

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ELC CASE NO. 78 of 2017

JOSHUA CHERUIYOT KOECH.....
.....PLAINTIFF

VERSUS

HEZRON KIMELI CHERUIYOT.....
DEFENDANT

JUDGEMENT.

INTRODUCTION.

- 1.** The Plaintiff commenced the present proceedings vide the
Plaint dated 7th July, 2017 that was amended on 28th
October, 2022.
- 2.** The Plaintiff avers that he is the registered owner of land
parcel No. **Kericho/Kunyak/S.S/262** which measures 11.8
Ha.
- 3.** The Plaintiff also avers that on 5th July, 2017, the Defendant
trespassed onto his parcel of land and destroyed the

boundary between his land and parcel No. **Kericho/Kunyak/S.S/267.**

4. The Plaintiff further avers that the Defendant erected his own fence in the Plaintiff's parcel of land that has a width of 100 meters and a length of 600 meters. (Sic)
5. It is the Plaintiff's averment that the Defendant has cut down his trees and planted crops while denying him (Plaintiff) access to the said portion of land.
6. It is also the Plaintiff's averment that they have tried to resolve the dispute by holding meetings with the County Land Officials and the Deputy County Commissioner but they have not been successful.
7. The Plaintiff prays for judgement against the Defendant for;

***a. An order of permanent injunction
restraining the Defendant by himself, his***

agents, and any other person claiming through him from encroaching, trespassing, remaining on, cultivating, planting, putting in use, or in any manner whatsoever interfering with the Plaintiff's boundary, and preventing the Plaintiff of his exclusive use, ownership, peaceful and quiet possession and occupation of his land LR No. Kericho/Kunyak/S.S/262.

- b. An order for the District Surveyor to visit the site, identify, confirm and restore the original destroyed boundary of land parcel LR No. Kericho/Kunyak/S.S/262 according to the registered map index (sic).**
- c. General and exemplary damages for trespass.**
- d. Costs of this suit.**
- e. Any other relief that this Honourable Court may deem fit or just to grant.**

8. The Defendant filed his Statement of Defence dated 4th July, 2024 where he denies the averments in the Amended Plaint and states that reports from the Kericho District Survey

Department confirm that he has not trespassed onto the Plaintiff's parcel of land.

9. He then prays that the Plaintiff's suit be dismissed with costs.

PLAINTIFF'S EVIDENCE.

10. **Joshua Cheruiyot Koech** testified as **PW1**. It was his evidence that he is a farmer and that he is the registered owner of land parcel **No. Kericho/Kunyak/262** which measured 11.8 Ha.
11. It was also his evidence that he purchased the said parcel of land in the year 1993 from one **Regina Marende**.
12. It was further his evidence that at the time **Regina Marende** was selling the land to him, it was still under the

settlement scheme and added that she sold to him her entire share.

- 13.** He testified that he took possession of the said parcel of land and undertook farming activities for a period of thirty years.
- 14.** He also testified that sometime in the year 2016, the Defendant went to the suit parcel and stated that he had purchased the adjacent parcel of land which was parcel No. 267.
- 15.** He further testified that the Defendant alleged that the person he purchased the land from showed him that he had sold to him a portion of the Plaintiff's land measuring about 100 meters.
- 16.** It was also his evidence that the Defendant tried to plant trees on his land forcefully and when he tried to stop him, the Defendant resorted to the use of force.

- 17.** It was further his evidence that the Defendant was accompanied by a police officer by the name **Kefa** from Kunyak AP Camp.
- 18.** He testified that he sought the assistance of the local administration to stop the Defendant and they advised him to seek the services of a surveyor.
- 19.** He also testified that he sought the services of a surveyor in order to determine whether the Defendant had acquired both the adjacent land and his land.
- 20.** He further testified that the Land Surveyor went to the suit parcel more than ten times and in all those times, the Defendant did not show up.
- 21.** It was his evidence that on 5th July, 2017, the Defendant went to his parcel of land in the company of his workers together with five Administration Police Officers from Kunyak and that they were in motor vehicle registration No. GKB 293R.

- 22.** It was also his evidence that the Administration Police Officers gave security to the Defendant's workers who uprooted his fence.
- 23.** It was further his evidence that he was not present when the fence was being uprooted but his workers were.
- 24.** He testified that when his workers asked them why they were uprooting the fence, the Administration Police Officers chased them away.
- 25.** He also testified that one of his workers, an old man, named **John Soi** did not run away and was arrested. He added that they took the uprooted fence and his worker was locked up at Fort Tenan Police Station.
- 26.** He further testified that **John Soi** was locked up for two days and released without being charged and explained that his release came after the police allegedly extorted his family.

- 27.** It was his evidence that after the Defendant destroyed his fence, he constructed a fence 100 meters into the Plaintiff's parcel of land.
- 28.** It was also his evidence that a surveyor went to the suit parcel of land and prepared a report without the participation of the Defendant which report was filed in Court.
- 29.** It was further his evidence that the surveyor did not survey the adjacent farm.
- 30.** He testified that he later came to discover that the adjacent parcel of land, that is, land parcel No. 267 did not belong to the Defendant and it was instead registered to the Settlement Fund Trustees.
- 31.** He also testified that the said parcel of land was allotted to someone but he had been absent for many years.

- 32.** He further testified that it was said that the owner of the said parcel of land was a Luhya and that he had died many years ago.
- 33.** It was his evidence that the Defendant was a resident of Kericho Town and that he used to come to their area, buy land, plant trees and then sell the land.
- 34.** He stated that he is seeking that the Court issues orders to stop the Defendant from interfering with his land, issue an injunction and order him to remove the fence he had erected on his parcel of land.
- 35.** It was further his evidence that the Defendant had prevented him from using his parcel of land for a period of about six years and added that had he leased the said parcel of land for six years, he would have made Kshs. 800,000/=.
- 36.** He testified that the land measured 100 x 600 meters.

- 37.** He also testified that had he planted trees on the said parcel of land then he would have harvested them and added that he wanted to plant coffee but he was not able to do so.
- 38.** He further testified that the Defendant cut down his Acacia trees and used them for fencing.
- 39.** He testified that the Defendant's workers should be stopped from interfering with his land and the original boundary be restored.
- 40.** It was also his evidence that the boundary between his parcel of land and land parcel No. 267 was established sixty years ago.
- 41.** He produced a copy of his title deed as **Exhibit P1** and the Surveyor's Report and map was marked as **PMFI 2(a)** and **(b)**.
- 42.** He also produced a copy of a Certificate of Official Search as **Exhibit P3**.

- 43.** He testified that he had filed in Court a bundle of letters that show the times that the surveyor went to the suit parcel and the Defendant did not show up.
- 44.** Upon cross examination, he admitted that the report dated 27th May, 2019 was with respect to land parcel No's 267 and 262.
- 45.** He also admitted that he was the owner of land parcel No. 262 and confirmed that he conducted a search which showed that land parcel No. 267 did not belong to the Defendant. The search showed that the land belonged to the Ministry of lands.
- 46.** He reiterated that the Defendant had trespassed onto his parcel of land.
- 47.** He admitted that the Ministry of Lands does not issue Certificates of Search for land that is yet to be distributed.

- 48.** He also admitted that he did not see the owner of land parcel No. 267 and denied knowing that his name was **Charles Ogembo Ndambete.**
- 49.** He confirmed that he had looked at the surveyors' report that was prepared after the Court issued an order on 14th February, 2018.
- 50.** He stated that the report was prepared after a visit to the suit parcel and he added that it was partly correct.
- 51.** He confirmed that his parcel of land was correctly portrayed and stated that the report did not portray the adjacent land properly.
- 52.** He was then asked to read the conclusion of the report that had been marked as **PMFI 2(a).**
- 53.** He read it out as follows;

“The map distance does not conform with the claim of the Plaintiff.”

- 54.** He admitted that the report was not conclusive because the Defendant was not present.
- 55.** He stated that he contested contents of the report and added that he was informed by one **Mr. Letio**, who visited the suit parcel, that the report had been prepared in the office.
- 56.** He stated that although a surveyor visited the suits parcels, the report was prepared in the office by the District Surveyor.
- 57.** He stated that his land was curved out by 600 meters but admitted that this was not indicated in the report.

- 58.** He also stated that the report was not valid and that the Registry Index Map needed to conform with the surveyor's report.
- 59.** He confirmed that he had not been advised to get a private surveyor's report and stated that he had the report which was prepared by the District Surveyor.
- 60. Nicholas Cheruiyot** testified as **PW2**. It was his evidence that he was in Court because of the present case.
- 61.** He testified that on 5th July, 2017 he was grazing animals on the suit parcel when at around 10:00 am he was called by one **Weldon Koech** who was an employee of the Defendant.
- 62.** He also testified that said employee was in the company of a police officer who started to remove the Plaintiff's fence.
- 63.** He further testified that he tried to ask the said employee why they were removing the fence but the Police Officer threatened him and he ran away.

- 64.** It was his evidence that he went back to the Plaintiff's land later and he saw that all the posts had been removed and taken away.
- 65.** Upon cross examination he admitted that he did not know the Defendant.
- 66.** He confirmed that at the time of the removal of the fence there were people on the suit parcel.
- 67.** He admitted that he knew that it was the Defendant who had destroyed the fence as it was his workers who removed it.
- 68.** He confirmed that he had been an employee of the Plaintiff for a period of twenty years.
- 69. John Soi Tuwei** testified as **PW3**. It was his evidence that he lives in Chesonoi Village and that he was a village elder.

- 70.** It was also his evidence that he was in Court because of the Plaintiff.
- 71.** It was further his evidence that he saw a person running and when he went to find out why, he was arrested as one of the people who were living on the boundary between the Plaintiff's land and land parcel No. 267.
- 72.** He testified that he was taken to the police station at Fort Tenan where he stayed for two days. He added that he was given a bond of Kshs. 20,000/= but paid Kshs.10,000/= to secure his release.
- 73.** He also testified that he was not charged with any offence and neither did he know why he was arrested.
- 74. PW3** further testified that he did not know anything about the Defendant's parcel of land and where it was located.

- 75.** It was also his evidence that the Plaintiff's parcel of land was No. 262 and that he was his neighbor and added that his parcel of land was no. 156 but he had subdivided it.
- 76.** He testified that he did not know anything about the land dispute between the Plaintiff and the Defendant.
- 77.** He also testified that he saw fencing posts in the police vehicle but he did not know where they came from.
- 78. Raphael Kibet Letyo** testified as **PW4**. It was his evidence that he was a Land Surveyor working at the Kericho Survey Office.
- 79.** It was also his evidence that summons were issued dated 9th April, 2019 and that a report dated 27th May, 2019 was prepared with respect to land parcel No's **Kericho/Kunyak/S.S/262** and **267**. He explained that the he was tasked to establish the boundaries between the two parcels of land.

- 80.** He testified that when they went to establish the boundaries, the Defendant and his representatives were not present.
- 81.** He also testified that measurements were taken from point B through C D then to AF.
- 82.** He further testified that Point E had been established earlier but they were to check it to confirm if it conformed with the map distance.
- 83.** It was his evidence that they found that the ground distance and the map distance conformed with the ground distance of line A E and slightly more on line D E.
- 84.** It was also his evidence that Point K was pointed out to him by the Plaintiff who claimed that that was the common boundary point between land parcel No. 262 and 267 before the fence was uprooted.
- 85.** It was further his evidence that the Plaintiff claimed that the Defendant had uprooted a fence that existed on line K D F

and erected one on line D E F A as per figure one of the report.

86. He testified that they found a barbed wire fence along D E F A that the Plaintiff claimed had encroached onto his parcel of land which was Kericho/Kunyak/S.S 262.

87. He also testified that their technical findings were as follows;

“Starting with Line A B, the map distance coincides with line D E and not K E as claimed by the Plaintiff.

Starting with line K D (line claimed by the Plaintiff) the map difference closes at line A B as per the map”

88. He further testified that they concluded that the disputed area D K A E D had an area of 1.2 Ha.

89. It was his evidence that the boundaries of the two parcels of land could not be conclusively re-established because the

map distance did not conform to the claim in the Plaintiff and that the Defendant was absent.

90. It was also his evidence that the Plaintiff's parcel of land measured 11.8 Ha.
91. It was further his evidence that he did not know the measurement between point K to A.
92. He testified that points D E A B C measured 11.2 Ha and admitted that he did not establish the acreage between points D K A B.
93. He produced a copy of the report as **Exhibit P4**.
94. Upon cross examination he confirmed that he visited the site with the Registry Index Map.
95. He also confirmed that measurements on the Registry Index

Map should normally tally with ground measurements.

96. He further confirmed that the points were established by GPS.

97. He admitted that they usually get a reference point on the ground which is the general boundary.

98. He also admitted that before the Registry Index Map is prepared, they know the exact boundaries.

99. He further admitted that the Registry Index Maps were of different types.

100. He stated that boundaries are captured using aerial photographs. They then take a reference point to see if they conformed with the map distance.

101. He acknowledged that the Kericho maps have not been georeferenced but the suit parcels have existing boundaries.

102. He reiterated that the Plaintiff was claiming D K A while the fence was along E F A.

103. He stated that as per the Registry Index Map, the boundary is at A B. He also stated that with A B as the reference, then the boundary is at D E.

104. He confirmed that if they used K as the reference point, this would be as the Plaintiff's claim, then his land would end at A B.

105. He admitted that there was a barbed wire fence along D E F A and confirmed that the said fence was correctly placed as per the Registry Index Map.

106. He also admitted that there was no trespass onto land parcel No. **Kericho/Kunyak/S.S/262.**

107. He confirmed that the area of D E A B C was 11.2 Ha and admitted that the area in dispute was D K A E D which measured approximately 1.21 Ha.

108. He admitted that he did not measure the size of land parcel No. 267.

109. He stated that if he added the area of D E A B C which was 11.2 Ha and the area of D K A E D which was 1.21 ha then the total area would be 12.4 Ha which was more than the registered acreage of the Plaintiff's parcel of land which was 11.8 Ha.

110. He confirmed that they re-establish boundaries just to be sure but this was usually done with the Land Registrar.

111. He also confirmed that the only document they used to confirm boundaries was the Registry Index Map.

112. Upon re-examination, he stated that he did not confirm if the Defendant was the owner of land parcel No. 267.

113. He also stated that there was no parcel of land between 267 and 262.

114. He further stated that he compared the sketch with the Registry Index Map but they did not move through D K F.

115. He stated that they did not re-establish K as the boundary and admitted that in his report he stated that the Plaintiff pointed out that K was a post that had been uprooted.

116. He further stated that it maybe that the Plaintiff tampered with the boundary.

117. He stated that he had prepared a report which the Court could adopt or choose not to adopt.

118. He also stated that he did not know the Defendant and further stated that land parcel No. 267 was registered under the Settlement Fund Trustees and measured 12.9 Ha.

119. He stated that it was not true that he did not walk through the said parcels of land.

120. He also stated that he measured all the points as shown on the sketch and that it was not true that he only measured the disputed points.

121. He admitted that the boundary could not be conclusively established and stated that general boundary measurements are approximates.

122. He also stated that the sizes of parcels of land are also approximate because the boundaries are not fixed.

123. He further stated that he did not need to alter the boundaries that were set out by the surveyors of the Settlement Funds Trustees.

124. He stated that the Court should decide whether the boundary should stay the same and that a conclusion can only be reached when all the parties are in agreement.

125. He also stated that he prepared the report and the District Surveyor, one **Isaack Kibet** checked it even though he did not visit the suit parcel.

126. He further stated that he could not remember the date he visited the suit parcel but the report was dated 27th May, 2019.

127. The Court observed that the Plaintiff cross examined **PW4** and it seemed that the surveyor was not the Plaintiff's witness.

128. The Court also observed that the Plaintiff filed an application dated 7th July, 2017 where he sought at prayer No. 4 for an order that the District Surveyor visits the suit parcels,

demarcates and/or establishes the boundaries between land parcel No's 262 and 267.

129. The Plaintiff's case was then closed.

130. Subsequently, the matter came up for Defence hearing on 2nd April, 2025 which hearing was adjourned to 24th April, 2025. On both occasions the Defendant failed to attend Court and therefore his case was marked as closed on 24th April, 2025.

ISSUES FOR DETERMINATION.

131. The Plaintiff filed his submissions on 25th June, 2025 while the Defendant filed his submissions on 12th June, 2025.

132. The Plaintiff submits on the following issues;

a. Whether the Defendant unlawfully trespassed and encroached upon the Plaintiff's land.

b. Whether the Plaintiff is entitled to a permanent injunction and restoration of the original boundary.

c. Whether the Plaintiff is entitled to general and exemplary damages for trespass.

133. On the first issue, the Plaintiff submits that he is the registered owner of land parcel No. Kericho/Kunyak/S.S/262.

134. The Plaintiff also submits that since he is the registered owner of the said parcel of land, he is entitled to the protection provided for under **Section 24** of the **Land Registration Act** and **Article 40** of the **Constitution of Kenya**.

135. The Plaintiff further submits that the legality of his title has not been challenged under **Section 26** of the **Land Registration Act**.

136. The Plaintiff relies on **Section 3(1)** of the Trespass Act, the judicial decisions of **EWM (suing in his capacity as the Guradian Ad Litem & Next Friend to EWM) vs County Government of Laikipia [2019] eKLR, Philip Aluchio vs Crispinus Ngayo [2014] eKLR** and submits that the Defendant trespassed onto his parcel of land, destroyed the boundary and took possession of a portion of his land.

137. The Plaintiff also submits that the Defendant's entry onto his parcel of land is illegal and he relies on the judicial decision of **Wambugu v Njuguna [1983] eKLR** in support of his submissions.

138. On the second issue, the Plaintiff relies on the judicial decision of **Giella vs Cassman Brown [1973] EA 358** and submits that he filed an application seeking that the District Surveyor goes to the suit parcel and restores the boundary. The application was made under **Sections 18** and **19** of the **Land Registration Act.**

139. On the third issue, the Plaintiff reiterates that he is the registered owner of land parcel No. **Kericho/Kunyak/S.S/262** and that the Defendant trespassed on it.

140. The Plaintiff relies on the judicial decisions of **Ochako Obincho vs Zachari Oyoti Nyamongo [2018] eKLR, Henry Mwangi Wainaina v Stephen Kimani Gachuri & another [2019] eKLR** and urges the Court to issue a permanent injunction against the Defendant.

141. The Plaintiff also seeks that the Court issues an order that the District Surveyor visits the suit parcel and restores the original boundary between their parcels of land as per the Registry Index Map.

142. The Defendant submits on the following issues;

a. Whether the Plaintiff has proved that the Defendant has trespassed onto the suit parcel.

b. Whether a permanent injunction should issue.

143. The Defendant relies on **Sections 107 (1)** and **108** of the Evidence Act, the judicial decision of **Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & another [2005] 1 EA 334** and submits that the burden of proof lies with the Plaintiff to prove that the Defendant trespassed onto the suit parcel of land.

144. The Defendant also submits that a report was filed in Court by the District Surveyor dated 27th May, 2019 which did not confirm the alleged encroachment.

145. The Defendant relies on **Sections 18** and **19** of the Land Registration Act and submits that a survey report was produced as **Exhibit P4**.

146. The Defendant also submits that the said report did not also confirm the alleged encroachment.

147. The Defendant further submits that even though he did not tender any evidence, the burden of proof still lay with the Plaintiff to prove his case.

148. It is the Defendant's submissions that the Plaintiff has not laid any basis for this Court to issue a permanent injunction. The Defendant relies on the judicial decisions of **Nguruman Limited v Jan Bonde Nielson & 2 others [2014] eKLR, Giella vs Cassman Brown [1973] EA 358** and urges the Court to dismiss the Plaintiff's suit with costs.

ANALYSIS AND DETERMINATION.

149. After considering the pleadings, the Plaintiff's evidence and the rival submissions, it is my view that the following issues arise for determination;

- a. *Whether the Defendant trespassed onto land parcel No. Kericho/Kunyak/S.S/262.***
- b. *Whether the prayers sought in the Amended Plaint should be granted.***
- c. *Who should bear costs of the suit.***

**A. Whether the Defendant trespassed onto land parcel
No. Kericho/Kunyak/S.S/262.**

150. It is the Plaintiff's case that he is the registered owner of land parcel No. **Kericho/Kunyak/S.S/262.**

151. It is also the Plaintiff's case that on 5th July, 2017, the Defendant trespassed onto the suit parcel of land and uprooted his fence.

152. It is further the Plaintiff's case that the Defendant established his own fence 100 meters into the suit parcel of land.

153. It is the Plaintiff's case that the Defendant cut down his Acacia tress and used them to set the boundary inside his parcel of land.

154. The Plaintiff therefore seeks that a permanent injunction be issued against the Defendant.

- 155.** The Plaintiff produced a copy of the title deed for land parcel No. **Kericho/Kunyak Settlement Scheme/262** as **Exhibit P1**. It shows that **Joshua Cheruiyot Koech** ID 3867768 P.O Box 453 Kericho is registered as the owner of the said parcel of land and that he was registered as owner on 30th March, 2001. It also shows that the said parcel of land measures 11.8 ha.
- 156.** During the hearing, the Plaintiff stated that he produced a copy of a certificate of official search as **Exhibit P3**. This Court has established that what was availed to Court is a copy of an undated application for official search for land parcel No. **Kericho/Kunyak/262**.
- 157.** A copy of a report dated 27th May, 2019 and an attached sketch map was produced as **Exhibit P4**. The contents of the said report and sketch map were set out in great detail by **PW4**.
- 158.** The Defendant did not adduce any evidence.

159. In the judicial decision of **Kenya Power & Lighting Co Ltd v Rassul Nzembe Mwadzaya [2020] eKLR** the Court held as follows;

“12. It is noteworthy that the Appellant in its amended Statement of Defence filed on 15th October 2012 denied all the allegations raised by the Respondent and attributed contributory negligence on the part of the Respondent. Although a defence was filed on behalf of the Appellant, no witness was called to prove that defence. Since no evidence was adduced in support of the defence case, the defence on record therefore remained as a mere allegation. This is the position in law and was restated in the case of Edward Muriga through Stanley Muriga...Vs...Nathaniel D. Schulter, Civil Appeal No.23 of 1997, where the Court of Appeal stated:-“In this matter, apart from

filing its statement of defence the Defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations. Section 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence”.

13.Further, it is trite that if no evidence is tendered to support an averment in a pleading, in this case, the defence, such averment stand as such as mere statement.”

(Emphasis mine)

160. In the present case, the Defendant filed a Statement of Defence but he failed to adduce evidence. Therefore, the averments in his Statement of Defence remain to be mere allegations which have not been proved.

161. Even though the Defendant did not adduce any evidence, the Plaintiff was obligated to call evidence and prove his case to the required standard.

162. In the judicial decision of **Gichinga Kibutha v Caroline Nduku [2018] eKLR** the Court held as follows;

“It is not automatic that in instances where the evidence is not controverted, the claimant’s claim shall have his way in Court. He must discharge the burden of proof. He must proof (sic) his case however much the opponent has not made a presence in the contest.” (Emphasis mine)

163. The Plaintiff alleged that the Defendant trespassed onto his parcel of land.

164. Section 3 (1) of the Trespass Act, Cap 294 provides that:

“Any person who without reasonable excuse enters, is or remains upon or erects any

structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”

165. The onus was on the Plaintiff to prove that the Defendant trespassed onto the suit parcel.

166. The Evidence of the District Surveyor who testified as **PW4** is crucial in determining whether or not the Defendant trespassed onto the suit parcel.

167. During cross examination, **PW4** confirmed that there was no trespass on land parcel No. **Kericho/Kunyak/S.S/262.**

168. In his report, which was produced as **Exhibit P4**, he made the following conclusion;

“The dispute (sic) area i.e points DKAED has an area of approximately 1.2 Ha.

The boundaries of parcels ker/kunyak ss/262 vs 267 could not be conclusively re-established since

- The map distance do not conform with the claim of the Plaintiff.***
- The Defendant was absent on the material date.”***

169.Essentially, the surveyor’s evidence is that there is was no trespass on land parcel No. **Kericho/Kunyak/S.S/262**. He went on to state that the boundaries between **Kericho /kunyak/262 and kericho /kunyak/267** could not be re-established for the reasons that ***The map distance does not conform with the claim of the Plaintiff and further that the Defendant was absent on the material date.”***

170.Section 107 of the Evidence Act provides as follows;

“(1) 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.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.[Emphasis Mine]

171. Section 108 of the Evidence Act provides as follows;

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”[Emphasis Mine]

172. Section 109 of the Evidence Act provides as follows;

“The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”[Emphasis Mine]

173.The Court of Appeal in **Antony Francis Wareham t/a AF Wareham & 2 others v Kenya Post Office Savings Bank** [2004] eKLR held as follows;

“We have carefully considered the judgement of the superior Court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or the Court on the basis of those pleadings pursuant to the provisions of order XIV of the Civil Procedure Rules. And the burden of proof is on the plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only

evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail. It also follows that a Court should not make any findings on unpleaded matters or grant any relief which is not sought by a party in the pleadings. [Emphasis Mine]

174. Upon considering the evidence adduced in this matter, it is evident that the Plaintiff has failed to prove that the Defendant trespassed onto the suit parcel of land.

B. Whether the prayers sought in the Amended Plaint should be granted.

175. The prayers sought in the Amended Plaint have been set out in the preceding paragraphs but I will nonetheless replicate them
as hereunder;

- a. An order of permanent injunction restraining the Defendant by himself, his agents, and any other person claiming through him from encroaching, trespassing, remaining on, cultivating, planting, putting in use, or in any manner whatsoever interfering with the Plaintiff's boundary, and preventing the Plaintiff of his exclusive use, ownership, peaceful and quiet possession and occupation of his land LR No. Kericho/Kunyak/S.S/262.**
- b. An order for the District Surveyor to visit the site, identify, confirm and restore the original destroyed boundary of land parcel LR No. Kericho/Kunyak/S.S/262 according to the registered map index (sic).**
- c. General and exemplary damages for trespass.**
- d. Costs of this suit.**
- e. Any other relief that this Honourable Court may deem fit or just to grant.**

176. Given my finding on issue (a) above, prayers (a) and (c) cannot be granted.

177. This Court notes that under prayer (b), the Plaintiff seeks that the Court issues an order for the District Surveyor to restore the boundary on land parcel No. **Kericho/Kunyak/S.S/262.**

178. A perusal of the Court record shows that on 7th July, 2017, the Plaintiff filed a Notice of Motion application of dated the even date which sought for among other prayers that;

“4. THAT; An order for the District Surveyor to visit the site, demarcate and to clearly establish the boundary of the two parcels of land Kericho/Kunyak/S.S/262 and Kericho/Kunyak/267, and to restore the original boundary according to the map sheet and to plant the beacons accordingly.”

179. A further perusal of the Court record shows that on 14th February, 2018 the Court issued the following orders;

“1. That the District Surveyor Kericho be and is hereby directed to visit the L/P (sic) Kericho/Kunyak Settlement Scheme/262 And 267 to establish the boundary and file a report in Court within 30 days.

2. That the survey to be conducted in the presence of both parties.

3. That the Plaintiff shall bear the costs of the survey.

4. Mention 03/04/2018.”

180. On 8th April, 2019, a Survey Report dated 3rd April, 2019 was filed in Court.

181. On 9th April, 2019 the Court issued orders that the survey exercise be repeated. It is in the following words;

“The survey exercise shall be repeated in the presence of the parties and their Counsels(sic).

Summons to issue to the District Surveyor Kericho to visit land parcels No. Kericho/Kunyak/262 & 267 himself (sic) or appoint another surveyor other than Mr. P.K Talam to visit the suit property for purposes of establishing the boundary and file a report in Court within 30 days.

The costs of the survey shall be shared by both parties. Mention on 29.5.2019 to confirm filing of the surveyors report.”

182. Subsequently, a survey report was prepared and filed in Court on 28th May, 2019. The report is dated 27th May, 2019 it was produced as **Exhibit P4.**

183. Given the said circumstances, it is evident that the Court already issued an order for the establishment of the

boundary of the suit parcel. It shall not be necessary to issue another order.

184. I also note that the report states that the Defendant, who is assumed to be the owner of **Kericho/Kunyak Settlement Scheme/267**, was absent on the day that the survey was done and because of his absence, the surveyor could not re-establish the boundary between the two parcels.

C. Who should bear costs of the suit?

185. The general rule is that costs follow the event. This is in accordance with the provisions of **Section 27** of the **Civil Procedure Act. (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the Court, for good reason, directs otherwise.

DISPOSITION.

186. In the result, I find that the Plaintiff's suit lacks merit and it is hereby dismissed with no order as to costs.

187. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO
THIS 20TH DAY OF NOVEMBER, 2025.**

**L. A. OMOLLO
JUDGE.**

In the presence of: -

Miss Otieno for Defendant

Joshua Koech - Plaintiff (In Person)

Court Assistant; Mr. Joseph Makori.