

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 744 of 2017

PENINAH NASIEKU PERTET.....
PLAINTIFF

VERSUS

PHYLLIS SELEINA NGOTIEK & RICHARD OLE MUNYAANYI
being sued as Legal Representatives of JOSEPH NGOTIEK

.....
.....1ST DEFENDANT

JOSEPH MUGO.....2ND
DEFENDANT

DAVID SHANGA3RD
DEFENDANT

DISTRICT LAND SURVEYOR KAJIADO.....4TH
DEFENDANT

DISTRICT LAND REGISTRAR KAJIADO.....5TH
DEFENDANT

JUDGEMENT

1. By the **Plaint** dated **18th May 2016** first filed at Nairobi, before it was transferred to this Court, the Plaintiff claims that she is the registered owner of parcel Kajiado/Kaputiei North/1589 measuring approximately 6.2Ha having purchased it from one Lemita Ole Kimurua. In 2001 she instructed the 2nd Defendant to undertake subdivision of 1589 into six parcels Kajiado/Kaputiei North/14745-14750. In 2002 she drilled a well and in 2008 she constructed a permanent house on the land. She claims that all this while, the 2nd Defendant was still in possession of her documents although he indicated that the subdivision was complete and he would hand over the six title deeds. During this time, the Plaintiff claims that she could see people walking through her land and discovered that some beacons had been planted. The 1st Defendant then attempted to fence part of her plot and she filed a complaint at Isinya Police Station. She would later learn

that her mutation map had been fraudulently tampered with by the 2nd defendant together with the 3rd defendant.

2. She outlined the following particulars of fraud and illegality against the 1st, 2nd and 3rd defendants:

- Undertaking subdivisions of parcels Kaiado/Kaputiei North/14745-14750 and illegally/irregularly altering the shape and size of her land.
- The 2nd and 3rd defendants causing a boundary overlap of between her parcel of land and the 1st defendant's parcel.
- The 2nd and 3rd defendants attempt at altering the original map for Olkinos Group Ranch to irregularly move the beacons causing the 1st defendant to encroach on her property.

3. She lodged several boundary disputes, between 9th March 2010 and 24th November 2015. When the site visit was conducted by the Olkinos Group Ranch demarcation committee members they resolved that the Group Ranch map was defective and should be rectified. The survey team contested this conclusion on grounds that the area map which had been used in sub-division and allocation of

the land had never been challenged and was therefore accurate.

4. The plaintiff therefore filed this suit to secure her land through orders that:

a) A permanent injunction restraining the 1st - 6th Defendants by themselves, their servants or agents, from trespassing, evicting, wasting and/or in any other way interfering with land Kajiado/Kaputiei North/1589 now subdivided into Kajiado/Kaputiei North/14745-14750 which is absolute and legally registered in the Plaintiff's name pending the hearing and determination of this suit.

b) An order of rectification of the Registry Index Map to reflect the original dimensions and measurements of all that parcel of land known as Kajiado/Kaputiei North/1589 prior to its subdivision to Kajiado/Kaputiei North/14745-14750.

- c) An order authorising the District Land Surveyor and all the parties concerned to have a proper re-surveying and cadastral measures to ascertain the actual boundaries between the portions of land known as Kajiado/Kaputiei North/1589 and its subdivisions and that of Kajiado/Kaputiei North/535.**
- d) The officer Commanding Police Division (OCPD) Kajiado and Officer In Charge of Police Station Isinya to ensure maximum compliance of the Court orders.**
- e) Costs of the suit.**
- f) Any other relief that this Hon. Court may deem fit and just to grant.**

5. The **1st Defendant in his statement of defence dated 25th November 2024** denied encroaching onto the Plaintiff's land claiming that she was the one who had encroached onto his land. He also contested the jurisdiction of this Court.

6. The **2nd Defendant** in his statement of defence contested the Plaintiff's claim stating that the Plaintiff signed all the mutation forms sometime in 2003, and once the subdivision was complete, he handed over the title deeds to her.
7. The **3rd Defendant** in his statement of defence denied the Plaintiff's claim. He also contested the jurisdiction of this court.

Evidence of the Plaintiff

8. **PW1, Peninah Nasieku Pertet**, the Plaintiff adopted her witness statement as her evidence in chief and produced her bundle of documents which was marked as P. Exhibit 1-18. She testified that her parcel and the 1st defendant's parcel were adjacent to each other sharing a common boundary. When the dispute arose, she filed a complaint and when no action was taken, she filed this suit. The Court ordered a site visit by the Land Registrar, Land Surveyor as well as parties to the suit. This was done the report dated 31st May 2018 filed in Court. Despite the report, the 1st Defendant continued encroaching on her property and should be stopped.

9. **On cross examination** she stated that after she purchased the property, she wanted to subdivide it and instructed the 2nd Defendant to undertake the subdivision. Before the subdivision, she claims her land was L shaped, but after the subdivision she discovered it had changed shape to rectangular. Upon investigation she noted that these changes took place at the mutation. She claimed that she entrusted the 2nd Defendant with the process and that is why she only discovered of the anomaly after the subdivision. She added that when she purchased the land from the late Rimita, the 1st defendant who was a treasurer of the group Ranch was already in possession of his parcel. She indicated that the dispute arose when she discovered that the 1st defendant had encroached on to her property and the beacons had been changed. It was her testimony that the correct beacon was beacon indicated as A and this was confirmed by the Government surveyor.

10. **On re-examination** she stated that the 2nd defendant was a private surveyor whom she entrusted with the subdivision of her property. She indicated that

she gave him the original documents and were in his possession for three years until she started seeing people on her part of the property. She confirmed that a site visit was conducted by the Land Registrar and Surveyor in presence of all parties through a Court order and a report filed in Court.

Evidence of the Defendants

11. **DW1 Richard Magilu Ole Munyaanyi**, the son of the late Joseph Ngotiek and 1st Defendant adopted his witness statement and as his evidence in chief. He also produced his bundle of documents as exhibits.
12. **On cross examination** he stated that when the beacons were placed on the land, he was a minor, but his father later showed them the land's beacons. It was his testimony that the 2nd defendant subdivided the Plaintiff's land properly and it was the site visit conducted which was not properly undertaken. He stated that the Surveyor's report had irregularities. He acknowledged that he was present during the site visit but could not demonstrate that the process was irregular.

13. **On re-examination** he confirmed that he was present when the survey was undertaken but the surveyor of the Group Ranch was not present.
14. **DW2 Moses Misio Kikon** a member of the Olkinos Group Ranch, adopted his witness statement as his evidence in chief.
15. **On cross examination** he stated that he was a member of the demarcation committee and it was the surveyor who subdivided the land and placed the beacons. In undertaking this, the surveyor used the original map of the group ranch. He acknowledged when the site visit was conducted by the surveyor and the Land Registrar also used the original map which was accurate.
16. However on **re-examination** he indicated that the 1st defendant had not encroached on the Plaintiff's land and another survey ought to be carried out.
17. At the close of the oral testimonies, the parties filed their final written submissions.

Submissions of the Plaintiff

18. On whether the Plaintiff is entitled to a permanent injunction against the defendants, counsel submitted that

property Kajiado/Kaputiei North/1589 belonged to the Plaintiff and when she purchased it, it was L shaped as per the area map and mutation form. However, when the boundary dispute arose, the Plaintiff discovered that the mutation used to subdivide the suit property to six parcels had changed the shape of her land to rectangular shape. It was submitted that in the report dated 31st July 2018, and in his testimony, the Land Registrar confirmed that the proper boundary was line A to D and not line B to D as claimed by the 1st Defendant.

19. Therefore, the boundary determination mandate being bestowed upon the Land Registrar, meant that his report and evidence was conclusive confirmation that the 1st defendant had encroached on the Plaintiff's land. Reference was made to **Nkidoroe v Nailole [2023] KEELC 22422 (KLR)**, **Andrew Marigwa v Josephat Ondieki Kebati [2017] KEELC 1590 (KLR)** and **Joseph Njuguna v. Elizabeth Mukuhi Nganga & Attorney General [2019] KEELC 670 (KLR)**.

20. On whether this Court had powers to order rectification of the Registry Index Map to reflect the

findings in the report dated 31st July 2018, it was submitted that Section 80(1) of Land Registration Act empowered the court to direct the Land Registrar to make any corrections where necessary. As such, the Plaintiff's reliefs should be granted as sought together with costs.

Submissions of the 1st Defendant

21. Counsel submitted that this Court did not have jurisdiction to determine the suit arguing that the consent recorded was not agreed upon by all parties. It was also argued that the Land Registrar tampered with the original map by removing the original beacons and that he did not give them an opportunity to scrutinise the report before 'sneaking it' in court. They therefore sought that the report be remitted back to relevant authorities for determination. It was also submitted that this suit was time barred since the Plaintiff brought it in 2016 while she had been in occupation of the suit property from 1990s.
22. They thus sought dismissal of the suit with costs.

Analysis and Determination

23. I have considered the pleadings, the evidence on record, the written submissions, and the authorities cited.

I find that the issues for determination are:

i. Whether the Plaintiff has proved that the 1st Defendant has encroached and trespassed on her land Kajiado/Kaputiei North/1589.

ii. What orders should issue.

iii. Who should bear costs of the suit?

24. The Plaintiff claims that the 2nd Defendant while subdividing her land Kajiado/Kaputiei North/1589 altered its shape and size causing the 1st defendant to move the beacons, encroach and trespass on it. One of the prayers in the suit was for the boundary dispute to be determined.

25. The 1st defendant denied that he had encroached on the plaintiff's property and both him and the 2nd defendant filed preliminary objections contesting the jurisdiction of this court to determine the dispute.

26. By consent dated 19th December 2017 the parties agreed to refer the dispute to the Land Registrar. This

was done and two site visits conducted with the report date 31st July 2018 filed in court.

27. This court will begin by addressing some issues raised in the 1st defendant's submissions. The 1st defendant submitted that this court did not have jurisdiction to determine the suit and that the consent entered was not accepted by all parties. It is worth noting that this consent was entered in 2017 in presence of all parties the same ought to have been raised so that the consent could be set aside. The consent is legally binding and it is too late in the day to deny it.

28. The 1st defendant also contested the Land Registrar's report in his submissions. It is worth noting that **Regulation 40(6)** of the **Land Registration (General) Regulations** provides for Appeal mechanisms against the Land Registrar's decision. If the 1st Defendant was aggrieved with the findings and determination as per the report filed in 2018, he had 30 days to file an Appeal against it. The remedy for Appeal not having been invoked at the appropriate time and through the proper channel means that the report dated 31st July 2018 is

binding on all parties and the 1st Defendant cannot purport to Appeal against it, through the submissions seven years later.

29. It was also submitted that this Court did not have jurisdiction to determine the suit since it was a boundary dispute. From the plaintiff's reliefs sought, this court notes that the issue is encroachment and trespass, which could only be determined upon the visit by the Land Registrar as per **Section 18 of the Land Registration Act**. This was duly done and the report filed in court. Once the Land Registrar filed the report, the Court has jurisdiction to determine the other issues which inter-alia sought for eviction of the 1st defendant from the plaintiff's property as well as orders for rectification of the Registry Index Map.

30. The 1st defendant also claimed that the suit was statute barred because it was brought in 2016 while they had been in possession from the 1990s. However, the plaintiff indicated that the trespass began sometime in 2002 after the 2nd defendant subdivided the land into six parcels. It was her case that between that time and when

the suit was filed in court, the Plaintiff had tried to have the boundary dispute determined by the officials of the Group Ranch. The court having pronounced itself that the dispute at hand is one for trespass, finds that the 1st defendant was sued for his presence on the plaintiff's land. Courts have held that the tort of trespass being a continuous tort, in some instances, does not meet the threshold for statute limitation. The Supreme Court in **Export Processing Zone Authority & 10 Others (Suing on their own behalf and on behalf of all residents of Owino-Uhuru Village in Mikindani, Changamwe Area, Mombasa) Vs. National Environment Management Authority & 3 Others (2024) KESC 75 (KLR)** held:

“.....Every continuance of a trespass was a fresh trespass for which a new cause of action arose from day to day as long as the trespass continued. The infringement in the instant case was not static but a continuing violation. Being a continuous act the same could not be the subject of mathematical computation of time.....”

31. The Plaintiff sought that the defendants be evicted and prohibited from interfering with her parcel Kajiado/Kaputiei North/1589 which was subdivided into Kajiado/Kaputiei North/14745-14750 and also sought that the Registry Index Map be rectified to reflect the original dimensions and measurements of the parcel.
32. In the report dated 31st July 2018, the Land Registrar adopted the boundary line A-D which is what was depicted by the original subdivisions of the Olkinos group ranch. Following this determination meant that the 1st defendant had encroached onto the Plaintiff's land and that the mutation form and subdivision which used the contested beacon B should be rectified to reflect the proper ground position.
33. I find that the Plaintiff is entitled to the reliefs sought.
34. On the issue of costs, the 1st defendant being the offending party should bear costs of the Plaintiff's suit.
35. In conclusion I find that the Plaintiff has proved her case as against the Defendants on a balance of probabilities.

36. Accordingly Judgement is entered for the Plaintiff in the following terms;

- i. That a permanent injunction is hereby issued, restraining the defendants by themselves, their servants or agents, from trespassing, evicting, wasting and/or in any other way interfering with land Kajiado/Kaputiei North/1589 now subdivided into Kajiado/Kaputiei North/14745-4750.**
- ii. That the 5th Defendant is hereby ordered to rectify the Registry Index Map to reflect the original dimensions and measurements of all that parcel of land known as Kajiado/Kaputiei North/1589 prior to its subdivision to Kajiado/Kaputiei North/14745-14750.**
- iii. That costs of the Plaintiff's suit to be borne by the 1st Defendant.**

Dated, Signed and Delivered virtually at Kajiado this 4th day of December 2025.

L.KOMINGOI

JUDGE.

IN THE PRESENCE OF:

Ms. Gichuki for the Plaintiff.

Ms. Okumu for Mr. Nyangito for the 1st Defendant.

N/A for the 2nd Defendant.

N/A for the 3rd Defendant.

4th - 6th Defendants.

Court Assistant - Peter.