



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NUMBER 863 OF 2001**

**KISANDA KILANDA ENTERPRISES. .... APPELLANT**

**VERSUS**

**LETEIPA OKEDIENYE OLE KISUA. .... 1<sup>ST</sup> RESPONDENT**

**TUPWAI OLE TENKEET. .... 2<sup>ND</sup> RESPONDENT**

**SOKONO OLE TENKEET. .... 3<sup>RD</sup> RESPONDENT**

*(From the Award and Orders of the Rift Valley Land Tribunal Disputes Appeal Committee in Case No. 6 Of 2001).*

**J U D G M E N T**

This appeal has been pending since the 13<sup>th</sup> June, 2001 when it was filed. The Memorandum of Appeal was triggered by an award and orders of Ololulunga District Land Disputes Tribunal between the registered owners of land parcels – Narok/Cis-Mara/Ololulunga/144 – the Respondents herein, and the owners of Narok/Cis-Mara/Ololulunga/126, the Appellants herein. The award which was made on 27<sup>th</sup> February, 2001 was in favour of the Appellants herein.

The aggrieved Respondents as a result, filed an appeal to the Rift Valley Provincial Land Disputes Tribunal which on 7<sup>th</sup> November, 2001 overturned the District Tribunals' award and thus turning the finding to be in favour of the Respondent. From the Provincial Land Disputes Committee's Tribunal Award, the Appellant appealed to this court on the 14<sup>th</sup> December, 2011, well within the two months allowed by the relevant Act. An amended Memorandum of Appeal was filed in court on 29<sup>th</sup> July, 2003.

The grounds of appeal in the Amended Memorandum of Appeal included the following: -

- 1. That the appeal do succeed on points of law and the Award, finding Ruling and Orders of the Rift Valley Provincial Land Disputes Appeal Committee be set aside.**
- 2. That the Land Registrar do establish the boundaries in accordance with the Registry Index Map as was done in Nakuru High Court Civil Case No. 33 of 1996 in respect of L.R. No. Narok/Ololulunga/206 and 126.**
- 3. That if the Respondents are by the re-establishment of the said boundaries found to have trespassed, they be evicted.**

#### 4. That costs be determined.

For various reasons, both technical and deliberate and beyond control, the appeal was not heard for 8 years after amendment of the Memorandum. When on 16<sup>th</sup> November, 2011 the appeal was placed before me, this court recorded the following orders with the consent of the parties: -

- a. **That within 60 days of the making of this order, and upon payment of the necessary fees by the parties on their pro-rated share thereof, the Chief Land Registrar, in conjunction with the Narok District Land Surveyor, do establish the boundaries shared by parcels No. L. R. Number Narok/Cis-Mara/Ololulunga/126, 144, 80 and 8.**
- b. **That pending the conclusion of the survey exercise under para (a) above, no party to this suit, their servants, agents or otherwise howsoever, shall remain upon, cultivate, graze, fell any tree or otherwise occupy any 200 meter stretch of land from the respective boundaries of the said parcels until 17<sup>th</sup> February, 2012.**
- c. **That the Chief Land Registrar do file his report under paragraph (a) aforesaid of this Order, on or before 1<sup>st</sup> February, 2012.**
- d. **That, this matter be mentioned on 7<sup>th</sup> February, 2012 for ensuring compliance and further orders.**
- e. **That costs be in the cause.**

The appeal was thereafter mentioned many times for various reasons. The Chief Land Registrar failed to carry out the court order for long. The parties themselves had failed to pay the relevant fees to enable the orders to be carried out in time.

Be that what it may, the Chief Land Registrar and District Surveyor's Report dated 17<sup>th</sup> July, 2012 was filed in court on 19<sup>th</sup> July, 2012. The court on 12<sup>th</sup> April, 2013 ordered the parties to file their respective written submissions on the said Chief Registrar's Report.

I have carefully perused the submission of the parties herein in respect of the grounds of appeal and more particularly, as based on the consent orders of this court dated 16<sup>th</sup> November, 2011. The parties and the court had clearly realized and understood that the main issue to be settled by this court was the proper boundary between the two plots of land i.e. L.R. Narok/Cis-Mara/Ololulunga/126 and Narok/Cis-Mara/Ololulunga/144. That is why the consent order of 16<sup>th</sup> November, 2011 was recorded with the encouragement of this court. The order required the Chief Land Registrar in co-operation or with the assistance of the District Land Surveyor of Narok **"to establish the boundaries shared by parcels No. L.R. Narok/Cis-Mara/Ololulunga/126, 144, 80 and 81"**.

To this court's mind and view, and more in respect to parcels 126 and 144, whose dispute is the one before this court, the Chief Land Registrar was obligated to establish the boundary between the two parcels of Land. In the view of this court, the dispute arose because either party was pointing the said boundary to pass along a position or a line not accepted by the other party. It would therefore, be foolhard to leave it to the parties to point out the boundary position. It would further and equally be totally wrong and unjustified to take and accept the ground boundaries to be the correct boundaries unless confirmed as so, by the Chief Land Registrar, based on the Registry Index Map existing in the District and/or National Land Registries. The present ground boundary between the aforementioned two parcels of land, is the boundary that brought up this dispute. It had been or must have been planted by one or the other of the parties now in dispute. It cannot, therefore, be made the basis upon which the Chief Land Registrar and the District Surveyor of Narok should or could base their Report. Hence the reason why the only other reliable basis for such establishment of the boundary would be the Registry Index Map (R.I.M.).

I now turn to the Report filed by Chief Land Registrar in co-operation with the Narok District Surveyor dated 12<sup>th</sup> July, 2012. It has attached to it a transparent film map of the plots No. 126, 144, 80 and 81 on Sheet No. 132/III, 146/1 and 131/III on scale 1:50,000. It shows plots 144, 126, 80 and 81 shaded in different colours. The facts of the Report are given as follows based on the registry Index Map: -

**Parcel No. 80:** record acreage is 100.5 hectares....

**Parcel No. 81:** R/s registered in .... And recorded acreage is 128.0 Hectare.

**Parcel No. 144:** has acreage of 169.0 Hectares and is registered in the name of Olkedianye Ole Kiswa Tupwai Tenkeet and Sokoni Ole Tenkeet.

**Parcel No. 126:** Recorded acreage is 91.5 Hectares. Was initially registered in name of Augustino Kirika Mungai before transferring to Kesenda Kilanda Enterprises as Trustee for Joseph Lojorwa Olengene, Wilson Kipsang Rono and Peter Melelo Towett.

The report shows that: -

***“The Surveyor took measurements as were shown for the four parcels of land and came up with a sketch report showing the ground occupation for these parcels of land, their R.I.M. position, area overlaps and encroachments in relation to the ground and map. The position of the adjacent and neighbouring parcels is also shown.”***

It is also, important to record the factual observations made by the registrar and Surveyor which are as follows: -

1. *The Registry Index Map does not tally with the ground positions of these parcels of land making the parcels to overlap on one another.*
2. *Parcels No. Cis-Mara/Ololulunga/81 encroaches into parcel Number Cis-Mara/Ololulunga/81 encroaches into parcel Number Cis-Mara/Ololulunga/80 which also encroaches into parcel No. Cis-Mara/Ololulunga/38.*
3. *Only parcel Number Cis-Mara/Ololulunga/126 is not fully occupied on the ground, the rest i.e. No. 144, 80 and 81 are occupied.*
4. *Parcel Cis-Mara/Ololulunga/144 had all the four beacons in all corners on the ground, but it overlaps onto parcel Cis-Mara/Ololulunga/126 leaving it with a small portion on the ground.*
5. *The Owners of parcel Cis-Mara/Ololulunga/126 did not know the exact position of their beacons (dependent on the map) along the road. They depended on beacons of the parcels 80 and 81 which are across the road and also confirms existing boundary line between them and parcel Cis-Mara/Ololulunga/206 which according to the map, leaves a portion of their land inside it.*
5. *(Not relevant to this dispute)*

The District Land Registrar and the District Surveyor then went ahead to make what they termed recommendations and conclusions it is *important that the court records them and they are as follows: -*

*“The requirement of the order was to have the boundaries of the parcels Cis-Mara/Ololulunga/126, 144, 80 and 81, established and a report filed to the court.*

*In the determination of a disputed boundary line, the duty of the Land Registrar is to establish as far as possible, where the boundaries were placed during adjudication through evidence of the persons who know the position of the original boundary and history of the dispute demarcation maps and Registry Index Maps as interpreted by the Surveyor. If the Registry Index Map differs from the original boundary*

*as established from reliable evidence, it is the Registry Index Map, and not the ground position, which should be amended. No boundary should be disturbed by reason only if (sic) it does not agree with the Registry Index Map.*

*From the site visit it was deducted that the ground position and that of the Registry Index Map do not tally and several other parcels which are not parties to the suit have a bearing on the ground positions and the boundary lines of the suit personal i.e. parcels 38, 206 and 82, same to be undisturbed in their positions yet according to the R.I.M. they lose or gain in acreage in relation to R.I.M and their ground positions – thus the map does not tally with the ground and positions of the suit four parcels could not be established with certainty.*

*Having made this elaboration/verification of the dispute boundaries, the court should find it easier to give its final judgment the once for all and to the satisfaction of both sides.“*

The court has carefully studied the District Registrars & District Surveyors above Report. In the courts view and finding the Registrar and the Surveyor established on the ground, in their finding (4) that Parcel Narok/Cis-Mara/Ololulunga/144, had all its four beacons in all corners on the ground **but** it also overlaps into parcel Cis-Mara/Ololulunga/126, leaving it with a small portion on the ground. This court is presently only interested in boundary between the two disputing parcels of land. For some unstated reason, however, the District Registrar and Surveyor chose not to state with accuracy, the extent of the overlap by L.R. No. 144 onto L.R. No 126. It is not clear and it is indeed difficult to understand why they could not measure the overlap after establishing the boundary as carried in the Registry Index Map so that the court could appreciate the over-step by L.R. 144 into L.R. 126 aforesaid beyond the boundary line. In their written and oral highlights the Appellants depicted the overlap as 19.4 Ha over and above the undisputed acreage of L.R. No. 144, which was 169 hectares on the registry record but 188.42 Hectare on the ground. The Respondents did not dispute these facts as to acreage nor did they challenge the fact that L.R. No. 144 had clearly on the ground overlapped onto L.R. NO. 126 . The Respondents case was that what exists on the ground notwithstanding any survey established overlap, should not be disturbed by this court.

As earlier stated, the parties and indeed this court, recognized the fact that the dispute between the two parties owning the two registered and directly neighbouring parcels of land, is a boundary dispute. They recognized the dispute and recorded the issue in a consent order which this court recorded on 16<sup>th</sup> November, 2011, ordering the Chief Land Registrar and the District Surveyor of Narok to go to the two pieces of land and establish the legitimate boundary between them. In the view and finding of the court, that establishment was accomplished. That is to say, the Registrar and Surveyor took measurements and fixed the positions of the present boundaries of the two pieces of land, thereby confirming in their report above cited that Parcel L.R. Cis-Mara/Ololulunga/144 is overlapping into L.R. Cis-Mara/Ololulunga/126.

The court as earlier stated accepts that the overlap is equal to 19.42 Ha by which measurement L.R. Cis-Mara/Ololulunga/144 had been unjustly and probably unlawfully increased or enlarged. If the boundary is re-established in such a way that the 19.42 Hectares are returned to L.R. No. Cis-Mara/Ololulunga/126, the dispute will be resolved fairly and justly as between the two. Such a correction will leave L.R. No. Cis-Mara/Ololulunga with 169.0 Hectares which would be the correct acreage originally allocated to the Respondent and always and presently contained in the Land Registry records. At the same the L.R. CIS-Mara/Ololulunga/126 was, will partly be restored by the same acreage although its other acreages are found in other parcels of land directly neighbouring with. This court finds no basis brought to its attention by the Respondent during this appeal, upon which it should be allowed to keep the 19.42 Hectares that belongs to the Appellant.

The Appellate hesitatingly raised the issue of whether this appeal was timely filed. This court has earlier taken up the issue and demonstrated that the appeal was filed within the prescribed time and is therefore, competent.

The Respondent also tried to suggest that Tribunals who entertained the original dispute may have lacked jurisdiction under the relevant statute which create them. The argument was not developed adequately to

be made an issue and this court will treat it as a technicality which in its present form did not go to the root of the dispute before the court. In any case, both parties recognized finally that the dispute was a mere boundary dispute in respect of which both Tribunals had jurisdiction.

The end result is that this appeal succeeds. The Narok District Land Registrar and Narok District Surveyor, are hereby ordered to visit the two pieces of land aforesaid within 90 days and restore the ground boundary of L.R. Cis-Mara/Ololulunga/144 into parcel L.R. Cis-Mara/Ololulunga/126 by a measurement of 19.42 Hectares following strictly the Registry Index Map used by the District Surveyor and District Land Registrar to draw the plan annexed to the Report filed in court on 19<sup>th</sup> July, 2014 and dated 12<sup>th</sup> July, 2014. Orders are made accordingly.

Dated and delivered at Nairobi this 4th day of March, 2015.

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**D A ONYANCHA**

**JUDGE**