



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL CASE NUMBER 78 OF 2007**

**ANTHONY KIPKOSKE KIMETO.....PLAINTIFF**

**-VERSUS-**

**DICKSON A. RONO .....1<sup>ST</sup> DEFENDANT**  
**DAVID A. RONO.....2<sup>ND</sup> DEFENDANT**  
**VERONICA SIGIRO.....3<sup>RD</sup> DEFENDANT**  
**PAUL CHEBUSIT.....4<sup>TH</sup> DEFENDANT**  
**PAUL A. SURA.....5<sup>TH</sup> DEFENDANT**  
**PHILIP A. SIGILAL.....6<sup>TH</sup> DEFENDANT**  
**DANIEL A. SIGILAL.....7<sup>TH</sup> DEFENDANT**  
**DAVID A. SIGILAL.....8<sup>TH</sup> DEFENDANT**  
**BENJAMIN A. SIGILAL.....9<sup>TH</sup> DEFENDANT**  
**MRS.OBOT NORA SERON.....10<sup>TH</sup> DEFENDANT**  
**KIPTANGUS A. BUSIENEL.....11<sup>TH</sup> DEFENDANT**  
**SAMUEL A. TOWET.....12<sup>TH</sup> DEFENDANT**  
**WISON A. TOWET.....13<sup>TH</sup> DEFENDANT**  
**ROBERT KIPROTICH.....14<sup>TH</sup> DEFENDANT**  
**THOMAS MAIWA.....15<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**1. Background and Pleadings**

This case was filed on the 16<sup>th</sup> April 2017 against all the (15) fifteen defendants.

They were served with summons to enter appearance. Defendants number 1, 2, 4, 5, 11, 12, 13, 14 and 15 failed to enter appearance nor file their defences. On the 12<sup>th</sup> March 2008, interlocutory judgement was entered against the nine defendants.

2. The 3<sup>rd</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendants filed their joint statement of defence on the 27<sup>th</sup> June 2007 which was Amended and filed on the 2<sup>nd</sup> June 2009 through their advocates M/S Lel & Associates Advocates.

The plaintiff is represented by Mr. Mong'eri Advocate, instructed by M/S Mong'eri & Co. Advocates.

3. The dispute between the plaintiff and the Defendants is over ownership and boundary over **Land Parcel Narok/CIS-Mara/Ilmotiok/468** measuring approximately 44.0 Hectares and registered in the plaintiff's name.

This property borders **Land Parcel No. Narok CIS-Mara/Ilmotiok/2444** to which the defendants lay claim of ownership. It is registered in the names of Indeyo Ole yaile, deceased.

4. This is evidently a Land case but was part heard by the High Court before the Hon. D.K. Maraga J (as he then was) before whom the plaintiff testified on the 13<sup>th</sup> May 2009, before the establishment of the Environment and Land court in 2012 that has the original and appellate jurisdiction over all land disputes relating to Title to land, ownership, occupation and use in line with **Article 162(2) (b) of the 2010 Constitution**.

5. I took over further hearing of the case in July 2016 pursuant to Practice Directions issued by the Hon. The Chief Justice and Gazetted under Legal Notice No. 5178 on the 24<sup>th</sup> July 2014 that directed that all part heard land cases before the High Court continue to conclusion before the High Court. Thus the High Court was clothed with the necessary jurisdiction to hear part heard land cases. On that strength, I became seized with the necessary jurisdiction to continue with the hearing of the case.

6. By his plaint dated the 13<sup>th</sup> April 2007 and filed on the 28<sup>th</sup> July 2007, the plaintiff being the registered owner of **Land Parcel No. Narok/CIS-Mara/Ilmotiok/468** claims that the defendants jointly and severally, on or about 2004 wrongfully entered on to the said land parcel, cut down trees damaged fences and other crops thereon causing loss and damage to the plaintiff.

7. The plaintiff states that by such acts of trespass, he has been deprived of the use and enjoyment of his land that was registered in his names on the 16<sup>th</sup> December 1988 and therefore seeks orders that

- (a) A declaration that the defendants by themselves, their servants or agents are not entitled to remain on the land Parcel No. Narok/CIS-Mara/Ilmotiok 468.*
- (b) A permanent injunction to restrain the defendants, their servants or agents from remaining on the said land parcel.*
- (c) An order of eviction of the defendants their agents, and servants from the said land parcel*
- (d) An order of immediate repossession of the portion of land parcel unlawfully occupied by the defendants, their agents and or servants.*
- (e) General damages for trespass*
- (f) Costs of the suit*

8. The 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendants denied the plaintiffs claim by their joint Amended defence filed on the 2<sup>nd</sup> June 2009. They denied having been in occupation of the plaintiff's parcel of land and stated that they occupy their land parcel **No. Narok/CIS-Mara/Ilmotiok/ 2444**. In my opinion, the Pleadings above point to a boundary dispute between the two land Parcels as each of the parties claim possession and occupation of their respective land parcels.

#### 9. **The Plaintiffs Case**

The plaintiff testified as **PW1**. It was his evidence that he bought land parcel **No.Narok/CIS-Mara/Ilmotiok/468** in a public auction in 1988 from Kenya Commercial Bank and was registered in his name. He produced as Exhibits - to prove ownership being

- a) The Title Deed** - **PExt 1**
- b) Certificate of official search of the Title** - **Ext 2**
- c) Copy of Green Card** - **Ext 3**
- d) Area map** - **Ext 4**

10. It was his further evidence that his land borders the Defendants Parcel No.2444, being a subdivision of Land Parcel No.378, and produced the map of the area – PExt 4.

He alluded to a boundary dispute involving the subdivisions but which he averred was resolved by the then Narok District Land Registrar.

He testified that the defendants entered into his land parcel and damaged his trees and fences, hence the prayers for declaration of ownership, eviction and damages for trespass.

#### 11. PW2 was Sitimei Langat

His evidence was that the plaintiff's land parcel was advertised for sale and produced the notification of sale by Auctioneers – Ext 5 and that at the time, nobody was in occupation of the land and that it belonged to Patrick Seki who had taken a loan from Kenya Commercial Bank. He further testified that it is the defendants who crossed over and occupied the plaintiffs land from their own despite being warned by the District Commissioner by a letter dated 14<sup>th</sup> February 1990 – PExt 6.

He also produced a map showing the various land parcels Ext 7 bordering the plaintiffs land.

12. He further testified that the boundaries of the various land parcels were fixed before the plaintiff bought the land and that the boundaries still exist on the ground, being a river between land parcel No.468 (plaintiffs) and No. 3991 and a road between Plot No.2442 and 2443. He further testified that those who had encroached onto the plaintiff's land parcel have moved out, except the current defendants No. 6, 7, 8, 9 and 10, 11, 12 13, 14 and 15 the family of the late Ole Yaile whose land is Parcel No. 2444.

#### 13. DW1 Benjamin A Sigilai is the 9<sup>th</sup> Defendant.

His evidence is that he lives and occupies plot No. 2444, formerly No. 378 before subdivision, with his brothers the 3<sup>rd</sup>, 6<sup>th</sup> 7<sup>th</sup> 8<sup>th</sup> and 10<sup>th</sup> Defendant and his mother. His evidence is that they have not trespassed on the plaintiff's land. He confirmed that if boundaries are fixed, and they are found to be occupying the plaintiff's land, they will be ready to move out onto their and Parcel No. 2444.

14. He produced Green cards to the two land parcels No. 468 and 2444, and confirmed that parcel No. 378 was subdivided into three portions – and looking at the Green Cards, testified that Parcel No. 2444 registered in his father's name, Nteeyo Ole Yiale who bought it from Ole Yaile.

15. DW2 is the 6<sup>th</sup> Defendant, Philip Kipkoech Sigilai. His evidence was that the plaintiff's land parcel shares a boundary with their father's Parcel No.378 which was subdivided into Parcel No. 2444, 2443 and 2442 and that each of the owners know their boundaries. He testified that **Parcel No. 468**, the suit land, belongs to the plaintiff and boundaries were fixed on the ground by elders.

16. DW3 David Lemalamba Ole Yaile testified that his family members, being defendant numbers 3, 4, 6, 7, 8, 9, 10, 11 and others bought land parcel No. 2444 which was registered in their father's name and occupy their portions and have not trespassed onto the plaintiff's land parcel, that the boundaries are fixed, and that his family, (the defendants) have no claim of ownership over the plaintiff's land parcel.

On cross examination, this witness stated that if the defendants have trespassed onto the plaintiffs land, they should be removed/evicted from the said land.

#### 17. Issues for Determination

(1) *Whether the defendants are trespassers on the plaintiff's land parcel No. Narok/CIS-Mara/Ilmotiok/468.*

(2) *If answer to (1) above is in the affirmative whether the plaintiff is entitled to orders of Eviction, damages for trespass, permanent injunction and costs of the suit.*

#### 18. Analysis and determination

Evidence adduced by the plaintiff and the Defendants cumulatively is clear that the suit land, **Narok/CIC-Mara/Ilmotiok/468** belongs to the plaintiff which is confirmed by the **Title Deed** - PExt 1 and the Certificate of official search - PExt 2. The plaintiff's witnesses as well as the defendants who are a family confirmed the same. Issue of ownership is therefore a non issue.

19. There is no dispute whatsoever on the genesis and occupation of land parcel **No. CIC-Mara/Ilmotiok/2444** by the defendants. This is the land parcel bordering the plaintiffs parcel No.468 on one side and where the defendants claim ownership and occupation. In his written submissions, the defendants advocate Mr. Lel rightly submits that the defendants have settled and have been in occupation and use of their portion being parcel No. 2444 and that they have no interest in the plaintiffs land or at all.

20. Both the plaintiff's witnesses and the defendants agree that there are fixed boundaries, natural river boundaries and a road between the two land parcels, and that the said boundaries were fixed, on the ground by the Provincial and Disputes Committee upon determination of ownership of the mother title – Plot No.378 which upon subdivision resulted to the suit land and the defendants parcel being No. 468 and No. 2444 respectively. Further, the boundary between the two parcels was also settled and fixed by the Narok District Land Registrar following a boundary dispute in 1996 – DExt 1 Green-Card for plot No. 2444.

21. It is trite that parties are bound by their pleadings and any evidence that does not support the pleadings or are at variance with the same must be disregarded – **IEBC & Another -vs- Stephen Mutinda & 3 Others (2014) e KLR.**

**Article 40** of the Constitution protects the rights of property to an individual from arbitrary deprivation of any description in any way including the right to quiet enjoyment and use of the property. To that end the court will not shy away from declaring a person who is wrongfully in occupation, and use of another's land as a trespasser.

**Section 3(1) of the Trespass Act Chapter 294 Laws of Kenya** provides that:

*“Any person who without reasonable excuse enters, is or remains upon erects any structure on, or cultivates or tills or grazes or permits to be on private land without the consent of the occupier thereof shall be guilty of an offence.”*

22. The defendants admitted having occupied, tilled and grazed on their portion, parcel No. 2444 that borders the plaintiff's parcel No. 468. It is their defence that the plaintiff's claim is misplaced as they have not trespassed on his parcel of land. Indeed **DW3** was categorical that if the defendants are found to be in occupation or encroached onto any portion of the plaintiff's land, they should be evicted therefrom as the boundaries are well defined.

23. The burden of proof rests with the plaintiff at all times. It is his duty to call sufficient evidence to prove existence of facts which he asserts, and would fail if no evidence is adduced to support the assertion – **Section 107-108 of the Evidence Act.** See also the case **Kiema Mutuku -vs- Kenya Cargo Hauling Services Ltd (1991) and Eunice Wajua Muyao -vs- Mutile Beatrice & 3 Others (2017) e KLR.**

24. Though the plaintiff pleaded that the defendants wrongfully entered on to his land parcel, and cut down trees and damaged fences thereon, no evidence was adduced to prove such illegal entry and damage as alleged.

25. What comes out clearly is that there is a boundary dispute between the plaintiff's and the defendants land parcels. This is so because no evidence was adduced of a clear fixed boundary between the two land parcels, the defendants stating that they are in occupation of their land parcel, and have not encroached onto the plaintiff's land.

That being the case, there is a probability that the defendants may have encroached into the plaintiff's land. This is demonstrated by the 1<sup>st</sup> and 2<sup>nd</sup> defendants who opted to move out of the plaintiff's land when they realized that they had encroached onto the suit land and therefore peacefully removed themselves therefrom. This is the same reason given by the rest of the defendants save for the family of the late Ole Yiale, the six defendants in the case, who filed their defences.

26. The only way the plaintiff's and the defendants dispute may be resolved, being a boundary dispute is to engage a land surveyor with instructions to move onto the two land parcels, determine and fix the boundary between the two land parcels, there being no dispute as to ownership. Had the plaintiff engaged a land surveyor to fix the boundaries, the dispute would have been resolved.

27. By the above evidence and findings, the decision that the court ought to come to would be a dismissal of the case. However, I will not do so, because the court ought to consider the justice of a case, and try to salvage the same as opposed to dismissing it, if by so doing justice would be metted to the parties, without causing prejudice or damage or loss to either. **Section 3A of the Civil Procedure Act and Article 159 2(d) of the Constitution** mandates the court to dispense substantive justice without undue regard to procedural technicalities. It is also now trite that courts should not lose sight of the fact that rules of procedure, though they may be followed, are the handmaids of justice, that they should not be given a pedantic interpretation which at the end of the day denies parties justice – Maraga J, in **Shashikant C. Patel -vs- Oriental Commercial Bank (2005) e KLR.**

28. For the above reasons and with a view to bringing the **boundary dispute** between the parties who are neighbours to a close, I come to the finding that it is for the interest of justice and good peaceful co-existence as neighbours, that the boundary between the plaintiff's and the defendants land parcels be fixed and settled by the Narok County Land Registrar who under **Section 19 of the said Act and Section 18(2)** thereof is empowered to settle boundary disputes within his jurisdiction.

29. **Section 19** requires that the Land Registrar gives notice to the owners and occupiers of the lands adjoining the boundaries in question of his intention to ascertain and fix the boundaries – See the holding in the case **Azzuri Ltd -vs- Pink Properties Ltd (2017) e KLR, ELC case No. 3 of 2015 at Malindi.**

30. Accordingly I order and direct that

*(1) The Narok County Land Registrar within whose jurisdiction the land Parcels No. Narok/CIS-Mara/Ilmotiok/468 and Narok/CIS-Mara/Ilmotiok/2444 and subject of this case are situated, to arrange and ascertain, fix and settle the boundaries between the two land parcels and to ascertain whether, on the ground, any of the defendants have encroached, or erected any structures, or are in use and occupation of any portion of land parcel No. Narok/CIS-Mara/Ilmotiok/468 the property of the plaintiff.*

*(2) The Narok County Land Registrar is further directed to file a report on his findings within a period of 60 days from the date of this order.*

*(3) The case will be mentioned before this court for compliance on the 30<sup>th</sup> July 2019.*

*(4) Final judgment and Orders in the case shall be given upon receipt and consideration of the Narok County Land Registrar's*

*report on the settlement and fixation of the boundary and report on the ground as to alleged encroachment onto the plaintiffs land by the defendants.*

*(5) Costs of the suit shall be determined upon findings above.*

It is so ordered.

**Dated, signed and delivered this 16<sup>th</sup> Day of May 2019.**

**J.N. MULWA**

**JUDGE**