that did not correspond with boundary on the ground and the Development Plan. That was when the Respondent had started claiming that the Appellant's father had been occupying his land.

33. The Appellants thus faulted the trial Magistrate for delivering his judgment and a decree order in favour of the Plaintiff/Respondent without considering the above facts.

34. Interestingly to note is that vide a notice of appointment of Advocate dated the 20<sup>th</sup> May 2016 and filed on the same date, the incoming Advocate M/S Kipkenei & Co Advocates did not deem it fit to regularize the Memorandum of Appeal filed by the Appellants in person but prepared the record of Appeal based on the said 'man made' grounds raised in the Memorandum of Appeal. In his written submissions however he chose to depart from the grounds raised in the memorandum and instead raised new issues for determination as herein above stated, contrary to the provisions of Order 42, Rule 4 of the Civil Procedure Rules wherein the same provides that an Appellant shall not, except with leave of the Court, urge or be heard in support of any ground not set forth in the Memorandum of Appeal.

35. A matter before a Court of law must be determined on the basis of the issues raised by the pleadings. This principle may appear trite but far too often advocates engage in evidence that is at variance with the averments in pleadings and hence goes to no issue and must be ignored.
36. Looking at the evidence adduced in the trial Court, PW1, the deceased Respondent's wife herein testified in the retrial of the 30<sup>th</sup> July 2015 that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants were the sons of Wanderi the proprietor of plot No. 439 whereas the 4<sup>th</sup> 5<sup>th</sup> and 6<sup>th</sup> Appellants were purchasers of the disputed parcel of land.
37. PW 1 further testified that her late husband, the Respondent herein was the proprietor of parcel No 438 initially plot No. 864 and measuring 26 acres (10.5 hectares). That her husband had been allotted the plot in the year 1963 by the Settlement Fund Trustee wherein they had taken possession of the same in the year 1964.
38. That when they took possession, they found Mr Wanderi had already settled on his own parcel of land and had already put a boundary. That after the Surveyor had fixed a boundary, the Appellants had demolished it and therefore there was no fence marking a boundary to both parcels of land.
39. That there had been a long standing boundary dispute between her husband and Wanderi which commenced in 1967 wherein several correspondences had been exchanged between the two prompting the Land Registrar to visit the suit land wherein he had prepared a report directing the Land Surveyor to fix all the boundaries. The same had subsequently been fixed in the presence of the buyers.
40. That after the Surveyor had left, the Appellants had destroyed the said boundary by uprooting the beacons and spreading them. The matter had been reported to both the police and the area chief wherein her husband's Counsel had then issued the Appellants with a demand letter. Subsequently, a suit had been filed in Court wherein an order had been issued for both the Land Registrar and the Land Surveyor to visit the suit land and file their report. The report dated the 2<sup>nd</sup> November 2011 was filed in Court as directed. That the report had confirmed that the Respondent's land was less by 12 acres while the Appellant's land was larger by 12 acres.
41. It was her testimony that the Appellants did not file any Appeal in the years 1990 and 2005 after the boundary had been fixed. That her deceased husband had initiated a matter with the Land Registrar who had then fixed the boundary.
42. It had been her evidence that Wanderi's Children had been sued because they were occupying the suit land, grazing on it, cultivating the same and had even sold part of it.
43. PW2, Mr Chege Muturi Nderitu, a Surveyor based in Nyandarua County had confirmed that vide the orders issued by the Court the parties in the suit and their Advocates had visited the suit lands in dispute being parcel No. 438 and 439 on the 11<sup>th</sup> May 2011 wherein he had prepared and filed his report dated the 2<sup>nd</sup> November 2011 confirming that the position of boundary on the ground was different from the position on the Map.
44. He had further confirmed that there was a fence between the two parcels of land. That there were 3 different boundaries which were inconsistent with each other namely the ground Map boundary, the Development Plan boundary and the Registry Index Map. That the Development Plan boundary had been the oldest map which had been proposed for implementation on the ground. He further testified that he could not clarify the claim between the parties, which was the preserve of the Land Registrar.
45. The Land Registrar who testifies as PW3 stated that he had been aware of the dispute between the parties and the order of the Court of 4<sup>th</sup> March 2010. That he had visited the suit lands on the 8<sup>th</sup> April 2015 in the company of the Surveyor. He confirmed that there had been several boundary disputes between the parties that had involved several Surveyors and the Settlement Officer. That each time the dispute was solved the proprietor of parcel No 439 would move the boundary again from the correct place. That on his last visit, they had installed the correct boundary using the Registry Index Map, which was the authority by which to determine boundaries, wherein they had admonished the parties to maintain the same.
46. He testified that he was not aware of any Appeal that had been filed following the determination of the boundary. That he was not aware as to why the Registrar's decision of 1990 was not implemented. He also confirmed that the green card had not been rectified to show any amendment.
47. The Defence evidence led by the 1<sup>st</sup> Appellant who testified as DW1 and confirmed that the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants were his brothers whereas the 4<sup>th</sup> 5<sup>th</sup> and 6<sup>th</sup> Appellants were purchasers of parcel of the disputed parcel of land from their late father Mr. Joseph Wanderi
48. That their father had passed away in the year 1992 while their mother had passed away in the year 2005. That their father had been allotted plot No 863 in the year 1963 by the Settlement Fund Trustee wherein after the same had been identified to him by the Settlement Officer, his father had then built a house on the said land.
49. He also confirmed that although the Respondent had land adjacent to their fathers' land being parcel No. 864, wherein the parcels of land shared the same boundary, yet his father had been the first to settle on his land wherein he had erected a fence and which fence was still intact.
50. He confirmed that in the year 1985, a Surveyor had gone on the land and had made a RIM with which the parties had used to get title deeds to their respective parcels of land where Parcel No 864 was registered as No 438 and parcel No. 863 had been registered as parcel No 439. That was when the Respondent had started complaining although the boundary dispute had begun in the year 1963 -1964.

51. That the Respondents' complaint had been handled by the Land Registrar in the year 1990 wherein he had made a decision which was not implemented. Thereafter their mother had filed a succession Cause wherein she had been issued with letters of administration to their father's Estate and land parcel No. 439 was transferred into her name

52. That prior to the transfer their mother had sold 3 acres of their father's land to the 5<sup>th</sup> Appellant/Defendant vide a sale agreement dated 7<sup>th</sup> July 1997(sic). That she had also sold 2 acres to the 4<sup>th</sup> Defendant/Appellant and ½ an acre to the 6<sup>th</sup> Defendant/Appellant but that she had died before she had transferred the land to the purchasers although they had taken possession of their respective parcels of land.

53. He confirmed that after his mother's death, they had not filed any succession cause and further that they were not in occupation of the Respondent's parcel of land but in occupation of their land No. 439, land upon which they had lived for more than 50 years.

54. He also confirmed that the decision made in the year 2005 concerning a dispute between the warring parties had not been implemented either.

55. The second defence witness DW 2, the 5<sup>th</sup> Defendant/Appellant herein confirmed the evidence of DW1 and added that the 4<sup>th</sup> and 6<sup>th</sup> Defendant/ Appellants had bought land from DW1's mother in wherein her children had been her witnesses.

56. That he had occupied his part of the land in the year 1995 but the same had not been transferred to him since there had been a dispute between DW1's mother and the Respondent. That he had become aware of the said dispute in the year 2005 after he had received a demand notice from the Respondent's Counsel informing him that he was in occupation of somebody's land.

57. Considering the evidence adduced in the trial Court, the issues that arise for my determination are as follows;

- i. Whether the matter was a boundary or land dispute
- ii. Whether the Appellants were trespassers to the Respondents suit land.
- iii. Whether the trial Magistrate had erred in his finding and judgment.
- iv. Who should pay for the cost of the Appeal?

58. From the evidence adduced, I find that the deceased Respondent's case had been based on the fact that he had sued the Appellants as trespassers to his land and not as against the registered owners of the suit land. It is not in dispute that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellant's deceased father, one Wanderi had been allotted parcel No 864 Wanjohi Scheme by the Settlement Fund Trustee in 1963 and that the deceased Respondent had also been allotted land parcel No 865 in the same scheme in 1964 wherein both parties had taken possession of their respective parcels of land which were adjacent to each other and shared the same boundary.

59. I also find that subsequently in the year 1985, the Registry Index Map (RIM) to both parcels of land had been prepared to enable registration of the parcels of land wherein the title deeds had been issued to the respective proprietors.

60. From both oral and documentary evidence herein adduced, there is no doubt that parcel No 863 measuring 10.5 hectares was registered to the deceased Respondent on the 10<sup>th</sup> December 1986 as No Nyandarua/Wanjohi/438. Parcel No 864 measuring 9.1 hectares was registered to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants' deceased mother one Gladys Keru Wanderi on the 13<sup>th</sup> October 1997, as parcel No Nyandarua/Wanjohi/439 and that both parcels of land had been registered under the provisions of the Registered Land Act.

61. It is also not in dispute that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants' deceased father had been the first to take possession of his portion of land in 1963 and start the developments therein before the deceased Respondent took possession of his own land in 1964.

62. That it had been after the deceased Respondent had settled on his land that he had started disputing the position of the boundary to the two parcels of land wherein he had lodged a series of boundary disputes/complaints with the Land Registrar complaining that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants' deceased father had moved his boundary hence encroaching on his (deceased Respondent's) land, Land which the Appellants had continued to utilize up to the time this matter was filed in Court.

63. I also find that following a series of complaints by the deceased Respondent to the Land Registrar, the suit lands were visited on the 6<sup>th</sup> June 1990 wherein the Land Registrar's ruling was as follows;

*'The development was checked and compared with the ground appearance.*

*It was found out that the RIM does not agree with the ground or map should also be compared with Development Plan*

*With the evidence adduced to me by the parties and the ground appearance and the evidence of the Surveyor and lastly the Development Plan, it was my ruling that the correct boundary should be that line which compares exactly which the lines of the Development Plan.*

*The Surveyor therefore to indicate that line to the parties'.*

64. Following this ruling, the record is not clear as to whether the Land Registrar's direction had been implemented or not, however on the 26<sup>th</sup> June 1997 the dispute was determined by the Land Registrar who directed the District Land Surveyor to visit the suit land and mark out the disputed boundary.

65. By this time the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellant's deceased father had passed away on the 26<sup>th</sup> May 1992 wherein their mother had been issued with letters of administration on the 11<sup>th</sup> June 1996.

66. That the boundaries had been fixed by the Surveyor on 31<sup>st</sup> August 2005 wherein after the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants had uprooted the beacons that had been fixed with the result that the matter had been reported to the police and subsequently filed in Court which had issued an order on the 8<sup>th</sup> March 2010 that both the Land Registrar and the Land Surveyor to visit the suit land and file their report.

67. The report prepared by the land Surveyor dated the 2<sup>nd</sup> November 2011 was filed in Court as directed with the finding that:

*'The boundary between plots 438 and 439 as per the Registry Index Map is in a different position from the one found on the ground.....the registered area of Nyandarua /Wanjohi 438 is 10.5 hectares wherein that of Nyandarua/Wanjohi 439 is 9.1 hectares.*

*The areas are as per the RIM boundaries when it comes to the position on the ground, the area of Nyandarua/ Wanjohi/438 is less by approximately 4.89 hectares (12 acres) making the other plot Nyandarua/Wanjohi/439 bigger by the same margin.....*

*This shows that the ground position, the RIM and the D. plan shows different positions of the same boundary that is boundary between plot 438 and 439.'*

68. On the 19<sup>th</sup> February 2015 Counsel to the parties had disputed the said report on grounds that it had not been prepared by the Registrar as provided for by the law. The Court had then directed for a fresh visit to the suit land by both the Land Registrar and the Land Surveyor and there after file their report.

69. The said visit was made and a report dated the 20<sup>th</sup> May 2015 was filed in Court on the 21<sup>st</sup> May 2015 wherein the Registrar's finding was as follows:

*'The late Paul Wachira who was the owner of plot No. 438 had settled in this plot after James Kihara Wanderi the owner of plot 439.*

*The Senior Settlement Officer from Murungaru told both parties that the area of plots No. 438 was 26 acres. This acreage is equal to the area as per the Registry Index Map (RIM) and the registered area in the land registry.*

*The two parties were present every time the correct boundary position was shown by the Settlement Officers and the Surveyors. Since the late owner of plot No. 439 settled before the late owner of plot 438, there are chances that the owner of plot 439 encroached into plot 438 knowingly or unknowingly.*

*I recommend the boundaries of these plots to remain as per the Registry Index Map (RIM).'*

70. Thus it was based on this report and the RIM filed by the Surveyor that the trial learned Magistrate found that the deceased Respondent herein had made out his case wherein he had subsequently issued the orders that he did in his judgment of 10<sup>th</sup> December 2015.

71. I also note that while the dispute between the parcels of land was ongoing, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants' deceased mother Gladys Keru Wanderi, sold part of the disputed parcel of land to the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Appellant/Defendants in the year 1994 and 1995 wherein the said Appellants had taken possession of their respective parcels of land.

72. Lastly, I find that none of the Appellants filed any Appeal following the findings of the Land Registrars in their reports of 1990, 1997 and 2005 when the boundary had been ascertained

73. It is clear that upon the discovery of an anomaly on the acreage of the their respective parcels of land, the deceased Respondent had referred the dispute to the Land Registrar for determination as a boundary dispute pursuant to the provisions of Section 21 of the Registered Land Act, Cap. 300, Laws of Kenya (now repealed).

74. Section 21 (2) of the Registered Land Act stipulates as follows:

*Where any uncertainty or dispute arises as to the position of any boundary, the Registrar, on the application of any interested party, shall, on such evidence as the Registrar considers relevant, determine and indicate the position of the uncertain or disputed boundary. (Emphasis mine)*

75. Sections 19 of the Land Registration Act provides as follows:

*“(1) If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey*

of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.

2) The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.

(3) Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section.

76. From the above provisions of the law, it is manifestly clear that the law gives the mandate to the Land Registrar to resolve boundary disputes of land with general boundaries.

77. It is not in dispute that the Registry Index Map (RIM) to both parcels of land being No 438 and 439 had been prepared in the year 1985, to enable registration of the parcels of land.

78. Indeed from the Registrars' respective reports of 6<sup>th</sup> June 1990 and 20<sup>th</sup> May 2015 herein above reproduced, their findings had been that the acreage on the ground of the two parcels of land did not correspond with the Registry Index Map. In the report of 6<sup>th</sup> June 1990 the Land Registrar had directed the Surveyor to indicate the boundary line to the warring parties.

79. Following this direction, on the 26<sup>th</sup> June 1997 the dispute was determined by the Land Registrar who directed the District Land Surveyor to visit the suit land and mark out the disputed boundary. The boundaries had been fixed by the Surveyor on 31<sup>st</sup> August 2005 wherein after the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants had uprooted the beacons.

80. The Director of Surveys is responsible for production of topographical maps on which plots and scheme layouts are planned, and then demarcated. In this case vide a report of 2<sup>nd</sup> November 2011 the Surveyor had found that the boundary between plots 438 and 439 as per the Registry Index Map was in a different position from the one found on the ground in that the area of Nyandarua/ Wanjohi/ 438 was less by approximately 4.89 hectares (12 acres) making the other plot Nyandarua/Wanjohi/ 439 bigger by the same margin.

81. The Registrar, in a subsequent report of 20<sup>th</sup> May 2015 had found that the two parties were present every time the correct boundary position was shown by the Settlement Officers and the Surveyors. Since the owner of plot No. 439, who was now deceased had settled before the owner of plot 438 also deceased, there were chances that the owner of plot 439 had encroached into plot 438 knowingly or unknowingly. The Registrar had then recommended that the boundaries of these plots remain as per the Registry Index Map (RIM).

82. The Surveyor's report of 2<sup>nd</sup> November 2011 had described the method that had been used to carry out the survey on the disputed parcels of land. The same had also attached diagrams showing the different positions of the RIM and boundaries as compared with the position on the ground as well as the encroachment area.

83. In the case of **Azzuri Limited v Pink Properties Limited [2017] eKLR**, Justice Angote while making a decision relating to general boundaries had this to say:

*'In his paper, "The Role of the Registry Index Map (RIM) in Land Management in Kenya", Peter K. Wanyoike stated that the Registered Index Map is a very useful document in registration and management of land in Kenya within the context of "General Boundaries" or "approximate boundaries."*

The paper defined "**General Boundaries**" 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."*

84. In the case of **Ali Mohamed Salim vs Faisal Hassan Ali (2014) eKLR**, the Court held as follows:

*"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."*

85. The Land Registrar's report of 20<sup>th</sup> May 2015 had also confirmed that indeed parcel No 439 had encroached into plot 438. Upon consideration of both the Surveyor's report, the Land Registrars reports and the evidence on record, I find that the dispute between the two parties entailed a substantial reduction, on the ground, of the size of one parcel, and corresponding increment of the size of another by about

12 acres. This was therefore a land claim for a chunk of land, which in my humble opinion, was beyond the jurisdiction of the Land Registrar, as it was not merely a boundary dispute but trespass, encroachment or invasion of land.

86. The boundaries had been fixed by the Surveyor on 31<sup>st</sup> August 2005 and there having been a finding by the Land Registrar that the Appellants had encroached into the Respondents parcel of land, the Appellants had thereby become trespassers to the Respondent's parcel of land No. Nyandarua/Wanjohi/438 wherein a suit had been filed on the 20<sup>th</sup> March 2006 seeking that they deliver vacant possession of the same.

87. I find that the Appeal herein has no merits, I uphold the finding by the trial Magistrate in the trial Court and proceed to dismiss the Appeal with costs to the Respondent.

**Dated and delivered at Nyahururu this 6<sup>th</sup> day of May 2020.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**

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