



REPUBLIC OF KENYA

IN THE LAND AND ENVIRONMENT COURT AT NYAHURURU

ELC NO. 83 OF 2017

(FORMERLY NAKURU HIGH COURT No. 321 OF 2013)

BERNARD KAMAU NJUGUNA.....PLAINTIFF

VERSUS

NEHEMIA GITAH NDIRANGU.....1st DEFENDANT

REUBEN MUCHIRE MUGO.....2nd DEFENDANT

DISTRICT LAND REGISTRAR NYANDARUA.....3rd DEFENDANT

ATTORNEY GENERAL.....4th DEFENDANT

JUDGEMENT

1. Before me for determination is an amended Originating Summons amended on the 26th October 2018, the original Originating Summons dated the 6th October 2010 having been filed in the Nakuru High Court as Civil Suit No.259 of 2010. Subsequently the matter had been transferred to this court, upon its establishment, and registered by its current number.

2. In the said amended Originating Summons, the Plaintiff sought for determination of the following;

- i. Whether the Plaintiff acquired Land parcel No. Nyandarua/Silibwet/3945, procedurally and legally.
- ii. Whether the 1st Defendant acquired Land parcel No. Nyandarua/Silibwet/734, procedurally and legally.
- iii. Whether the 2nd Defendant acquired Land parcel No. Nyandarua/Silibwet/735, procedurally and legally.
- iv. Whether Land parcel No. Nyandarua/Silibwet/3945, 734, 735 and 736 were excised from Land parcel No. Nyandarua/Silibwet/136?
- v. Whether Land parcel No. Nyandarua/Silibwet/3945, 734, 735 and 736 were excised from Land parcel No. Nyandarua/Silibwet/137?
- vi. That since parcel No. Nyandarua/Silibwet/3945, and parcel Nos. Nyandarua/Silibwet/734, 735 and 736 refer to the same parcel of land on the ground who among (sic) the Plaintiff and the Defendant is the rightful owner?
- vii. If the answer to issue No.(vii) above is in favor of the Plaintiff, then a declaration be made that the Plaintiff is the rightful owner of land parcel No. Nyandarua/Silibwet/3945 and title Nos. Nyandarua/Silibwet/734, 735 and 736 be cancelled forthwith.
- viii. Is the 3rd Defendant entitled to detain a title No. Nyandarua/Silibwet/3945 alone while title No. Nyandarua/Silibwet/734, 735 and 736 are in possession of the 1st and the 2nd Defendants respectively.
- ix. Whether the 3rd and 4th Defendants followed procedure o illegally by registering the mutation amending the map without notice to the Plaintiff and assigning the Plaintiff's parcel Nyandarua/Silibwet/3945 new numbers that is title No. Nyandarua/Silibwet/734, 735 and 736 and to the 1st and 2nd Defendants.

3. The Originating Summons was supported on the grounds that were adduced at the hearing as well as by the supporting affidavit sworn on the 6th October 2010 by the Plaintiff.
4. The 1st and 2nd Defendants' replying affidavits both dated the 18th November 2010 were to the effect that they were the proprietors of sub divisions of parcels of land No. Nyandarua/Silibwet/734 and 735 respectively, having bought the same in the year 1988 from one Samuel Njuguna Chomba, who had been the proprietor of the original parcel of land No. Nyandarua/Silibwet/137.
5. The Hon Attorney General entered his appearance on the 22nd October 2010 on behalf of the 3rd -5th Defendants. Directions were taken on the 21st March 2012 that the Originating Summons be heard by way of Viva Voice evidence. The matter stalled for six (6) years up to the 4th October 2018 when Counsel for the Plaintiff sought leave to amend their Originating Summons which application was not contested and therefore allowed with corresponding leave to the Defendants herewith to file and serve their responses (if need be) upon service. Directions having been issued earlier on, the hearing of the suit proceeded on the 14th May 2019.
6. The Plaintiff's case was that he had filed suit against the Defendants because 1st and 2nd Defendants had trespassed on his land which was parcel No. Nyandarua/Silibwet/3945, land which he had inherited from his father Joseph Njuguna Wagiko and which land had been originally parcel No. Nyandarua/Silibwet/136, as per Pf exh 1. That he had also sued the District Land Registrar because he had taken away his title deed without his consent. That he had sued the Surveyor because they had amended the map to the suit land without consent of the owner.
7. That upon his father's death in the year 2003, he had had filed a Succession Cause in the Nyahururu PM's court being Succession Cause No. 50 of 2005 wherein he had been issued with a confirmation of grant in regard to parcels No. Nyandarua/Silibwet/136 and Laikipia/Sosian Block 3/912 (Maundu Ni Meri). He produced the grant as Pf exh 2
8. That prior to filing of the Succession Cause, he and his siblings had gone to the Land Control Board at Oljoro-orok to seek for consent to sub-divide their father's land using the letter from the area chief which showed his father's beneficiaries. That they had filled the application No. 148/06/2006 for consent from the Land Control Board herein produced as Pf exh 3.
9. That thereafter they had been issued a consent from the Land Control Board which consent was dated the 27th June 2006 Ref: No. LCR/148/06/2016 which he produced as Pf exh 4. On the 12th April 2003, they had sought for the services of a surveyor one Muriithi and Co. Associates to sub-divide the land.
10. The Plaintiff further testified that his father was the proprietor of parcel No. 136 having been allotted the same by the Settlement Fund Trustee in Silibwet Scheme in the year 1965. The loan had been discharged on the 2nd November 1992 wherein his father had then been issued with a discharge of charge dated the 2nd November 1992, produced as Pf exh 5. That after the land had been discharged, his father had been issued with a title deed on the 26th January 1993.
11. That their closest neighbor was Samuel Njuguna Chomba whose parcel of land was Nyandarua/Silibwet/137. That at one time, Samuel and the Plaintiff's father had had a dispute over access to the road because Samuel had no access road on his land and therefore he used to use the Plaintiff's father's land. That on the 8th December 1992, Samuel Njuguna brought a surveyor to the Plaintiff's father's land and a subdivision was caused to both the Plaintiff's father's land and Samuel Njuguna's land. The Plaintiff's father reported the matter to the Assistant Chief of Silibwet- Mr. Ndirangu who then summoned the parties through a letter dated 18th December 1992 herein produced as Pf Exhibit 6.
12. That Samuel did not comply with the summons wherein the Chief advised the Plaintiff's father to lodge a complaint with Land Registrar Mr. Mugeni S.G who then visited the ground and heard the dispute between Samuel Njuguna Chomba and Joseph Njuguna Wagiko in the presence of other persons.
13. That although they were not served with the verdict of the dispute, yet he had seen a copy of the same with Samuel Njuguna Chomba wherein he had filed a complaint with the DCIO Nyahururu wherein in the company of an officer, they had gone to the Land Registrar Nyandarua and had demanded for a copy of the ruling to which they had been issued with one on the 25th March 2009, by which time it had been too late to file an Appeal.
14. That at the same time, Samuel Chomba had got into the land and had subdivided it. From a map for Silibwet Settlement Scheme – sheet No. 3(119/2/1) dated the 7th June 2000 and Sheet No. 3 (119/2/1) dated 27th January 2005, both their land and their neighbor's land was visible but the only difference between the two maps was that parcel No. 136 had been subdivided and now read plot No. 734, 735, and 736 which were the resultant new numbers. He produced the maps as Pf exh 7 and 8 respectively.
15. That in the year 2000, they had been arrested pursuant to a complaint by the 2nd Defendant that the Plaintiff's father had trespassed onto his land parcel No. 735. They had been charged at the Nyahururu Law Court in case No. 1663/2000 with the offence of malicious damage and forcible detainer where the case had proceeded to hearing and determination and they had been acquitted for lack of evidence. He produced copies of the charge sheet, proceedings and ruling as Pf exh 9 (a – c).
16. That subsequently, Nyahururu PMCC Civil suit No. 68 of 2001 between the Plaintiff's father and 2nd Defendant and others had been filed but which case had been finalized and dismissed on the 8th July 2004.
17. That after the dismissal, there had been an attempt to file the same case again where it had been dismissed vide an order dated the 27th January 2005 herein produced as Pf exhibit 10 (a – c). That it had been pursuant to the said dismissal that they had been given consent to

subdivide plot No. 136 which resulted into plots No. 3938 – 3945 (8 pieces) and he had been registered as proprietor to land parcel No. 3945 measuring 3.2 hectares.

18. That at the time when the 2nd Defendant Reuben Michire had claimed proprietorship of the land, parties had been asked to report to the Land Registrar's office with their documents of proof of ownership wherein his (Plaintiff's) title deed had been confiscated by the Land Registrar Nyandarua, Mr. Birundu. He however produced a copy of the same as Pf exhibit 11.

19. That subsequently on the 18th September 2008, he had conducted a search to the said parcel of lands where he confirmed that parcel No. 3945 measuring 3.2 hectares was still registered to his name Bernard Kamau Njuguna and that title had been issued on the 23rd October 2007. He produced the search certificate as Pf Exhibit 12. That on the 5th July 2017, he had conducted another search to the same parcel of land wherein he had discovered that now it had been registered to Fresiar Njoki Njuguna and a title issued on the 21st December 2007 to land No. 3945 now measuring 0.81 hectares. He produced the said search certificate as Pf Exhibit 13.

20. He proceeded to testify that he had never sold his land and neither did he know Fresiar Njoki Njuguna and that the land was vacant. Subsequently his search on parcels No. 734 and No. 735 on the 21st December 2011, yielded the results that they had been registered to Nehemiah Gitahi and Reuben Mugo and that the same measured 0.81 and 2.42 hectares respectively. He produced the search certificate as Pf exhibit 14 and 15 respectively. A search conducted on the 27th November 2008 on parcel No. 736 revealed that the land, measuring 0.405 hectares had been registered in the name of Samuel Njuguna Chomba and title had been issued on the 2nd July 1993. He produced the search certificate as Pf exh 16.

21. That the green card to parcel No. 136 measuring 15.5 hectares depicted that the title had been closed on the 17th September 2007 upon subdivision which gave rise to parcels No. 3938 – 3945. The certified copy of the green card was produced as Pf exhibit 17.

22. He also produced the green card for parcel No. 3945 measuring 3.2 hectares to which title had been issued to him on the 28th October 2007, as Pf exh 18 as well as a green card and mutation form for land parcel No. 137 as Pf exhibit 19 (a–b). He testified that the mutation form was different from the green card in terms of the resultant number of the subdivisions whereas on the ground, the subdivisions tallied with the mutation.

23. That the green card to land parcel No. 736 measuring 0.405 hectares showed that the title deed was issued in the names of Samuel Njuguna Chomba on the 2nd July 1993 which card he produced as Pf exh 20.

24. He testified that Plots No. 734 – 736 were on his parcel of land. That the owner of parcel No. 736 was deceased. He produced the sketch map drawn by Muriithi and Associates and dated the 12th April 2003 as Pf exh 21 and proceeded to testify that before his father died, he had not sold his land and therefore what he had sought from the court was to have titles to parcels No. 734, 735 and 736 revoked and also to have the amended maps returned to their original status. He also sought for costs of the suit and any other orders as the court may deem fit to grant.

Defence case.

25. The defence called the Land Registrar as DW 1 who testified that he knew the former Land Registrar Charles Onyambu Birundu who was now retired. That he had with him the green card for parcels No. Nyandarua/Silibwet 136 and 137. That the first entry to parcel No. 136 measuring 15.5 hectares was registered on the 27th March 1991 in the name of Settlement Fund Trustee(SFT). On the 26th January 1993 a discharge of charge was registered in the name of Njuguna Wagiku who later changed his name to Joseph Njuguna Wagiku wherein he had been issued with a title deed in those names.

26. That on the 17th September 2007, a transmission had been done in the name of Bernard Kamau Njuguna vide Succession Cause No. 50 of 2005 in PM's Court at Nyahururu wherein a transfer had been made to himself on the same day through transmission No. 7. That on the 17th September 2007 the said Bernard Njuguna had subdivided the land giving rise to LR. No. 3938 – 3945 wherein parcel No. 136 had been closed upon subdivision into 8 parcels of land. He produced the green card for parcel No. 136 as Df exhibit 1.

27. That in reference to parcel No. 137, the same had first been registered on the 27th March 1991 in the name of SFT wherein it had been discharged on the 7th June 1993 to Samuel Njuguna Wachomba. On the same date, he had subdivided it resulting to parcels No. 733 – 746.

28. He confirmed that parcel Nos. 734, 735, 736 were not subdivisions or part of parcel No. 136. That equally, parcel No. 3945 was not part of parcel No. 137 and therefore should be struck of the register. That what may have arisen was that there was a likelihood of duplication of No. 3945 which came about because of lack of consultation of the District Land Registrar by the surveyor.

29. He testified that he also had another record for parcel No. 3945 which meant that there were two registries of parcel No. 3945. That the second parcel of land No. 3945 was a subdivision of land parcel No. 748 which was neither a subdivisions of parcel No. 136 or 137 the subject of this case.

30. That Parcel No 748 had been opened on the 22nd December 1992 in the name of Malel Mibei Cheptindi who later transferred it to Daniel Njuguna Maina on 17th May 2007 wherein title had been issued to him on the 19th May 2007. On the 3rd December 2007, the said parcel No. 748 had been subdivided resulting into parcels No. 3945–3947. That currently the holder of the title deed to parcel No. 3945 was one Frasier Njoki Njuguna and that the first holder was the legal proprietor.

31. That whereas parcel No. 136 was subdivided on 17th September 2008, parcel No. 748 was subdivided on the 3rd December 2007, in his

expert opinion the holder of title for 3945 should be Bernard Kamau Njuguna. That in the case of parcels No. 734, 735 and 736, there was no duplication of numbers.

32. The Registrar further testified that in such a scenario where there were two overlapping numbers and a duplicate register, the surveyor was duty bound to visit the ground wherein the latest number issued as a duplicate number was to be cancelled and replaced with another number if the party so deserved. That whenever such confusion arose, the person who was registered first would be the rightful owner of the parcel of land when compared to the subsequent person.

33. He confirmed that there had been a boundary dispute involving the two parcels of land No. 136 and 137 wherein a ruling had been delivered by the Land Registrar and a report generated thereto, which report he produced as Df exhibit 2. That he was not aware of any appeal regarding the said ruling. He also produced the green card for parcel No. 137 as Df Exhibit 3.

34. When he was referred to the map for Silibwet Settlement Scheme – Sheet No. 3 (119/2/1) the Land Registrar confirmed that the subdivisions arising from parcel No. 137 were No. 733 – 746 and that he could not see parcel No. 3945 from these subdivisions. He produced the RIM as Df exhibit 4.

35. He also testified that the acreage of parcel No. 137 was not indicated which was irregular and further that the size of land could not be ascertained by going back to the original map.

36. He testified that he was not aware that the title to parcel No. 3945 had been confiscated by Mr. Birundu but that a title deed could be recalled through an order of the court or where there had been fraud or illegality in procuring the same. That the recalling of a title could be done by the Registrar. That he had no information that title to the land parcel No. 3945 was recalled hence the proprietor should be in possession of the same.

37. He confirmed that the RIMs herein produced as Pf Exhibit 7 and Pf ex 8 were not similar for Pf ex 7 which was in regard to parcel No. 136 appeared to be bigger towards the river as compared to Pf ex 8 which had been subdivided. That in this case Pf exhibit No. 7 prevailed.

38. He also testified that in a scenario where land had no access road, one was obligated to write a formal complaint to the land Registrar. Thereafter the summons would be issued to both parties to which the Registrar and surveyor would visit the land and if they were to create an access road passing through one's land, there would be prior compensation. He added that all these steps would be recorded.

39. While referring to Df ex 2, the witness testified that in the land dispute aforesaid, no minutes had been taken and that Df Exhibit 2 was not dated but that both parties were present at the site during the exercise. That if any party was dissatisfied, (s)he could appeal within reasonable time which in his own case, he normally gave give 14 days. That while looking at those proceedings one could not tell whether Joseph had been issued with a copy of the decision or not.

40. That duplication of land meant that one parcel of land had 2 numbers. In the present case, parcel No. 3945 had been duplicated as a subdivision of parcel No. 748 and also as a subdivision of No. 136. Such a scenario had been occasioned by an irregular process of subdivision. That parcel No. 748 was not a subdivision of No. 137.

41. He further confirmed that although he did not have the corresponding records, the title deeds to parcels No. 734 and 735 were in the names of the 1st and 2nd Defendants and were excised from parcel No. 137 and which include parcels No. 733 – 746, and that they were be validly registered

42. That the issue of the access road to a parcel of land was based on the agreement by both parties and if there was no agreement, the court could issue orders since he had no powers to issue access roads.

43. DW2, the 2nd Defendant's case was that he was the proprietor of parcel No. 735 as per the title deed herein produced as Df exhibit 5. That he had bought the 6 acres from Njuguna Chomba in 1988 for a consideration of Ksh. 105,000/- as per the sale agreement dated the 29th August 1988 which he produced as Df Exhibit 6.

44. That although he had paid the stamp duty and got all consents from Land Control Board, the land had not been transferred to him immediately because while he was in the process of having the same transferred, he had gone for further studies in the United Kingdom. He produced a letter to the chairman of the Land Control Board dated 17th September 1988 as Df Exhibit 7. He also produced the payment receipt for Kshs. 24,600/- and dated the 2nd September 1988 as Df exhibit 8.

45. He confirmed that there had been a boundary dispute between Njuguna Chomba and Njuguna Wagiku wherein the Registrar in the company of a land surveyor had interviewed both parties. Subsequently here had been a preliminary finding that the boundaries remain as they were on the ground. He testified further that it was normal that when the SFT gave land, trenches would be dug by tractors to form the boundaries which people respected before the issue of maps came about 35 years later. That after the decision had been made, the surveyor had subdivided the land using the amended map. He produced the mutation form as Df exhibit 9, and the receipt for payment of stamp duty for Ksh 4,800/- dated 8th March 1994 as Df exhibit 10.

46. That after acquiring the title in 1994, he had fenced the piece of land whereupon, his father had started using it for grazing before he then took over and started utilizing it for cultivation. That he had utilized the parcel of land up to the year 2000 when he had been informed, whilst in Nairobi, that the Plaintiff and his family had blocked the road, destroyed his fence and had put up a structure on his land.

47. That the blocking of the road had affected many people who had filed a complaint with the District Officer who had visited the suit land

removed the fence that had blocked the road. That the Plaintiff and his late father had been arrested and charged for a criminal offence in Nyahururu Criminal Case No. 1663 of 2002 in which he had testified as a witness. Thereafter, he had instituted a civil suit against the Plaintiff in Nyahururu PMCC No. 38 of 2001 where he had successfully sought that the structure that had been put up on his land be removed.

48. That the Plaintiff herein had inherited his father's property which had been excised from parcel No. 136. He confirmed that the Land Registrar's decision of 1993 had never been appealed against and that it had not been true that the Plaintiff had come to learn of the same in the year 2009 because it had been produced as an exhibit in the criminal case.

49. That later in the year 2007, Kamau, while armed with a title to parcel No. 3945 had claimed ownership to land parcel No. 734 and 736. That in the month of March 2010, following a complaint to the District Commissioner, the Plaintiff had been advised to go to court and appeal the decisions of 1993 but he had ignored the advice.

50. That his former Advocate Mr. Shauri Advocate had written to the Ministry of Lands in regard to parcel No. 3945 wherein vide their letter, in response, dated the 3rd April 2009 and produced as Df exhibit 11, it had been confirmed that title to parcel No. 3945 had been cancelled after it had been discovered that the subdivision of parcel No. 136 had been wrongly drawn. The Plaintiff had been advised accordingly. He produced the demand letter dated the 10th September 2008 and a letter from his Advocate dated the 14th March 2009 as Df exhibit 12 and 13 respectively.

51. He confirmed that the Plaintiff had never farmed on his upon which he as in possession, was farming on the same and had planted trees on 3 acres..

52. The 1st Defendant who testified as DW3 relied on documents relied upon by DW2 wherein he testified that he was the proprietor to parcel No. 734 as per the Df exhibit No. 14, land which measured 0.81 hectares and which he had bought from Samuel Njuguna Chomba for Kshs. 78,000/-. That the land had been subdivided in the year 1992 before he had bought it wherein after, he had planted trees and farmed on it without any interference thereon.

53. He confirmed that the Plaintiff was in possession of parcel No. 137 (old number), while plot No. 136 belonged to Samuel Njuguna Chomba. That a problem had cropped up in the year 2000 when Njuguna Wagiku had claimed parcel No 136 wherein he had closed the access to the road before building a house on DW2's land.

54. The witness confirmed that the matter had been reported to the District Commissioner in 2010, and further testified that he had seen the Plaintiff give his title deed to the Land Registrar who did not give it back to him because the same was fraudulent as it had been superimposed on the land.

55. That at the time the registrar came on the land, none of them had titles which had been subsequently issued after the visit to the land. That by the time the Plaintiff got his title, they already had theirs. He also confirmed that the District Land Registrar had given his verdict in the month of June 1993 wherein he had asked the Njugunas to pick their verdict from the Chief.

56. He confirmed that the Plaintiff had been arrested but that he did not know the outcome of the case and had not been there when he (Plaintiff) was destroying DW2's fence, but that he was sure it had been him because after the fence had been destroyed, the Plaintiff had started building a house therein. That as far as I knew, parcel No. 3945 could exist on papers but not on the ground. At the close of the Defendant's case, parties filed their respective written submissions.

Plaintiff's Submissions.

57. Upon giving the history of the matter in question the Plaintiff framed his issues for determination as follows;

- i. Whether the proprietor of all that parcel of land known as Nyandarua/Silibwet/137 trespassed and encroached into all that parcel of land known as Nyandarua/ Silibwet/ 136.
- ii. Whether the Plaintiff acquired the land registration No. Nyandarua/ Silibwet/ 3945 procedurally and legally.
- iii. Whether the 1st and 2nd Defendants acquired the parcel of land registration No.Nyandarua/ Silibwet/ 734, 735 and 736 procedurally and legally.
- iv. Whether the 4th Defendant followed the legal procedure in the subdivision of the suit property.
- v. Whether the 3rd and 5th Defendants followed the legal procedure by registering the mutation and amending the original map of Silibwet area from Silibwet(7/6/00) sheet 3/119/2/1 to Silibwet (27/1/03) sheet (11/2/11)
- vi. Who (sic) the Plaintiff is entitled to the prayers sought
- vii. Who should bear the costs of the suit.

58. On the first issue for determination it was the Plaintiff's submission that his late father Joseph Njuguna Wangiku was allotted parcel No. Nyandarua/ Silibwet/136 by the settlement fund trustee in the year 1965 pursuant to a discharge of charge which was on the 2nd November

1992. That therein after he had been issued with a title to the land on the 26th January 1993.

59. That his father's neighbor, the late Samuel Njuguna Chomba was the proprietor of land parcel No. Nyandarua/ Silibwet/137 and since he did not have access to the road he had used a pathway that passed through the Plaintiff's father's land.

60. That on or about the 8th December 1992 the said Samuel Njuguna Chomba conducted an illegal subdivision on his parcel of land wherein over 8 (eight) acres of land were hived out from the Plaintiff's father's land No. Nyandarua/ Silibwet/137 thereby forming new parcels of land amongst them Nyandarua/ Silibwet 734 735 and 736.

61. The original map dated 7th June 2000 herein produced as Pf exhibit 7 and the amended map dated 27th January 2005 produced as Pf exhibit 8 indicated different acreages on the parcels of land namely Nyandarua/ Silibwet/136 and Nyandarua/ Silibwet/137. That the mutation Map also indicated that Nyandarua/ Silibwet/137 had been subdivided into 14 parcels of land from 733-746 which was in contrast to the green card which showed that the land had been sub-divided into 7 portions being No 733-739. The Plaintiff's submission was that the actions of the late Samuel Njuguna Chomba in regard to parcel No. Nyandarua/ Silibwet/136 was tantamount to trespass.

62. On the second issue for determination the Plaintiff submitted that it was evident that he had acquired Nyandarua/ Silibwet/136 through transmission upon the sub-division and distribution of the estate of his late father wherein on the 23rd October 2007 he had been registered as proprietor of parcel No Nyandarua/ Silibwet/ 3945 one of the subdivisions herein to which he had now gained protection of the law as per the provisions of Section 24(a) of the Land Registration Act.

63. The Plaintiff, on his third issue for determination submitted that whereas the 1st Defendant claimed ownership of parcel No. Nyandarua/ Silibwet/734 which measured 0.81 hectares, by virtue of having purchased it from the deceased Samuel Njuguna Chomba, yet he only produced the title deed and not all documents that were a requisite to prove ownership. Further that the said title deed was not verified by the land Registrar.

64. That the 2nd Defendant had claimed ownership of land parcel No. Nyandarua/ Silibwet/735 measuring 6 acres also having purchased it from the deceased Samuel Njuguna Chomba a fact which was denied as neither he nor his father had sold part of their land. That instead these parcels of land had been illegally carved out of parcel No. Nyandarua/ Silibwet/136 by Samuel Njuguna Chomba. That the Defendants also did not produce any Land Control Board Consent which was a requisite in disposition of land and therefore the transaction and transfer of the land to the Defendants was null and void as per the provisions of Section 6(1) (b) (c) of the Land Control Act.

65. The 4th issue for determination was argued as follows; that since the parcel No. Nyandarua/ Silibwet/136 had been registered to Joseph Njuguna Wagiku, the District Land Registrar and the Surveyor acted contrary to the provisions of Section 103(2) of the Registered Land Act when they purported to sub-divide the same.

66. The Plaintiff relied on the provisions of Section 79 of the Land Registration Act to submit that no notification or consent was issued to either the Plaintiff or his late father with regard to the amendment of the Registry Index Map (RIM) on land parcel No. Nyandarua/ Silibwet/ 136. Secondly, that the ruling of the land dispute lodged by the Plaintiff was also delivered without his knowledge and not within reasonable time thereby denying the Plaintiff an opportunity to appeal against the same. The said ruling could not have been used therefore as a basis to amend the RIM from Silibwet original map 7/6/00 sheet 3/119/2/1 to Silibwet 27/1/03 sheet 3/119/2/1 which action led to the subdivision of parcel of land No. Nyandarua/ Silibwet/ 136.

67. That indeed the Plaintiff's evidence had been supported by DW1 who testified that land parcel No. Nyandarua/ Silibwet/ 3945 was also registered to one Freshia Njoki and that the issue of double registration of two different parcels of land was as a result of irregular subdivisions to which the first to be registered retained the registration number and the latter land would be issued with a new number.

68. The Plaintiff submitted that the Land Registrar had confirmed that the resultant subdivisions being No. Nyandarua/ Silibwet/734, 735 and 736 were a resultant of the subdivision of parcel No. Nyandarua/ Silibwet/ 136 and that they were not duplication numbers.

69. As to whether the Plaintiff was entitled to the prayers sought it was their submissions that they had proved that the transfer was un-procedural and illegal and therefore the registration of parcels of land No. Nyandarua/ Silibwet/ 734, 735 and 736 into the names of the 1st and 2nd Defendants was null and void and the said titles should be cancelled so that the property reverts back to the rightful owner, the Plaintiff herein. The Plaintiff also sought for costs as per the provisions of Section 27(1) of the Civil Procedure Act.

1st and 2nd Defendants' Submissions.

70. The 1st and 2nd Defendants' submission was that they were the lawful proprietors of suit parcels No. Nyandarua/ Silibwet/ 734 and 735 respectively, by virtue of being purchasers for value, land which was excised from Plot No 137 Silibwet scheme whose proprietor was the late Samuel Njuguna Chomba.

71. They framed their matters for determination as follows;

- i. Whether the boundary dispute of 1993 was heard and determined and whether the decision of the Land Registrar Nyahururu was appealed.
- ii. Whether the 1st and 2nd Defendants, are the legal, bona fide registered owners of land registration No. Nyandarua/ Silibwet/ 734 and No. Nyandarua/ Silibwet/ 735 respectively.

iii. Why the Plaintiff did not involve the registered land owner of No. Nyandarua/ Silibwet/ 736 and other several landowners in the areas who would be affected by the decision of the court.

72. On the first issue for determination, it was the Defendants' submission that the boundary land dispute between Joseph Njuguna Wagiku and Samuel Njuguna Chomba of 1993 was not contested. That the ruling of the Land Registrar in the said boundary dispute, after making a site visit, was to the effect that boundaries remain as they were on the ground as he undertook to amend the RIM to reflect the true position of the boundaries as they were on the ground.

73. Subsequently the Land Registrar had amended the map wherein Samuel Njuguna Chomba proceeded to sub divide this parcel of land No. 137 for the benefit of the 1st and 2nd Defendants who had also assisted in marking the boundaries. The Land Registrar's decision had never been appealed against to date.

74. That the Defendants had taken possession of their respective parcels of land up to the year 2000 when the Plaintiff and his father forcibly entered the 2nd Defendants land, maliciously damaged property, built a fence and locked out the Defendants and their neighbors from accessing their respective parcels of land.

75. The Plaintiff's assertion that he became aware of the Land Registrar's ruling in the year 2007 was false and misleading for reasons that his father was present when the decision was made, secondly through a letter dated 14th May 1993 produced as evidence in court, the Registrar had stated his decision to the boundary dispute, third when the Plaintiff and his father were charged in the criminal matter, amongst the prosecution evidence was the decision of the Land Registrar of 1993. Lastly the subdivision of plot No. 137 was conducted in broad daylight with the assistance and presence of the Plaintiff's father and the Defendants herein. The Defendants had then taken possession of their respective parcels of land where they had continued to enjoy quiet possession until the year 2000. The decision of the Land Registrar being a public document could be obtained at any time upon request.

76. On the issue as to whether the 1st and 2nd Defendants, are the legal, bona fide registered owners of land registration No. Nyandarua/ Silibwet/ 734 and No. Nyandarua/ Silibwet/ 735 respectively, it was their submissions that flowing from the decision of the Land Registrar, there was the amendment of the map which was followed by the sub division of plot No. 137, the production of mutation forms upon receipt of a letter of consent to transfer, payment of stamp duty fees and the subsequent issuance of title deeds was evident enough that they were the legal, bona fide registered owners of land registration No. Nyandarua/ Silibwet/ 734 and No. Nyandarua/ Silibwet/ 735 respectively.

77. That the Plaintiff's parcel of land No. Nyandarua/ Silibwet/ 3945 was designed by a private surveyor to overlap land parcels No. Nyandarua/ Silibwet/ 734, 735 and 736 and was the reason why during cross examination the Plaintiff was at pains to disclose the details of the private surveyor he had contracted to subdivide the suit land. Parcel No. Nyandarua/ Silibwet/ 3945 had been cancelled and notification to that effect served upon the 2nd Defendant vide a letter dated the 3rd April 2009 (Df exh 11) and copied to the Plaintiff, after the District Land Registrar had realized that the subdivision of parcel No. 136 which resulted into 3945, had been drawn wrongly.

78. The 1st and 2nd Defendants' answer as to why the Plaintiff did not involve the registered land owner of No. Nyandarua/ Silibwet/ 736 and other several landowners in the areas who would be affected by the decision of the court was for the reason that the registered owner of plot No. 736 was Samuel Njuguna Chomba, who had further subdivided the land which is currently inhabited by several other land owners. The Plaintiff's assertion that he was the one to decide whether the other land owners within the subject area would get access to the road or not was unfounded in law and practice

79. Finally the Defendants' submitted that the Plaintiff had not come to Court with unclean hands and that he was trying to gamble with the justice system having previously failed to acquire the 1st and 2nd Defendants' properties herein.

3rd and 4th Defendants' Submissions.

80. The office of the Honorable Attorney General framed their issues for determination as follows

- i. Whether the claim before court is a boundary dispute or a claim for ownership between the Plaintiff and the 1st and 2nd Defendants
- ii. Whether the boundary dispute (if any) is properly before this Honorable Court
- iii. Whether the 3rd and 4th Defendants acted within the law.

81. The 3rd and 4th Defendants' submissions on the first issue for determination was that there was no boundary dispute and by extension no dispute capable of being adjudicated by this honorable court for reasons that there was a boundary dispute prior to 1993 which dispute was heard and determined and a decision made by the District Land Registrar and which decision was binding on parties to the dispute including the Plaintiff herein.

82. The issues being litigated before the court thereof were issues that ceased to exist in the year 1993 upon the District Land Registrar rendering his decision on the boundary dispute between the proprietors and/ or beneficiaries of plot No. 136 and 137.

83. The decision of the Land Registrar has never been appealed or challenged. The only thing the Plaintiff had done, was to feign ignorance of the existence of such a decision, a decision he had on various occasions, prior to institution of this suit, relied upon.

84. The 3rd and 4th Defendants' submitted that pursuant to the provisions of Section 19 of the Land Registration Act, that the Land Registrar was empowered to fix boundaries to the registered land and therefore he was mandated to resolve disputes with general boundaries. This duty was discharged in accordance to the law and the same should remain as it is.

85. That it was trite law that where the law had given legal obligation to a department of the Government, the court should let that department proceed to meet its legal obligations. That the dispute before this court, in their humble submission was incompetent frivolous and vexatious against the Defendants and a complete waste of the judicial time and resources, and the same was thus a candidate for dismissal with costs to the Defendants.

86. In regard to the issue as to whether land parcel No. Nyandarua/ Silibwet/ 3945, 734, 735, and 736 had been excised from land parcel No. Nyandarua/ Silibwet/ 136 or whether they were excised from parcel No. Nyandarua/ Silibwet/ 137, could easily be addressed by looking at the copies of the green cards produced as Df exhibit 1 and 3 respectively which confirmed that titles No. 3938-3945 were excised from parcel No. Nyandarua/ Silibwet/ 136 while parcels No. 733-746 were excised from parcel No. Nyandarua/ Silibwet/ 137.

87. From the evidence of DW1 parcel No. Nyandarua/ Silibwet/ 3945 could not be registered as it had been designed by a private surveyor to overlap on parcels No. Nyandarua/ Silibwet/ 734, 735 and 736. DW1 had also testified that first in registration would prevail if an issue of double allocation arose. In this case, the registration of parcels No. Nyandarua/ Silibwet/ 734, 735 and 736 would prevail.

88. On the second the issue for determination, it was the 3rd and 4th Defendants' submission that there was no dispute capable of being solved by this honorable court as none existed that further, the court's jurisdiction had not been properly invoked.

89. Least but not last, the Defendants' submission was that they had acted within the law at all times and any allegations of illegality was therefore unsupported and mala fide and therefore the Plaintiff's suit should be dismissed with costs to the Defendants.

Determination.

90. I have carefully considered the Plaintiff's claim against Defendants, the evidence, submissions as well as the law applicable thereto. I find the matter arising for determination thereto as being:

i. Whether the present suit as against the Defendants is sustainable in the law.

91. It is evident from the evidence adduced herein that the matter in question arose from the sub-division of parcel of land No. Nyandarua/ Silibwet/137 into 7 parcels of land, which land had been initially registered to Samuel Njuguna Chomba. The resultant sub-divisions included parcels No Nyandarua/ Silibwet/734, 735 and 736 wherein the first two parcels had been sold to the 1st and 2nd Defendants herein.

92. The Plaintiff's claim herein is that these subsequent sub divisions were excised from parcel of land No. Nyandarua/ Silibwet/136, land which had been registered to his father Joseph Njuguna Wagiku. That upon his father's demise, his estate had been distributed to his beneficiaries wherein Nyandarua/ Silibwet/136 had been sub divided giving rise to No. Nyandarua/ Silibwet/3945 amongst others, land which he had been registered to as proprietor by transmission. It was further his assertion that the 1st and 2nd Defendants' parcels of land including land parcel No 736 had been excised from his father's original land parcel No. Nyandarua/ Silibwet/136. That he should be declared as the owner of land parcel No. Nyandarua/Silibwet/3945 and title Nos. Nyandarua/Silibwet/734, 735 and 736 be cancelled forthwith.

93. It is also not in contention that land parcel No Nyandarua/Silibwet/136 and Nyandarua/Silibwet/137 shared a common boundary such that in the year 1993 a boundary dispute had been reported to the District Land Registrar by the Plaintiff's father, against Samuel Njuguna Chomba wherein the Land Registrar and had gone on the ground, interviewed all the respective parties before submitting his finding in the presence of all parties, that the boundaries remain as they were on the ground from the time the parties were allotted their land. The Registry Index Map was subsequently amended to reflect the position of the boundaries as they were on the ground.

94. Section 18 of the Land Registration Act stipulates as follows:

Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.

(2) 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.

(3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary:

95. Section 19 of Land Registration Act, 2012 is clear that the duty to fix boundaries to registered land is vested in the Land Registrar. It 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.

96. By virtue of Sections 18 and 19 of the Land Registration Act, the Land Registrar is empowered to fix boundaries after giving all persons appearing in the register an opportunity of being heard, which process according to the evidence submitted herein was followed.

97. 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)

98. 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.”

99. In the case of *Samuel Wangau Vs. AG & 2 others (2009) eKLR*, it was held as follows:

“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.”

100. In relying on the facts as presented, I opine that the District Land Registrar and District Surveyor who were experts properly arrived at their conclusions in respect of the general boundaries between land parcels numbers No. Nyandarua/Silibwet/ 136 and 137 respectively. It was thus based on the land Registrar’s finding and the amendment of the Registry Index Map that mutation forms were prepared wherein Samuel Njuguna Chomba had subdivided his parcel of land No. Nyandarua/Silibwet/ 137 and had sold the resultant subdivisions to the 1st and 2nd Defendants herein amongst others.

101. Indeed the green cards produced and the evidence of the Land Registrar did confirm that parcel No. 137 had been first registered on the 27th March 1991 in the name of SFT wherein it had been discharged on the 7th June 1993 to Samuel Njuguna Wachomba. On the same date, he had subdivided it resulting to parcels No. 733 – 746.

102. He confirmed that parcel Nos. 734, 735, 736 were not subdivisions or part of parcel No. 136. That equally, parcel No. 3945 was not part of parcel No. 137 and therefore should be struck of the register.

103. Having found as above, the provision of Section 24(a) and 25(1) of the Land Registration Act No. 3 of 2012 which outlines the interests and rights of a registered proprietor would come into play;

104. Section 24 of the Land Registration Act provides as follows:

Subject to this Act—

the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

105. Section 25 of the Land Registration Act provides as follows

The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

106. Section 26(1) of the Land Registration Act provides as follows:

The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the

encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or

b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

107. It will be seen from the above provisions that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation or where it is procured illegally, un-procedurally, or through a corrupt scheme. The Plaintiff did not adduce any evidence to prove that the 1st and 2nd Defendants had acquired Title to their respective parcels of land illegally, un-procedurally or through a corrupt scheme.

108. The provisions of the law having empowered the 1st and 2nd Defendants by virtue of being registered as owners of parcels of land No. Nyandarua/Silibwet/ 734 and 735, with vested rights and privileges therein and which no person should interfere with except with the exceptions therein stated, I find that 1st and 2nd Defendants were the legal proprietors of parcels of land No. Nyandarua/Silibwet/ 734 and 735 respectively.

109. It therefore goes without saying that there being no evidence that the Plaintiff's action of entering into the 2nd Defendant's land and carrying out the impugned activities was lawful or otherwise legally sanctioned, the Plaintiff's action therefore constituted trespass to land.

110. It is trite law that trespass to land is actionable *per se* (without proof of any damage). See the case of **Park Towers Ltd v. John Mithamo Njika & 7 others (2014)** eKLR where J.M Mutungi J., stated:-

'I agree with the learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case. ...'

111. In the case of **Duncan Nderitu Ndegwa v. KP& LC Limited & Another (2013)** eKLR P. Nyamweya J. held:-

"...once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the Plaintiff's right to use and enjoy the suit property occasioned by the 1st and 2nd Defendant s' trespass"

112. The net result of my judgment is as follows:

i. I award general damages of Kshs.100,000/= to the 2nd Defendant, to be paid by the Plaintiff as compensation for the wrongful entry onto the 2nd Defendant Land.

ii. Since the Plaintiff's suit against the Defendant has not been proved on a balance of probabilities, I accordingly dismiss it with costs to the Defendants

It is so ordered.

Dated and delivered at Nyahururu this 4th day of February 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE