



**Kerio View Investments Company Limited v Chief Land Registrar & 4 others;  
Hiltten Company Limited & another (Interested Parties) (Environment and Land  
Petition E006 of 2021) [2025] KEELC 6844 (KLR) (7 October 2025) (Judgment)**

Neutral citation: [2025] KEELC 6844 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

**ENVIRONMENT AND LAND PETITION E006 OF 2021**

**JM ONYANGO, J**

**OCTOBER 7, 2025**

**IN THE MATTER OF THE CONSTITUTION OF  
KENYA 2010 ARTICLES 10, 22, 23, 27, 40, 47 & 50**

**AND**

**IN THE MATTER OF THE ILLEGAL AND UNFAIR ADMINISTRATIVE ACTION  
CONTRARY TO ARTICLES 47 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF BREACH OF FUNDAMENTAL  
RIGHTS AND FREEDOMS CONTRARY TO ARTICLE 40  
CHAPTER 4 OF THE NEW CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF UNFAIR ADMINISTRATIVE ACTION  
PURSUANT TO ARTICLE 50 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF UNILATERAL FIXING OF BOUNDARY RESULTING  
IN THE APPROPRIATION OF THE PETITIONERS PARAGLIDING PATH  
ALONG KEIYO ESCARPMENT ON LAND REGISTRATION IRONG/ITEN 2089**

**AND**

**IN THE MATTER OF APPROPRIATION OF RIGHT TO PROPERTY OTHER THAN  
THROUGH THE PROCESS OF SALE AND OR COMPULSORY ACQUISITION LEADING TO  
LOSS OF A PARAGLIDING PATH ON LAND REGISTRATION IRONG/ITEN 2742 & 2743**

**AND**

**IN THE MATTER OF AN APPLICATION FOR CERTIORARI TO REMOVE  
UNILATERAL SURVEY PROCEEDINGS DATED 18TH DAY OF AUGUST 2010**

**SANITIZING A FRAUD COMMITTED ON IRONG/ITEN/2742**



**AND**  
**IN THE MATTER OF REGISTRATION OF TITLES ACT CHAPTER 281 LAWS OF KENYA**  
**AND**  
**IN THE MATTER OF FRAUDULENT ACTS IN ALTERING BOUNDARIES**

**BETWEEN**

**KERIO VIEW INVESTMENTS COMPANY LIMITED ..... PETITIONER**

**AND**

**THE CHIEF LAND REGISTRAR ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY LAND REGISTRAR, ELGEYO MARAKWET COUNTY .... 2<sup>ND</sup>  
RESPONDENT**

**THE COUNTY LANDS SURVEYOR, ELGEYO MARAKWET  
COUNTY ..... 3<sup>RD</sup> RESPONDENT**

**MR DAVID DUNYA OMOLO ..... 4<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT**

**AND**

**HILLTEN COMPANY LIMITED ..... INTERESTED PARTY**

**COUNTY GOVERNMENT OF ELGEYO MARAKWET .... INTERESTED PARTY**

**JUDGMENT**

**Introduction**

1. This Petition is born out of a long history of litigation between neighbours whose parcels of land lie side by side in high escarpments of Iten in Elgeyo Marakwet County. What began as a dispute over a common boundary has since spiralled into a series of proceedings, dismissals, and enforcement attempts, culminating into the present petition.
2. The Court is invited to consider whether the actions complained of were consistent with the dictates of justice, *the Constitution* of Kenya, 2010, and the law.

**Background**

3. The dispute before this Court traces its genesis to the year 2007, when the mutation of the original land parcel No. Irong/Iten/2089, gave rise to two neighbouring parcels, Irong/Iten/2742 and Irong/Iten/2743, now at the heart of this litigation.
4. What began as a matter of survey and boundary delineation soon evolved into a contest of possession and right. Dissatisfied with the demarcation that followed the subdivision, the parties' differences deepened, drawing the attention of the Land Registrar.



5. After hearing both sides and the Land Registrar rendered a determination on 18<sup>th</sup> August 2010, purporting to settle the boundary adjoining the parcels. The Land Registrar then filed a report dated 30<sup>th</sup> May 2011 detailing his decision on the boundary dispute.
6. Aggrieved by the decision of the Land Registrar, the Petitioner herein moved to the High Court in High Court as HCCC No. 112 of 2010 seeking judicial redress. The matter was subsequently transferred to the Environment and Land Court as Eldoret ELC case No 636 of 2012 Kerio Valley Investments -Vs- Lornah Kiplagat & Another.
7. The dispute now falls for determination under the Amended Petition dated 18<sup>th</sup> July 2022 supported by the affidavit of John Eric Butler Williams sworn on even date.
8. The Petitioner herein is the registered proprietor of the parcel of land known as Irong/Iten/2742 measuring approximately 0.44 hectares (hereinafter 'suit property'). The petitioner has utilized the suit property and developed a 4 Star sports enhancement and hospitality facility that operates paragliding activities for both local and international visitors.
9. The 1<sup>st</sup> Interested party is the registered owner of the parcel of land known as Irong/Iten/2743 which neighbours the suit property.
10. Both the suit property and Irong/Iten/2743 came about as a result of subdivision of Irong/Iten/2089 which measured approximately 0.95 acres.
11. A boundary dispute arose between the Petitioner and the 1<sup>st</sup> Interested party. It is the Petitioner's claim that the 1<sup>st</sup> Interested Party has encroached on one portion of the suit property which has encumbered their ability to carry out their paragliding activities.
12. The discord led the Petitioner to file ELC 636 of 2012. On 23<sup>rd</sup> May 2016, the parties, in an effort to resolve the matter amicably, recorded a consent order in which it was agreed that the County Surveyor, Elgeyo Marakwet, would ascertain the true boundary between the parcels and file a report in court within 30 days.
13. The Court record discloses that earlier reports had been prepared and the Land Registrar subsequently fixed the boundary although no narrative report was filed in relation to the excuse of fixing the boundary. The Petitioner failed to prosecute the suit and ELC 636 of 2012 was dismissed for want of prosecution. An application to reinstate the suit was brought but met with dismissal, prompting the Petitioner to file an appeal against that ruling.
14. After dismissal of the suit, a director of the 1<sup>st</sup> Interested party sought to revive the matter by filing an application in ELC 636 of 2012 to enforce the purported boundary determination. The court declined her request, holding that no enforcement could issue from a suit already dismissed and in which she had filed no counterclaim.
15. Thwarted in court, the director of the 1<sup>st</sup> Interested party mobilized police officers from Iten Police Station and, with their assistance, proceeded to the disputed area where she erected a barbed-wire fence. This act effectively closed off the Applicant's paragliding path and helipad.
16. It is this encroachment, the fencing off approximately half an acre of land, which the Petitioner maintains forms part of its property, that has given rise to the Amended Petition dated 18<sup>th</sup> July 2022.



17. Faced with the loss of business and the erosion of its proprietary rights, the Petitioner turns to this Honourable Court seeking the following reliefs:
- a. A Conservatory order restraining the County Lands Registrar and County Lands Surveyor from appropriating the Petitioner's Parcel Irong/Iten/2742 approximately measuring 0.44 Ha.
  - b. A declaration order that the proprietary interest in land parcel Irong/Iten/2742 approximately measuring 0.44 Ha vests in the Petitioner absolutely and cannot be appropriated by the 1<sup>st</sup> Interested Party without due process of the law being followed.
  - c. An order of Certiorari to call into court the County Lands Registrar's unilateral boundary fix and determination dated 18<sup>th</sup> day of August, 2010 breached rules of fair Administrative Action, Article 47 *the Constitution* of Kenya 2010.
  - d. An order of declaration that the County Lands Registrar breached the rules of natural justice by presiding over a complaint he is the subject of and a fraud, which he perpetuated.
  - e. An order of declaration to the effect that the dismissal order in Eldoret Environment and Land Court Case No. 636 of 2012 Kerio View Investments Company Limited vs Lornah Kiplagat & Another breached the hearing (sic) as envisaged by Article 50 of *the Constitution* of Kenya 2010.
  - f. A declaration that the process of terminating the complaint prematurely amounts to unfair administration of justice contrary to Article 47 of the New Constitution of Kenya 2010.
  - g. An order of mandamus to compel the County Lands Registrar to Commission a lawful survey and have a neutral surveyor involving both parties in delineating the common boundary.
  - h. Costs of the Petition from the time of instituting the Award and Petition Proceeding in court to the date of judgment.
  - i. Any other order the court may deem fit to grant.
18. The Petition was vehemently opposed by the Respondent's Replying Affidavit of one Susan Kabisa, sworn on 22<sup>nd</sup> November 2022. Additionally, the 1<sup>st</sup> Interested Party strongly opposed the Petition through the Replying Affidavit of Lorna Jebiwott Kiplagat sworn on 7<sup>th</sup> June 2002 and prayed for its dismissal.
19. The hearing of the petition commenced on 20<sup>th</sup> June 2023 and concluded on 11<sup>th</sup> March 2025. The 4<sup>th</sup> Respondent did not participate in the proceedings. While I took the evidence of the Petitioner and his witness as well as the evidence in chief of DW1, the remaining Defence witness testified before my successor Hon. Justice Washe as I had been transferred to Thika. The file was then transferred to Thika for me to write the Judgment.



## Petitioner's Case

20. John Eric Butler Williams, the Petitioner's duly authorized director testified as PW1. He produced the Petitioner's CR12 (PEX1) and board resolutions dated 12<sup>th</sup> February 2012 (PEX 2) and 19<sup>th</sup> July 2022 (PEX3) granting him authority to represent the Petitioner in the suit.
21. It was his case that between the year 1995 and 2001, he and his wife Anna Cheptoo Williams purchased 5 ½ acres parcel of land along the Kerio Escarpment – Iten from one Kiptanui Chebutio Cherop (deceased).
22. In 2003, PW1 identified an adjacent parcel of land to the one he had previously purchased which was ideal for paragliding and rented the same from one Benjamin Tanui. In 2006, they later purchased the 0.44 Ha parcel for a sum of Ksh. 800,000/- paid to Benjamin Tanui to host the paragliding takeoff and landing point.
23. He testified that they later developed a 4-Star Hotel and an international sports training gymnasium on the 0.44 Ha parcel of land known as Irong/Iten/2742. He produced a copy of the title to the suit property as PEX4.
24. PW1 relied on the affidavit sworn on 18<sup>th</sup> June 2021 as his evidence in chief.
25. It is PW1's testimony that the Petitioner is the registered proprietor of the suit property which was excised from the original parcel of land known as Irong/Iten/2089 measuring 0.95 Ha (mother title). He produced a copy of the mother title as PEX 5.
26. The Petitioner's claim against the 1<sup>st</sup> Interested party is that they have encroached on one portion of the suit property. Additionally, the Petitioner contests the boundary between the suit property and the 1<sup>st</sup> Interested Party's land known as Irong/Iten/2743.
27. PW1 testified that the boundary dispute has effectively prevented the Petitioner from carrying out the business of paragliding on the suit property.
28. PW1 acknowledged that there was a survey conducted at the behest of the 1<sup>st</sup> interested party in regards to the boundary dispute which culminated in a report dated 30<sup>th</sup> May 2011 by the Land Registrar (PMF1). It was PW1's testimony that they were aggrieved by the Land Registrar's determination and report because they were never involved in the survey and the mutation process in regard to the mother title.
29. He filed a suit in 2010, Eldoret HCC 112 of 2010 against Lorna Kiplagat. The suit was later transferred to the ELC (ELC No. 636 of 2012 Kerio View Investments Co. Ltd v Lorna Kiplagat) for determination. The crux of this suit was to challenge the issuance of titles Irong/Iten/ 2742, Irong/Iten/2743 and the survey carried out in the absence of PW1. ELC No. 636 of 2012 was ultimately dismissed for want of prosecution..
30. PW1 testified that the issues raised in the instant Petition have never been determined by another court and prayed that the Petition be allowed with costs.
31. In cross examination by Counsel Odongo, PW1 reiterated that the Petitioner owns the suit property while Irong/Iten/2743 belongs to the 1<sup>st</sup> Interested Party. He clarified that both parcels are as a result of a subdivision of Irong/Iten/2089.
32. PW1 stated that parcel No. 2089 was owned by Kiptanui Cherop Chebutio and the title was issued on 10<sup>th</sup> September 1996.



33. PW1 stated that the mutation of Irong/Iten/2089 was initiated by Joseph Kimaiyo Kiptanui. He clarified that that he has never filed a case against Joseph Kimaiyo Kiptanui.
34. PW1 testified that in ELC No. 636 of 2012, the parties agreed to have the boundary dispute resolved by the County Surveyor. The consent order was marked as DMFI 2. PW1 confirmed that during the survey process, he was summoned to appear at the Land Registrar's Office. The summons are marked as DMFI 3.
35. PW1 testified that following the hearing by the Land Registrar, a report dated 30<sup>th</sup> May 2011 was prepared. He further confirmed having given his input before the report was completed but clarified that he took issue with the findings of the report.
36. PW1 stated that the report concluded that the boundary between the two parcels was clearly reflected on both the map and mutation. The report further recorded that boundary features were planted in the presence of the parties and each party was given 30 days to appeal to the Chief Land Registrar. PW1 conceded that he did not pursue and appeal within the time allowed, thus leaving the findings of the report unchallenged.
37. PW1 confirmed that there is a fence between parcels 2742 and 2743.
38. In cross examination by Counsel Katwa, PW1 confirmed that in ELC No. 636 of 2012, the parties filed a consent dated 12<sup>th</sup> April 2016.
39. PW1 was referred to the mutation form (PEX 6) which he claimed he did not remember seeing before the instant petition. He later clarified that he might have encountered PEX6 in ELC No. 636 of 2012.
40. PW1 was shown a copy of the Green Card for land parcel No. 2089 which at entry No.5, indicated that Joseph Kiptanui (deceased) was registered as the proprietor.
41. PW1 reiterated that he purchased the suit property from Benjamin Tanui in 2006 and not Joseph Kiptanui (deceased). He acknowledged that Benjamin Tanui's (deceased) name does not appear in the green card for land parcel N. 2089.
42. PW1 testified that the fence between the two parcels on the ground does not conform to the mutation form. He stated that according to the mutation form, both the suit land and parcel No. 2743 ought to be 0.44Ha or thereabouts.
43. PW1 reiterated that the Land Registrar's report was filed on 30<sup>th</sup> May 2011 and conceded that he had not challenged the same within the prescribed 30-day timeframe.
44. PW1 also acknowledged that he never contested the dismissal of ELC 636 of 2012 on 10<sup>th</sup> April 2015.
45. PW1 confirmed that on 12<sup>th</sup> April 2016, the parties recorded a consent to settle the boundary dispute through a joint survey. He further testified that he attended the survey conducted on 3<sup>rd</sup> March 2017. However, he expressed dissatisfaction with the manner in which the survey was carried out, asserting that the process was flawed and contrary to the consent.
46. PW1 further testified that the mutation had been done before he obtained the title to the suit property. He testified that the Petitioner obtained the title in 2010 whereas the 1<sup>st</sup> Interested Party obtained the title to parcel No. 2743 in 2007.
47. PW1 stated that the mutation was carried out in October 2007. He conceded that he did not have any other map to demonstrate that the mutation was inaccurate.



48. Upon re-examination by his learned counsel, PW1 testified that although the mutation form expressly reflected that both parcel Nos. 2742 and 2743 enjoy access to the escarpment, the boundary fence presently erected on the ground runs contrary to the very mutation form.
49. He prayed that a proper and impartial demarcation be undertaken in accordance with the terms reflected in the mutation and earlier consent of the parties.
50. The petitioner called one witness, Boniface Wanyama, a Land Surveyor based in Eldoret, who testified as PW2.
51. PW2 testified that he was engaged by the Petitioner to ascertain the boundaries of the suit property. He stated that while carrying out his duty, he obtained the existing documents relating to the suit property including a Registry Index Map (RIM) and the mutation form for title No. Irong/Iten/2089 which captures the two parcels in dispute. The RIM was produced as PEX6 while the mutation form was produced as PEX7.
52. PW2 testified that the finding of his survey was that the mutation that was used to amend PEX6 did not conform to the ground both in shape and measurements.
53. He produced his report dated 5<sup>th</sup> May 2017 (PEX8) which concluded that the discrepancies could only be resolved if a resurvey was carried out and the records at the Lands Office amended accordingly.
54. PW2 also produced an addendum to the report dated 31<sup>st</sup> May 2022 (PEX9). The addendum came about as a result of the Petitioner alleging further encroachment on the suit property. PW2 testified that he found that the suit property had further been encroached by 0.17 Ha by the 1<sup>st</sup> Interested Party and that he had the same captured in PEX9.
55. PW2 produced two aerial photographs (PEX10a and PEX10b) that illustrate the alleged encroachment on the suit property.
56. On cross examination PW2 testified that the application for subdivision that gave rise to the mutation was done on 16<sup>th</sup> July 2007 by Kimayo Kiptanui (deceased) the former registered proprietor of Irong/Iten/2089 from which the suit property was excised.
57. PW2 admitted that he never consulted Patrick Opiyo, the surveyor who prepared the mutation form. He also testified that nothing in the mutation form indicated any fault by the survey work done by Partick Opiyo.
58. PW2 testified that survey work is subject to a margin of errors and explained that two or more surveyors could obtain varied measurements when carrying out work on the same land.
59. PW2 testified that with regard to the escarpment, there is a line on the RIM but it is not curved out as it appears on the ground. He explained that there should be provision of the same space between the escarpment and the land.
60. PW2 confirmed that he did not find any beacons in respect to the general boundaries. He clarified that the use of the term “beacons” in his report (PEX9) was erroneous.
61. PW2 testified that the authority to determine general boundaries rests with the Land Registrar. He candidly admitted that he was unaware that the Land Registrar had already determined the boundaries in respect of the suit property.
62. PW2 testified that his recommendation was for a resurvey to be conducted to settle the boundary dispute.



63. PW2 confirmed that those present during his survey of land parcel No. 2742 and parcel No. 2743 were Jean Paul Fourier and John E. B Williams of Kerio View Hotel and Mr. Wilson Ongosi of Angu Kitigin & Co. Advocates. PW2 admitted that he did not have any representative of the registered owner of parcel No. 2743 when he carried out his survey.
64. PW2 testified that Page 4 of the mutation indicates the thumb print of Joseph Kiptanui (deceased) and it establishes that the original owner Irong/Iten/2089 was present when the initial survey and subdivision was conducted.
65. PW2 testified that in his report dated 31<sup>st</sup> May 2022, he outlined the area of encroachment which he ascertained to be 0.1783 Ha.
66. PW2 clarified that Page 1 of the mutation indicates that the original acreage of the land was 0.95 Ha with both parcels 2742 and 2743 measuring approximately 0.44 Ha. He explained the current total acreage of parcels 2742 and 2743 is 0.88 Ha which indicates that there is a surplus which is reserved for a road.
67. PW2 was shown a notice to attend a boundary dispute dated 29<sup>th</sup> July 2010 and he thereafter confirmed that the Petitioner was invited to attend the boundary dispute before the Land Registrar. He stated that he was aware that the decision of the Land Registrar is final unless the same is set aside.
68. PW2 was referred to the mutation and he observed that parcel no. 2743 fronts the escarpment whereas parcel 2742 does not.
69. On re-examination, PW2 confirmed that he visited the suit property on three different occasions. On 5<sup>th</sup> May 2017 and 31<sup>st</sup> May 2022 while conducting a survey of the land. Thirdly on 13<sup>th</sup> October 2023 during the court's site visit to the land.
70. PW2 testified that both the suit land and parcel No. 2743 touch the escarpment. He also testified that there is a clear boundary separating the two parcels.
71. He testified that he had no issue with the Land Registrar's report dated 18<sup>th</sup> August 2010 but stated that he took issue with the mutation dated 16<sup>th</sup> July 2007 particularly in relation to the orientation of the parcels and the acreage.
72. PW2 also noted that the mutation shows the escarpment on the wrong side. He explained that according to the mutation, the suit property does not boarder the escarpment which is contrary to the situation on the ground.
73. PW2 stated that when he visited the suit property in 2022, nearly half the parcel had been encroached. He went on to explain that the effect of the encroachment is that it blocks the suit property from the escarpment.
74. PW2 testified that he had not received any objection to his report and stated that in his final report, he recommends that a resurvey be conducted to resolve the boundary dispute.

### **Respondents' Case**

75. Susan Kabisa, the Land Registrar, Elgeyo Marakwet County testified as DW1.
76. She testified that the Petition was frivolous and an abuse of the court process. She explained that both the suit property and Irong/Iten/2743 each measuring 0.44 ha respectively arose from the sub-division of the parcel of land known as Irong/Iten/2089 which measured 0.95 Ha. She produced the green-card for Irong/Iten/2089 as DEX1.



77. DW1 testified that after the subdivision of Irong/Iten/2089, the suit property was registered in the name of the Petitioner on 6<sup>th</sup> January 2010. She also testified that Irong/Iten/2743 was registered in the name of the 1<sup>st</sup> Interested Party on 14<sup>th</sup> December 2007. She produced the green-cards for the respective parcels as DEX2 and DEX3.
78. DW1 testified that on 29<sup>th</sup> July 2010 the 1<sup>st</sup> Interested party registered a property dispute against the Petitioner. She stated that vide a notice dated 29<sup>th</sup> July 2010 (DEX4), the Petitioner was informed that the dispute would be determined on 18<sup>th</sup> August 2010.
79. DW1 testified that the surveyor attempted to amicably resolve the dispute and thereafter identified and fixed the boundaries in the presence of the parties.
80. DW1 stated that on 30<sup>th</sup> May 2011, the surveyor compiled the report on the boundary dispute (DEX6). The letter forwarding the surveyor's report was produced as DEX5.
81. DW1 testified that the Petitioner had previously filed a suit to resolve the dispute in ELD ELC Case No. 636 of 2012. She produced a consent order dated 24<sup>th</sup> May 2016, authorizing a surveyor to visit the disputed parcels and file a report. The consent order and proceedings in ELD ELC Case No. 636 of 2012 were marked as DEX 6(a) and DEX6(b) respectively.
82. DW1 stated that according DEX6(a) the parties were required to produce the relevant title documents and to attend the survey exercise.
83. DW1 testified that after the survey conducted in accordance with the consent, a report dated 6<sup>th</sup> April 2017 was filed. The same was produced as (DEX7).
84. DW1 stated that during the survey process both parties to the dispute were given an opportunity to be heard and after the report by the Land Registrar, both parties had the right to appeal.
85. DW1 explained that mutation forms are prepared by a surveyor and thereafter the Land Registrar verifies whether the mutation has passed all required procedures before registration is done.
86. DW1 testified that no issue was raised by the original owner (the late Joseph Kimaiyo Kiptanui) of Irong/Iten/2089 with regard to the mutation and the same was signed to indicate that the owner was present during the survey and mutation exercise.
87. DW1 produced the mutation registered on 9<sup>th</sup> October 2007 as DEX8.
88. In cross-examination, DW1 testified that every action done by the Land Registrar is subject to *the Constitution* of Kenya, 2010.
89. DW1 acknowledged that the Petitioner is the registered proprietor of the suit land and stated that the Petitioner is entitled to approximately 0.44Ha.
90. DW1 testified that the title to the suit property has never cancelled and any action which reduces the acreage of the land is unlawful unless proper procedure is followed.
91. She testified that both the suit property and Irong/Iten/2743 enjoy access to the escarpment at roughly the same distance.
92. It was her further testimony that according to photographs PEX11 and 12, the escarpment is on the Eastern side, there is a stream and a tree canopy on the Northern side. She stated that there is a live fence acting as a boundary line between the disputed parcels. DW1 added that she did not see any encroachment on the suit property.



93. DW1 confirmed the both suit property and Irong/Iten/2743 should measure the same size according to the mutation. She also confirmed that according to the mutation the escarpment is in the wrong position and the part indicated as the escarpment ought to be the riparian area.
94. She asserted that DW1 testified that she would have no problem if the resurvey was done to establish the frontage of the escarpment for the two parcels of land.
95. DW1 stated that the Petitioners have not demonstrated any Constitutional rights that have been infringed upon by the office of the Land Registrar.
96. Irene Cherop Kibiego, the Deputy County Surveyor, Elgeyo Marakwet testified as DW2. She stated that she was aware that the dispute involved the boundary between land parcel No. Irong/Iten/2742 and land parcel No. Irong/Iten/2743.
97. DW2 testified that she was aware that the disputed parcels came about after the sub-division of Irong/Iten/2089 which measured 0.95 Ha. She explained that the original acreage of 0.95 Ha included the riparian area which is currently found within Irong/Iten/2743.99.
98. She told the court that during the site visit in 2017, there was a live fence between the 2 parcels. She stated that she did not see any alteration of the boundary fence placed in 2007.
99. DW2 produced the following documents during the hearing: A Certified Copy of the Mutation of Irong/Iten/2089 dated 16<sup>th</sup> July 2007 (DW2 EX1) and Certified Copy of the Registry Index Map for Elgeyo Marakwet District, Chebokokwo Area -Sheet No. 33 (DW2 EX2).
100. In cross-examination, DW2 confirmed that the Petitioner purchased his parcel in 2004 whereas the 1<sup>st</sup> Interested Party purchased theirs in 2005.
101. She testified that the properties are demarcated by a live fence and noted that the escarpment is on the Eastern side while the riparian area is on the Northern side.
102. It was her testimony that there is a riparian land on the 1<sup>st</sup> Interested Party's parcel of land. She explained the stream was included as part and parcel of Irong/Iten/2743.
103. She told the court that according to the mutation, both the Petitioner and the 1<sup>st</sup> Interested Party have access to the escarpment at almost equal frontage. Moreover, that according to the Mutation, each plot should have its own access to road to the main road.
104. DW2 was referred to PEX10 and she acknowledged that if photographs shown to her were accurate then there is encroachment by parcel no.2743 onto the suit property. She reiterated that both parcels ought to measure 0.44 Ha.
105. She stated that the mutation was drawn by a licensed surveyor, Patrick Opiyo and approved by a government surveyor, Robert Kurgat.
106. She ended by stating that she had no issue with a resurvey being done.
107. At the close of the hearing, the parties were directed to file their final written submissions. The directive was duly complied with by the Petitioner and the 1<sup>st</sup> Interested Party.



## Issues for Determination

108. Having carefully considered the petition and the affidavit in support, the replying affidavits in opposition, the evidence adduced by the parties and the rival submissions, the following issues emerge for determination:
- i. Whether this dispute is barred by the doctrine of res judicata.
  - ii. Whether the boundary between the Petitioner's parcel and the 1<sup>st</sup> Interested Party's parcel was lawfully determined by the Land Registrar.
  - iii. Whether 1<sup>st</sup> Interested Party unlawfully encroached upon the Petitioner's land.
  - iv. Whether the Petitioner is entitled to the reliefs sought.

## Analysis and Determination

109. The first issue which this Court must resolve is whether the hand of justice is restrained by the doctrine of res judicata. That principle, stands as a sentinel at the gates of the courts, forbidding the resurrection of disputes once lawfully laid to rest. It proclaims that a matter fully heard and finally determined shall not again trouble the conscience of the law.
110. The Court must therefore examine, whether the present Petition bears the marks of a matter already adjudged within the meaning of section 7 of the *Civil Procedure Act*.
111. Section 7 of the *Civil Procedure Act* provides:
- “No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
112. The law, in its wisdom, bars a second trial where the seeds of the dispute have already been sown, cultivated, and harvested in an earlier proceeding. The object is not to shield wrongdoing beneath the cloak of technicality, but to preserve the dignity of judicial pronouncements and to protect the courts from being drawn into a revolving cycle of litigation.
113. In construing section 7, the courts have consistently held that for res judicata to apply, certain elements must coalesce. The matter in issue must be identical in both suits; the parties must be the same or litigating under the same title; the previous court must have been competent; and the issue must have been heard and finally determined.
114. This position was affirmed by the Court of Appeal in *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR, where the Court emphasized that res judicata is founded upon the public interest that there be an end to litigation, the principle that no person should be vexed twice over the same cause, and the desire to maintain the authority of judicial decisions.
115. In considering the plea of res judicata, the Court must not be content with surface resemblance between proceedings; it must inquire whether the prior matter was heard and determined on its merits by a court of competent jurisdiction.



116. Section 7 of the *Civil Procedure Act* contemplates a final adjudication; not a dismissal occasioned by default or procedural lapse.
117. Learned counsel for the 1<sup>st</sup> Interested Party submits that the Petition is res judicata as the matter was conclusively determined in Eldoret ELC No. 636 of 2012. Counsel urges the court to be guided by the decision in Maithene Malindi Enterprises Limited v Kaniki Karisa Kaniki & 2 others [2018] eKLR.
118. The record shows that Eldoret ELC No. 636 of 2012, between these same parties and over the same parcels of land, was dismissed for want of prosecution. It was never heard on its merits, nor did the Court pronounce itself on the validity of the boundary determination that lies at the heart of the present Petition. A dismissal of that nature does not satisfy the essential element of finality required to invoke res judicata.
119. Moreover, the determination of the Land Registrar dated 18<sup>th</sup> August 2010 cannot assume the character of a judicial decision for the purposes of the doctrine of res judicata.
120. The Registrar, though empowered to fix boundaries under section 19 of the *Land Registration Act*, does not exercise judicial authority. The decision of the Registrar is an administrative act, amenable to challenge on grounds of procedural impropriety, illegality, or breach of fair administrative action; precisely the grounds upon which the Petitioner anchors this Petition.
121. I therefore find that this Petition is not barred by the doctrine of res judicata. The earlier suit was never adjudicated on its merits, and the administrative determination by the Land Registrar cannot, in law or logic, preclude the Court from inquiring into its legality.
122. The second issue is: Whether the boundary between the Petitioner’s parcel and the 1<sup>st</sup> Interested Party’s parcel was lawfully determined by the Land Registrar.
123. The Petitioner contends that the Land Registrar’s determination was procedurally flawed, asserting that it was neither notified nor invited to participate in the boundary ascertainment exercise, and that the process relied on fraudulent or inaccurate survey plans. The Respondents, on the other hand, maintain that the Land Registrar acted within the scope of his statutory mandate.
124. At its core, this question calls for an examination not merely of the Registrar’s authority, but of the manner in which that authority was exercised.
125. The Law entrusts the Land Registrar with the solemn duty of defining the limits of ownership where boundaries are uncertain, but that power is not unbridled. It must be exercised in accordance with the law, transparently, and in observance of the cardinal principles of fairness.
126. The contours of the Land Registrar’s authority are carefully traced in statute. Section 18 of the *Land Registration Act*, 2012 provides:
- “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:



provided that where all the boundaries are defined under section 19(3), the determination of the position of any uncertain boundary shall be done as stipulated in the Survey Act (Cap. 299).”

127. The purport of Section 18 is unmistakable: it vests the initial and primary responsibility for determining and fixing land boundaries in the Land Registrar. The Court’s jurisdiction is consequently deferred until that administrative process has run its lawful course.
128. In *Azzuri Limited v Pink Properties Limited* [2018] eKLR the Court of Appeal affirmed this position, holding that boundary disputes must first be addressed by the Land Registrar in accordance with Sections 18 and 19 of the Land Registration Act before the court may be properly seized of the matter.
129. Section 19 of the Land Registration Act sets out the procedure to be followed by the Land Registrar as follows:

“ 19.

- (1) if the Registrar considers it desirable to indicate on a field 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.”

130. This provision lays down an elaborate, sequential process that demands notice to adjoining proprietors, a fair hearing, an accurate survey, and the formal filing of a plan, culminating in a notation in the register. It is only upon completion of this statutory ritual that a boundary may be said to have been “fixed” within the contemplation of the law.
131. Sections 18 and 19 of the Land Registration Act vests the initial responsibility for ascertaining and determination of boundary disputes upon the Land Registrar.
132. As observed in *Benard Otieno Alosi & another v Kepha Omulo Opap & 3 others* [2017] eKLR held:

“It is evident that the law recognizes that the court lacks the technical ability to determine disputes relating to boundaries and that explains why the land registrar and the surveyor are



given that mandate expressly under the law since they are the ones who possess the technical ability to do so.”

133. In the instant Petition, there are two reports by the Land Registrar, one dated 30<sup>th</sup> May 2011 and the second dated 6<sup>th</sup> April 2017. In both instances, the disputing parties were given notice, and a site visit was conducted in the presence of the respective proprietors. With regard to the survey conducted in 2017, the court has noted that the report dated 6<sup>th</sup> April 2017 does not contain the Registrar’s findings on how the boundary was fixed.
134. Although the Petitioner has not demonstrated that the 2017 survey was tainted with illegality or procedural impropriety, there is consensus by DW1 and DW2 that a resurvey is necessary to correct the erroneous position of the escarpment on the map in relation to what is on the ground.
135. I now proceed to the next issue: Whether 1<sup>st</sup> Interested Party unlawfully encroached upon the Petitioner’s land.
136. The Petitioner contends that the 1<sup>st</sup> Interested Party has encroached onto a significant portion of the suit land. Learned counsel for the Petitioner submits that this alleged encroachment violates the Petitioner’s right to property under article 40 of *the Constitution* of Kenya, 2010, article 17 of the Universal Declaration of Human Rights and article 14 of the African Charter on Human and People’s Rights.
137. The 1<sup>st</sup> Interested party on her part denies any encroachment and asserts that the boundary fence erected conforms to the demarcation established by the Land Registrar. She maintains that her occupation and use of the disputed portion fall squarely within the confines of her title.
138. Learned counsel for the 1<sup>st</sup> Interested Party submits that the burden of proving the alleged encroachment rests squarely upon the Petitioner.
139. Section 107(1) of the *Evidence Act* stipulates that:

“whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
140. It was therefore incumbent upon the Petitioner to demonstrate that the suit property was unlawfully encroached.
141. At the hearing, there was testimony from DW1 and DW2 who both conceded that that inconsistencies exist between the mutation plan and the features established on the ground.
142. At the heart of this controversy lie the Registry Index Map (RIM) and the mutation form, which was prepared during the subdivision of Irong/Iten/2089. Both of these documents define the boundaries of the adjoining parcels.
143. There is general consensus among the witnesses for both Petitioner’s and 1<sup>st</sup> Interested Party’s that the suit property and parcel No. Irong/Iten/2743 each measure approximately 0.44 Ha.
144. The Petitioner contends that both the mutation form and the RIM reflect a boundary configuration that accords its parcel direct access to the escarpment, and that the current fence deviates from those approved plans.
145. The 1<sup>st</sup> Interested Party insists that the existing fence accurately follows the demarcation shown in the mutation and the RIM.



146. PW2, a licensed private surveyor engaged by the Petitioner, testified that upon examining the mutation and conducting a site visit, he noted inconsistencies between the documents and the existing physical boundaries. He accordingly recommended that a re-survey be undertaken to regularize the position on the ground with what appears on record.
147. Learned counsel for the Petitioner urged the court to be guided by the decision in *Hezekiah Njuguna Mwangi v Jamleck Chege Kanyi* [2019] eKLR where the court reaffirmed the finding in *Samuel Wangau Vs. AG & 2 others* (2009) eKLR, which held:
- “However, it is common ground that such maps (Registry Index Map) 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 Registry Index Map in solving the dispute.”
148. Guided by the foregoing principle, counsel submitted that a re-survey was necessary to accurately ascertain the true boundary between the adjoining parcels, contending that reliance solely on the RIM or the impugned mutation would perpetuate the existing error.
149. PW2’s evidence, the site visit by the court coupled with the concessions by DW1 and DW2 acknowledging discrepancies between the mutation, the RIM, and the boundary features, supports the conclusion that the dispute is one of technical misalignment rather than deliberate encroachment.
150. In view of this uncertainty, the most prudent course is not to assign blame but to restore clarity. The more appropriate course is to conduct a re-survey under the supervision of the Chief Land Registrar and the Director of Surveys to reconcile the discrepancy between the mutation and the physical boundary on the ground.
151. I now turn to the final issue: whether, in light of these findings, the Petitioner is entitled to the reliefs sought in this Petition.
152. Having reviewed the petition, testimony and submissions, it is evident that the Petitioner’s grievance principally arises from a boundary dispute between private landowners. The substance of the complaint concerns the accuracy of the mutation form and the positioning of the boundary fence separating the suit property from the 1<sup>st</sup> Interested Party’s parcel.
153. The Petitioner places blame on the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and asserts that the mutation was irregularly prepared.
154. The 1<sup>st</sup> Respondent maintains that the boundary fence was erected in strict conformity with the said mutation and the RIM.
155. Learned counsel for the 1<sup>st</sup> Interested Party urged the Court to decline the invitation to “constitutionalize” what is, at its core, a private land and boundary dispute.
156. Relying on *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR, counsel submitted that constitutional litigation should not be invoked to address grievances adequately resolvable through ordinary statutory mechanisms.
157. The Court in *Mumo Matemu* cautioned that constitutional jurisdiction must be exercised with restraint and that courts should discourage attempts to elevate every dispute into a constitutional controversy where established statutory remedies are available.



158. This position finds further support in *Gabriel Mutava & 2 Others v Managing Director, Kenya Ports Authority & Another* [2016] eKLR, where the Court of Appeal reiterated that *the Constitution* should not be converted into a general substitute for all causes of action, and that courts must discourage the tendency to dress every dispute in constitutional garb.
159. While the Petitioner invoked articles 40 and 47 of *the Constitution* 2010, the alleged violation is, in essence, a question of fact and title demarcation rather than a matter of constitutional interpretation or enforcement.
160. These are matters firmly within the province of the Land Registrar under sections 18 and 19 of the *Land Registration Act*. As underscored in *Benard Murage v Fine Serve Africa Ltd & others* [2015] eKLR, not every claim that cites *the Constitution* necessarily transforms an ordinary civil dispute into a constitutional issue. The Court must guard against the growing trend of constitutionalising private disputes, especially where alternative statutory remedies exist.
161. In light of the foregoing, the Court finds that this matter, though presented as a constitutional petition, essentially involves a private land boundary dispute that is properly remediable through statutory mechanisms. The invocation of constitutional provisions was therefore unnecessary. Nevertheless, in the interest of justice and in recognition of the conflicting survey evidence, the Court deems it appropriate to grant limited relief.
162. Accordingly, I enter Judgment for the Petitioner and direct as follows:
- a. That a re-survey of land parcels Irong/Iten/2742 and Irong/Iten/2743 be undertaken by a Land Registrar and Surveyor other than the County Surveyor Elgeyo Marakwet, designated by the Chief Land Registrar and the Director of Surveys respectively within sixty (60) days from the date of this judgment.
  - b. The re-survey shall be conducted transparently, in the presence of both parties or their duly appointed representatives, guided by the original mutation form, the Registry Index Map and the permanent physical features on the ground.
  - c. The parties are at liberty to engage their own private surveyors to accompany the Government Surveyor during the re-survey exercise.
  - d. A comprehensive report shall be filed before this Court within Fourteen (14) days of the survey's completion.
  - e. The costs of the survey shall be shared equally between the petitioner and the 1st Interested Party.

168. Save for this direction, all other prayers in the Petition are declined.

169. Each party shall bear its own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 7TH DAY OF OCTOBER 2025**

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**J. M. ONYANGO**  
**JUDGE**

**In the presence of:**



1. Mr Yego for the Petitioner
  2. Ms Waweru for Mr Katwa for the 1st Interested Party
  3. Mr Kwame for the Respondent
- Court Assistant: Hinga.

