

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ELC NO. 25 OF 2021

PATRICK SIMIYU WAMOTO-----

1ST PLAINTIFF

CAROLYN MWIKALI MUSYIMI
(Suing as the legal representative of the estate of
PAUL NDETO MUSYIMI MANG'ELA (Deceased)-----

2ND PLAINTIFF

VERSUS

THE COUNTY GOVERNMENT,
TRANS NZOIA COUNTY-----1ST

DEFENDANT

ANDREW KITUM-----2ND

DEFENDANT

KIPSIGISIN METTO-----

3RD DEFENDANT

DAVID CHEMATIA-----4TH

DEFENDANT

REUBEN CHEGE-----

5TH DEFENDANT

GRACE KIPKECHUI-----

6TH DEFENDANT

DANIEL MAIYO-----

7TH DEFENDANT

CHERUIYOT CHEMITAN-----8TH

DEFENDANT

LUCAS MARU-----

9TH DEFENDANT

PAUL TOROREI	-----	
10TH DEFENDANT		
KIPSOI TANU	-----	
11TH DEFENDANT		
LUCAS TERER	-----	
12TH DEFENDANT		
LULEI TIROP	-----	
13TH DEFENDANT		
MANYURE KETER	-----	
14TH DEFENDANT		
MARY MARU	-----	
15TH DEFENDANT		
PAUL TOROREI	-----	
16TH DEFENDANT		
THOMAS BIRERICH	-----	17TH
DEFENDANT		
CHERUIYOT LIMO	-----	18TH
DEFENDANT		
ELIJAH SIRIMA	-----	
19TH DEFENDANT		
CHEMELI CHEBOR	-----	20TH
DEFENDANT		
SAMWEL KOECH	-----	
21ST DEFENDANT		
KIPTEIMET RITIU	-----	
22ND DEFENDANT		
EUNICE CHEMASUNDE	-----	23RD
DEFENDANT		
ELIZABETH CHEBIWOT	-----	24TH
DEFENDANT		

KIPKOGEI SORE-----
25TH DEFENDANT
KENYA RURAL ROADS AUTHORITY-----26TH
DEFENDANT
LAND REGISTRAR-----
27TH DEFENDANT

AND

NATIONAL LAND COMMISSION-----
INTERESTED PARTY

JUDGMENT

- 1.** The 1st plaintiff, and the 2nd plaintiff as the legal representative of the estate of Paul Ndeto Musyimi Mang'ela (deceased), being owners of **L.R. Nos. Kaisagat/Chepkoilel Block 2/Kipsogon/38 and 9** situated at Kitale - Kapenguria Road, within Kipsogon Farm, sued the defendants by an amended amended plaint dated **11/4/2024**, for trespass or invasion of the suit on **31/3/2021** living hiving off portion thereof, claiming it belongs to Makunga Farm, creating a non-existent boundary and allocating the hived off portion to third parties, interfering with the plaintiffs' right to own land and to the access road to their land, hence infringing on their right to ownership of the suitland.
- 2.** They sought:-

(a) Declaration that Title No. Kaisagat/Chepkoilel Block 2/Kipsogon/38 measuring approximately 10.52 Ha and Kaisagat/Chepkoilel Block 2/Kipsogon/9 belong to the 1st and 2nd plaintiffs, and thus an injunction does issue restraining the defendants, their agents, servants, or employees from entering into or in any way interfering with the plaintiffs' quiet enjoyment and use of the said pieces of land.

(ai) Declaration that the title deeds issued to the 2nd - 25th defendants, in respect of the plots hived from the plaintiffs' parcel of land and the road reserve, are null and void and should be cancelled.

(aii) Declaration that Maili Saba Centre, Kwanza Road, is a public road and an easement meant to be enjoyed by the plaintiffs' access to their farm, which is located along the said road.

(aiii) Permanent injunction restraining the defendants by themselves, their servants, agents, employees, proxies, or any other person acting on their behalf from blocking the public access road by creating plots on the road reserve belonging to Kenya Rural Roads Authority (KERRA), and on the plaintiffs' parcels of land.

3. The plaintiffs contend that the acts of the defendants to trespass into, invade, hive off, and or create plots

or erect new beacons therein to create new boundaries contrary to the existing main boundary between Makunga and Kipsogon Farm were done without notice or a court order. Further, the plaintiffs aver that Maili Saba Centre Kwanza public road belongs to the 26th defendant and has an easement meant to be enjoyed by members of the plaintiffs, Kipsogon Farm, as well as to access their homes, which access they have peacefully enjoyed without any interruption, since acquiring the suit properties in **1993** and **2000**, respectively.

- 4.** Due to the invasion, and or trespass, the plaintiffs aver that the defendants crossed the main road which has been the main boundary between the two farms, created new parcels of land out of the plaintiffs' suit parcels of land as well as on the road reserve, thereby blocking any access to their parcels, claiming that the hived off or trespassed portions belong to Makunga Farm.
- 5.** The plaintiffs aver that despite reporting the encroachment and blockage of their right of way or access road to the 1st and 26th defendants, they have refused to take remedial steps against the

trespassers who are the 2nd - 25th defendants, hence this suit.

6. The 1st defendant opposed the suit through a statement of defence dated **10/11/2021**, denying that the plaintiffs are the legal and beneficial owners of Land Reg. No. **Kaisagat/Chepkoilel Block 2/Kipsogon/38** and **Kaisagat/Chepkoilel Block 2/Kipsogon/9**, located along Kitale - Kapenguria Road within Kipsogon Farm.
7. The 1st defendant denies the allegation that it instructed the 2nd - 25th defendants to invade the plaintiffs' parcels of land and hived off part of the land, allegedly as belonging to Makunga Farm, without any notice to the plaintiffs.
8. The 1st defendant avers that the boundary determination or alignment exercise between Makunga Farm and Kipsogon Farm was carried out following a letter from the Chief Kapsagat Location to the Ministry of Lands on **21/2/2019**, that members of the aforementioned farms had agreed that the boundary be determined.
9. The 1st defendant avers that as a result of the letter, it wrote back to the Chief Kaisagat Location on **16/3/2021**, informing him of the rescheduled dates

for the said exercise, and informed all concerned parties to attend or send a representative.

- 10.** The 1st defendant denies that Kitale - Kapenguria Road was the main boundary demarcating the boundary between Makunga and Kipsogon Farms, otherwise its findings as per the boundary alignment report dated **14/4/2021**, between Makunga Farm (formerly L.R. No. **3005** and **3007**) and Kipsogon Farm (formerly L.R. No. **5796**), identified the existing control of the ground and found two beacons, intact namely; **A18** on FR/No. **82/35** and **6h** on F/R No. **26/140**, whose bearing of **337° 33' 19"** at a distance of **1996.692m** was established, as per the survey plans, as the line boundary between Kipsogon and the road as per the survey plans with the land owners of Kipsogon Farm, having fenced off their parcel of land beyond the surveyed line **6h - A18**.
- 11.** The 2nd - 25th defendants opposed the suit by an undated amended statement of defence and counterclaim filed on **10/1/2023**. They deny the alleged hiving off, trespass, or crossing over to the plaintiffs' parcel of land, but admit that the disputed parcel of land belongs to Makunga Farm.

- 12.** The 2nd - 25th defendants aver that the road marks have never been a boundary between Makunga and Kipsogon Farm; otherwise, there exist well-erected beacons indicating the boundary in any contradictions.
- 13.** Further, the 2nd - 25th defendants admit that the plaintiffs' suit parcels of land are private properties, but deny that they border Makunga Farm. The 2nd - 25th defendants aver that the dispute between the plaintiffs and the 2nd - 25th defendants relates to a boundary dispute, which narrows down to the fact that the two parcels of land border each other, contrary to the assertion by the plaintiffs.
- 14.** The 2nd - 25th defendants aver that the plaintiffs are not entitled to the reliefs sought in the amended plaint, noting that the plaintiffs cannot seek orders on behalf of the 26th defendant, who has not registered any complaint of trespass against them; otherwise, the claim is malicious, fatally defective, and lacking merit.
- 15.** By way of a counterclaim which lack a titular heading, the 2nd - 25th defendants aver that as members of Makunga Farm, they got registered as lawful and rightful owners, where title deeds were

issued in their respective names, with varying portions of land in the disputed land, and any one claiming under him or her be restrained from encroaching or trespassing on to the 2nd -25th defendants' portion under different title deeds, with varying measurement, but cumulatively measuring approximately **10** acres or any lesser or greater portion that the plaintiffs should be evicted therefrom. The 2nd - 25th defendants counterclaim for an order for eviction.

- 16.** The counterclaim was not accompanied by any authority to plead or sue issued to the 9th, 12th, and 21st defendants, the deponents of the verifying affidavit to sue or plead on behalf of the rest of the defendants.
- 17.** The 26th defendant opposed the suit through a statement of defence dated **23/3/2023**. It avers that the suit properties fall along Maili Saba - Centre Kwanza (**C620**) Road, which is part of the Chepchoina - Centre Kwanza Maili - Saba - Kaplamai - Mois-Bridge Road, forming part of the National Road Network under its purview.
- 18.** Again, the 26th defendant avers that the suit parcel of land Ref. No. **Kaisagat/Chepkoilel Block**

2/Kipsogon/38 and **Kaisagat/Chepkoilel Block 2/Kipsogon/9**, were established as a result of the subdivision of parcel L.R. No. **5796**, while Makunga Farm was established as a result of the subdivision of parcel L.R. Nos. **2135, 2136, and 3007**.

- 19.** The 26th defendant denies the allegation that it received communication from the plaintiffs that there was creation of any land parcel on the road reserve of Maili Saba - Kwanza Road, thus blocking the aforesaid road.
- 20.** The 26th defendant avers that before the subdivision stated above to create the suit parcels of land and the Makunga Farm, the road reserve and the suit properties had been surveyed and the position of the boundaries fixed, allocating a **200ft (60.98 meters)** road reserve width parcel L.R. No. **5796** and L.R. No. **3005/3007** are being separated from the road reserve.
- 21.** Further, the 26th defendant avers that the establishment of **Sinyerere/Sitatunga Block 5/Makunga**, led to a reduction of the road reserve's width along this section of the road to approximately **25** meters, with the remaining part of the road reserve of approximately **35** meters, forming part of

the Makunga Farm parcel, thus causing an inconsistency on the extent of the road reserve's width at this section of the road. This led the 26th defendant to request assistance from the Land Registrar, Trans Nzoia, as the authority on general boundaries to authenticate the road reserve along this section of the road.

- 22.** The court record shows that on **20/3/2024**, the court ordered that the Land Registrar, Trans Nzoia, and the National Land Commission be added as the 27th defendant and an interested party. The plaintiffs were directed to amend the plaint, extract summons to enter appearance, and serve the same within 21 days from the date thereof, and a similar order was made on **4/7/2024**. It appears the said orders were never complied with.
- 23.** At the hearing, **Carolyn Musyimi Mwikali**, the 2nd plaintiff, testified as **PW1**. She relied on a witness statement dated **20/1/2021** as her evidence-in-chief. PW1 told the court that she is the legal administrator of the estate of Paul Ndeto Musyimi Mangela (deceased), who was the registered owner of L.R. No. **Kaisagat/Chepkoilel Block 2/Kipsogon/9**. Her testimony was that the defendants jointly and

severally, without any justifiable cause or colour of right or consent, trespassed and or encroached into the aforesaid parcel of land, hived off part of it, alleging that it belongs to Makunga Farm.

- 24.** PW1 said that the exercise was carried out without any notice to her or a court order whereby officers working under the instructions of the 1st defendant placed new beacons and purportedly created a new boundary on the suit parcel of land and proceeded to allocate the hived off portion to the 2nd- 25th defendants.
- 25.** PW1 said that the main boundary that demarcated the boundary between Makunga Farm and Kipsogon Farm as per the area map, is Kitale - Kapenguria Road, which the 1st - 25th defendants, unfortunately, crossed and purported to create new parcels of land on the disputed land, claiming that it belongs to Makunga Farm.
- 26.** PW1 said that the suit land is private property, which does not in any manner relate to or border Makunga Farm, since there is a road between the two. PW1 said that the defendants' acts were not only acts of trespass, but also illegal and contrary to her rights to own property under **Article 40** of the Constitution.

- 27.** Further, PW1 relied on a copy of the title deed for L.R. No. **Kaisagat/Chepkoilel Block 2/Kipsogon/38** as **P. Exhibit. No. (1)**, title for **Kaisagat/Chepkoilel Block 2/Kipsogon/9** as **P. Exhibit. No. (2)**, a copy of the grant for the estate of Paul Ndeto Musyimi dated **6/11/2014** as **P. Exhibit. No. (3)**, a copy of the deed plan as **P. Exhibit. No. (4)**, notice to produce issued o the Director of Survey dated **17/12/2021** as **P. Exhibit. No. (5)**, and a letter dated **16/6/2020**.
- 28.** In cross-examination, PW1 said that the dispute herein between the two farms is over the boundary, which the County Land Surveyor was unable to resolve during the site visit on **31/3/2021**. PW1 denied knowledge of a letter dated **31/3/2021** written by the 1st defendant to her late mother, or the letter dated **16/3/2021**.
- 29.** Regarding the 1st defendant's report dated **14/4/2021**, PW1 said that she was not aware of the findings, though the determination of boundaries in law falls squarely within the jurisdiction of the 1st defendant.
- 30.** PW1 insisted that the boundary between the two farms, according to the person who sold the suit land

to them, was the main road. PW1 said that before filing the suit, a Land Surveyor, one Makokha, had confirmed the said boundary as per the area map.

- 31.** PW1 said that her late father bought a total of **44 acres**, part of which the defendants have encroached upon. PW1 admitted that she has no survey report establishing the extent of the encroachment of the suit land by the defendants. PW1 said that she now resides in Australia, though before then, she was residing on the suit property.
- 32.** PW1 said that her late father bought a subdivision of L.R. No. **5796** from John Bires in **1997**, who used to be a maize seed farmer. PW1 could not tell if there was an isolation space between the suit land and the main road. PW1 said that she was not aware of any recent amendments to the Registry Index Map.
- 33. Patrick Simiyu Wamoto** testified as **PW2**. He relied on a witness statement dated **20/1/2022** as his evidence-in-chief. He said that he owns L.R. No. **Kaisagat/Chepkoilel Block 2/Kipsogon/38**, measuring **10.52 Ha** as per the title deed, which the defendants encroached onto on **31/3/2021**, as clarified by PW1 in her testimony. PW2 said that the

boundary demarcating Makunga and Kipsogon Farms is the Kitale - Kapenguria Road as per the area map.

- 34.** PW2 said that his advocates had written to the Director of Surveys requesting the original Registry Index Maps before the subdivision and alteration of the boundaries to guide the court. PW2 said that after he personally delivered the letter at Arthi House, he was told that the 1st defendant was the custodian of the area maps, in which case he made a follow-up at the Trans Nzoia County Surveyor's office as per the notice to produce before the court.
- 35.** PW2 said that his land was separate and distinct from Makunga Farm or its subdivisions, hence the acts of the defendants are not only unjustified but also interfere with his right to ownership of the suit property. PW2 relied on the exhibits produced by PW1.
- 36.** Equally, PW2 denied that the 1st defendant wrote to him and also visited the suit parcel of land on **31/3/2021** to resolve the boundary dispute; otherwise, no notices to that effect were sent to him before the alleged visit. PW2 said that he became aware of the alleged notice when the 1st defendant

attempted to erect new beacons on his land during the site visit.

- 37.** PW2 said that he bought the land in **November 1999**, took vacant possession, and has been living on the land together with his family. PW2 denied knowledge or receipt of the letter dated **18/3/2021**, allegedly sent to him through the area chief, as well as the surveyor report dated **14/4/2021**.
- 38.** In addition, PW2 said that he conducted due diligence to verify the boundary before he bought the land in 1999. PW2 said that before filing the suit, he never sought any surveyor's report to verify the boundary or the extent of encroachment.
- 39.** PW2 said that the 26th defendant had already erected their beacons before the 1st - 25th defendants removed them. PW2 said that he was shocked to find people on his land measuring **26** acres, where they had hived off almost $\frac{3}{4}$ of an acre. PW2 said that he relied on the boundary marks shown to him by the seller in **1999**, which were a resultant subdivision of **LR No. 5796**. According to PW2, the main road measures approximately **60.98** meters.

- 40.** PW2 said that he communicated with the 26th defendant on the extent of the encroachment by writing a letter and also visiting their offices.
- 41. Sammy K. Koech** testified as **DW1**. He relied on a witness statement dated **20/9/2021** as his evidence-in-chief. DW1 told the court that he was among the first people who bought land in Makunga Farm from white settlers, when one Kibirech Chemiron used to engage in large-scale maize seed farming along the boundary between the farm and Kipsogon Farm.
- 42.** DW1 said that due to the delicate nature of maize seed farming regarding the quality of the maize seed production, there was a need for some isolation space. Therefore, DW1 said that the farmer approached them to lend him the isolation space along the boundary of the two farms, on condition that he shall hand over the space once he retires from maize seed farming.
- 43.** DW1 said that around **1990**, the said Kibirech Chemison handed over the isolation space to the Makunga Farm members, who started processing the title deed, which came out in **2001**.
- 44.** Further, DW1 said that since their neighbour had stopped large-scale farming, the land next to the

boundary was given to one John Birech, who in turn sold it to the plaintiffs, who were shown the correct boundary but instead encroached onto the disputed land.

- 45.** DW1 said that as officials of the Makunga Farm, they wrote a protest letter to the District Officer, Kwanza Division, as well as the District Land Surveyor and Registrar, who kept on promising that they would visit the site to resolve the issue.
- 46.** DW1 said that the County Surveyor wrote a letter dated **16/3/2021**, when they conducted the boundary alignment and eventually prepared a report dated **14/4/2021**, indicating their findings that it was the plaintiffs who had encroached on part of the parcel of land.
- 47.** DW1 said that instead of the plaintiffs complying with the report, they sued them in court, hence the counterclaim for eviction. DW1 relied on letters dated **23/1/2021, 25/2/2021, 18/2/2022, 28/2/2000, 26/1/2017, 1/7/2016, 1/3/2021, 16/3/2021** as **D. Exhibits. No. (1) - (8)**, surveyor's report dated **14/4/2021**, copy of map, and copies of titles to parcels **No. 322, 334, 327, 323, 328, 135,**

and **324** as **D. Exhibit. Nos. 9 -10 (a) - (g)**, respectively.

- 48.** According to DW1, he bought the land in **1965**, which was subdivided into parcel **Nos. 2135, 2136**, and **3007**. DW1 said that he had no written authority, which the 2nd-25th defendants, as members of the Makunga Farm, had written to the seed farmer to use the isolation space.
- 49.** DW1 said that he equally had no evidence in writing to show that the isolation space was eventually surrendered to the 2nd-25th defendants. DW1 said that the boundary between the two farms has been intact since **1965**, as per the survey map.
- 50. Lukas Korir Marwa** testified as **DW2**. He relied on a witness statement dated **20/9/2021** as his evidence-in-chief. DW2 said that he owns parcel **No. 326**, which he inherited from his late father, which formed part of the isolation space. Again, DW2 said that he obtained his title deed in **2021**, which had visible boundary beacons as confirmed in the surveyor's report.
- 51.** DW2 said that the letter dated **25/2/2000** was clear that the late Elizabeth Musyimi was a *bona fide* purchaser who had no relationship with Makunga

Farm. DW2 said that he never objected to her use of the land before **March 2021**.

52. Luka K. Terer testified as **DW3**. He relied on a witness statement dated **20/9/2021** as his evidence-in-chief. DW3 associated himself with the evidence of DW1-DW2, save to state that the isolation space was approximately **6** acres.

53. Calvin Kibet Chemiron testified as **DW4**. He relied on a witness statement dated **21/12/2021** as his evidence-in-chief. He confirmed that he was the son of the late Mzee Chemiron.

54. Fredrick Otieno Okongo testified as **DW5**. He relied on a witness statement dated **22/3/2023** as his evidence-in-chief. As a registered surveyor employed by the 26th defendant, DW5 told the court that he visited the location of the suit properties and established that they fall along Maili-Saba-Centre-Kwanza **C620** Road, which forms part of the National Road Network under the purview of the 26th defendant.

55. DW5 said that the road was tarmacked by the 26th defendant between **August 2017** and **August 2020**. DW5 said that the two disputed parcels of land were resultant subdivisions of **L.R. No. 5796**, while

Makunga Farm was established as a resultant subdivision of **L.R. No. 2135, 2136, and 3007**.

- 56.** DW5 said that before the subdivision, the road reserve around the suit properties had been surveyed and the position of the boundaries fixed as a **200ft (60.98 meters)** road reserve width, with parcels **No. 5796** and **3005/2007** being separated from the road reserve.
- 57.** DW5 said that the establishment of **Sinyerere/Sitatunga Block 5/Makunga Sheet 1** Registry Index Map led to a reduction of the road reserve width along this section of the road to approximately **25 meters** with the remaining part of the road reserve of approximate **35 meters** forming part of Makunga Farm parcels, thus causing an inconsistency on the extent of the road reserve width at this section of the road.
- 58.** DW5 said that during the process of tarmacking the road, the challenge of this inconsistency on the extent of the road reserve width at this section of the road was encountered, since the Registry Index Map and the Cadastral Plan of the area gave different dimensions of its extent.

- 59.** DW5 said that the 26th defendant had made a request for assistance from the Land Registrar in the establishment of the authentic road reserve boundary along the said section by a letter dated **6/9/2018**. The above notwithstanding, DW5 said that the horizontal alignment of the road was therefore adjusted to fix the tarmac within the undisputed **25** meters of the road reserve, to avoid delay in road works.
- 60.** DW5 relied on the 4th Schedule of Legal Notice **No. 2** of **22/1/2016**, on the classification of roads, Registry Index Map Sheet No. **(1)**, Registry Index Map Sheet for **Sinyerere/Sitatunga Block 5**, Survey Plan **No. 23853** dated **9/7/1926**, Survey Plan **FR No. 73/184** dated **9/10/1956**, letter to the Land Registrar dated **6/9/2018**, and a drawing showing the compilation of the map along the road dated **17/3/2023** as **D. Exhibit. Nos. (12)-(18)**, respectively.
- 61.** DW5 in cross-examination told the court that the 26th defendant was aware of some encroachment on the road reserve by some trespassers, but could not tell if the 2nd - 25th defendants were the trespassers; otherwise, the road is supposed to be **60** meters in width as opposed to **25** meters. DW5 said that apart

from writing **D. Exhibit No. (19)**, the 26th defendant has not made a follow-up on the issue.

- 62.** DW5 said that the Chepchoina Centre, Kwanza - Moi's Bridge Road, was a classified and gazetted **C620** road. DW5 denied receiving complaints over its encroachment from the plaintiffs. DW5 said that the disparities in the width of the road are captured in the survey plan, hence the letter written to the Land Registrar.
- 63.** The plaintiffs rely on written submissions dated **30/10/2025**, isolating six issues for the court's determination. It is admitted that the plaintiffs have tendered enough evidence on ownership of the two parcels of land as absolute owners under **Section 24(a)** and **25(1)** of the Land Registration Act, whose title deeds and official search certificates should be taken as *prima facie* evidence of ownership. Reliance is placed on **Wreck Motors Enterprises Ltd -vs- Commissioner of Lands & Others [1997] eKLR** and **Dr. Joseph Arap Ngok -vs- Justice Moiijo Ole Keiwua & Others [1997] eKLR.**
- 64.** As to whether the survey conducted on **30/3/2021** was lawful and valid, the plaintiffs submit that their properties are private, and re-demarcated or a

survey affecting them without due process is unlawful and void *ab initio*, unprocedural, defective, and irregular.

- 65.** Further the plaintiffs submit that the day of the alleged survey is also when the alleged trespass or encroachment to their parcel of land begun and therefore the entry without notice, invitation or involvement was contrary to **Section 21(2)** of the Survey Act, Regulation **41** of the Land Registration General Regulation **2017**, and instead of resolving a genuine technical boundary dispute was designed to justify the unlawful entry by the 1st - 26th defendants.
- 66.** The plaintiffs submit that the report contains no coordinates, beacon certificate, gazettelement, public notice, or authentication by the Director of Surveys, hence violating their right to Fair Administrative Action Act under **Article 47** of the Constitution.
- 67.** The plaintiffs submit that the coincidence of the dates with the trespass demonstrates that it was not an independent or lawful survey but rather a post-facto justification for an unlawful encroachment, which had no prior notification, or attendance of all the affected parties, or record authentication. Reliance is placed on **Republic -vs- Land Registrar**

Mombasa Ex parte Super Nova Properties Ltd [2018] eKLR, on failure to involve adjoining owners, rendering it a nullity.

- 68.** On trespass, the plaintiffs submit that the defendants have produced a recent, unreliable, illegally procured, self-serving, and unregistered map purporting to show new boundaries or allocations, which lacks an approval, gazettelement, or registration. The plaintiffs submit that the original map produced by the 26th defendant clearly delineates the Maili Saba-Centre Kwanza road as the boundary between the two farms, which, unlike the one by the 2nd - 25th defendants, carries greater evidential weight. Reliance is placed on **Ogeto -v-s Kenya Urban Roads Authority (KURA) [2025] eKLR**, that an unregistered sketch map carries no probative value against an unofficial survey map.
- 69.** The plaintiffs submit that they produced an original Deed Plan **No. 23853** delineating the boundaries, which does not include the 2nd - 25th defendants' parcels of land outside their parcels of land, which falls under the road reserve.
- 70.** The plaintiffs submit that the 2nd-25th defendants rely on an undated or unauthenticated map which clearly

shows that they have, without justification, interfered with their property rights, relying on an altered original boundary to create an appearance of occupation where none exists. The plaintiffs submit that the authentic and duly registered deed plans, compared to those by the 2nd - 25th defendants, provide irrefutable proof that the defendants' activities amount to deliberate and illegal encroachment upon their parcels of land.

- 71.** On violation of their rights to property, the plaintiffs submit that the defence witnesses' evidence by Sammy Koech and Lucas Maru was discredited for lack of authority to represent Makunga Farm, the alleged "isolated space" had no supporting documents, and the complaint letters show they were guilty of laches. **D. Exhibit No (1) and (2)** acknowledge the right of PW1, and contradict the 2nd - 25th defendants' claim.
- 72.** Regarding the evidence of Kibirech Chemiron, the plaintiffs submit that he was neutral and credible, consistent and unshaken. The plaintiffs submit that their rights under **Article 40** of the Constitution have been violated through arbitrary deprivation of their land. Reliance is placed on **Kuria Greens Ltd -vs-**

Registrar of Titles & Another [2011] eKLR and **Wainaina -vs- Murai & Others [1976] KLR 227**, the Kenya Road Act **2007**, and **Section 91** of the Traffic Act.

- 73.** The 2nd - 25th defendants rely on written submissions dated **27/10/2025**, isolating six issues for determination. It is submitted that the burden of proof was on the plaintiffs to prove their claim to the required standards under **Sections 107-109** of the Evidence Act, which they have not been able to discharge. Reliance is placed on **Anne Wambui Ndiritu -vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334** and **Evans Nyakwana -vs- Cleophas Bwana Ongaro [2015] eKLR**.
- 74.** On the nature of the dispute before the court, the 2nd-25th defendants submit that the plaintiffs have admitted it is a boundary dispute which this court lacks jurisdiction to entertain. Reliance is placed on **Motor Vessel Lillian "S" -vs- Caltex Oil (K) Ltd [1989] KLR, Samuel Kamau Macharia & Another -vs- Kenya Commercial Bank & Others [2012]**, and **Mutuku -vs- Kamutu & Others [2024] KEELC 7181 [KLR] (30th October 2024) (Ruling)**.

- 75.** On notification of the boundary determination and alignment, the 2nd - 25th defendants submit that there was no creation of any new boundary on **31/4/2021** as alleged by the 1st defendant; otherwise, all parties affected were duly notified through the area chief, going by **D. Exhibits. No. (5)-(9)**, under **Section 19(1)** of the Land Registration Act, which, despite notification, the plaintiffs boycotted the same. Further, the 2nd - 25th defendants submit that from **D. Exhibit. No. (10)**, it is clear that two beacons were found intact on the ground and were used to align the boundary.
- 76.** On alleged trespass, the 2nd-25th defendants submit that no iota of evidence has been tendered to show any breach of **Section 3(3)** of the Trespass Act. On the contrary, the 2nd - 25th defendants submit that they have produced evidence of trespass to their land parcel by the plaintiffs for parcels subdivided from **L.R. No. 2135, 2136, and 3007**, as per exhibits produced as **D. Exhibit. No. (1) and (11) (a)-(g)**, otherwise, the plaintiffs are relying on an imaginary boundary, which is not supported by any expert evidence.

77. On the counterclaim, the 2nd - 25th defendants submit that in view of **D. Exhibits. No. (5)(1), (10), 11(a)-(15)**, the portion for the titles that they hold is encroached upon by the plaintiffs, yet under **Section 26** of the Land Registration Act, they obtained their title deeds lawfully and procedurally, which the plaintiffs have been unable to impeach in law.

1. The 26th defendant relied on written submissions dated **5/12/2025**. It submits that the plaintiff's complaints were not ignored since the alleged letter, which the plaintiff failed to adduce in court, was not served upon it. The 26th defendant further submits that the burden of proof is on he who alleges, and the plaintiff failed to meet the same.

78. Regarding the encroachment, it is submitted that the width of the road reserve has been encroached by Makunga Farm, and as held in **Munguti & 12 others -vs- Kenya National Highways Authority & another [2023] KEELC 16457 (KLR)**, is an offence. Further, the 26th defendant submits that the road reserve is **60.98** meters, save for Sinyere/Situnga Block 5 (Makunga) Sheet 1 Registry Index Map of **1995**, by Survey of Kenya, which provides that the road reserve width is **25** meters.

The 26th defendant submits that the inconsistency forced the construction of the road on the undisputed **25** meters, to avoid accrual of contractual sums caused by the delay in road works.

79. The court has carefully gone through the pleadings, the evidence tendered, and the written submissions. The issues calling for my determination are:

- (1) If the court has jurisdiction to entertain the suit.**
- (2) If the plaintiffs have pleaded and proved the alleged trespass, encroachment, erection, irregular or illegal, creation, registration, and issuance of title deeds over a portion of the suit land and occupation thereto by the 2nd - 25th defendants with the assistance of the 1st defendant.**
- (3) If the 2nd-25th defendants are justified in law in occupying portions of the plaintiffs' parcels of land.**
- (4) If the 2nd-25th defendants, by claiming ownership of parcels of land over the plaintiffs' portion of the suit land, have interfered with the access road or right of ownership of property.**
- (5) If the 1st - 25th defendants have interfered with the main public road belonging to the 26th defendant.**

(6) Whether the plaintiffs are entitled to the reliefs sought.

(7) What is the order as to costs?

- 80.** It is trite law that parties are bound by their pleadings, and issues for the court's determination flow from the pleadings. In **Sila -vs- Attorney General Civil Appeal 224 of 2019 [2025] KECA 498 [KLR] (21st March 2025)**, the court reiterated that parties are bound by their pleadings and cannot be allowed to raise issues not pleaded. The court cited **Stephen Onyango Achola & Another -vs- Edward Sule Hongo & Another Civil Appeal No. 209 of 2001**, that it is trite law that cases must be decided on the issues pleaded.
- 81.** The court further cited **Mohamed Fugicha -vs- Methodist Church of Kenya & Others [2016] eKLR**, that the primary purpose of pleading is to communicate with an appreciable degree of certainty and clarity the complaints that a pleaded brings before the court and to give sufficient notice to the party impleaded what the case is to answer.
- 82.** The 2nd - 25th defendants have, for the first time, raised the issue of lack of jurisdiction by way of written submissions dated **27/10/2025**. It is their

submissions that PW1 and PW2 admitted in their testimony that what is before the court is a pure boundary dispute, which was not determined by the 1st defendant, and which this court has to determine. The 2nd - 25th defendants submit that the court, guided by **Motor Vessel Lillian "S" -vs- Caltex Oil (K)** (*supra*) and **Sila Macharia -vs- Kenya Commercial Bank** (*supra*) and **Mutuku -vs- Kamutu** (*supra*), cannot arrogate to itself jurisdiction which falls under the Land Surveyor by dint of **Section 18** of the Land Registration Act.

- 83.** Jurisdiction can be raised at any time, though it is preferable to be determined at the very onset of a case. From the pleadings, none of the defendants raised the issue of lack of jurisdiction. That notwithstanding as to whether the court has jurisdiction, a court has to ascertain the cause of action based on the pleadings to establish whether or not it has jurisdiction. From the pleadings, what the plaintiffs plead is that on **31/3/2021**, the 1st defendant, allegedly at the request of the 2nd-25th defendants, visited the *locus in quo* in their absence, or without notice, and purported to irregularly, and in breach of their rights to property, trespass, encroach,

hive off, create or erect new boundaries and sanitize the illegal acts of the 2nd - 25th defendants to claim portion of the suit land as if they belong to Makunga Farm.

- 84.** The 1st defendant denies the same. It is pleaded that what the 1st defendant did was a boundary alignment between the Makunga and Kipsogon Farms in line with the existing maps.
- 85.** The 26th defendant, on the other hand, admits that the Kitale - Kapenguria Road, measuring **60.98** metres on the disputed section, has been encroached upon to the extent of **35** meters, yet it is a gazetted **C160** road, hence the letter written to the Land Registrar to establish the legality of the titles created to encroach on the road reserve.
- 86.** In **Mberia -vs- Mbui Civil Appeal 102 of 2020 [2025] KECA 954 [KLR] (9th May 2025) (Judgment)**, boundary disputes had been filed with the Land Registrar. A government surveyor subsequently visited the disputed boundary, retraced, demarcated, and fixed it.
- 87.** A preliminary objection had been raised on jurisdiction, which the appellant opposed on account of the dispute being a claim on trespass and theft of

his land, fenced and annexed off by the respondent. The court said that it had no jurisdiction over the matter.

- 88.** In the ***Estate of Sonrisa Ltd & Another -vs- S.K. Macharia & Another [2020] eKLR***, the court observed that the ascertainment and fixing of the boundary in dispute involves three parties, the owners of the affected parcels, the surveyor, and the registrar under **Sections 16-19** of the Land Registration act, after the Registrar gives notice to all affected parties as well as those whose land adjoins the boundaries in question, who with the assistance of the surveyor ascertains and fixed the boundary.
- 89.** The centre of the dispute before the court as pleaded by the parties is whether the 1st defendant had jurisdiction to interfere with the gazetted public road by purporting to trespass into, effect beacons, allow the 2nd - 25th defendants to occupy the disputed portion of land alleging falling on a road reserve without the involvement of the plaintiffs and also the 26th defendant, such that the hived off portion not only fall within the plaintiffs suit properties but also interfere with their rights of way which portion or

adjoining parcels fall under the jurisdiction of the 26th defendant.

90. In **George Kamau Macharia -vs- Dexka Ltd [2019] eKLR**, the court said that where the law has given a legal obligation to a government department, such a department must be given the opportunity by the court to meet its legal obligation.
91. In **Suzzane Achieng Butler & Others -vs- Redhill Height Investments & Another [2016] eKLR**, the court said that pleadings give the court a glimpse of what the predominant issues are.
92. Trespass was defined in **Kenya Power Lighting Company -vs- Ringera [2022] KECA 104 [KLR]**, as where a person enters into or upon property in possession or occupation of another with an intention of committing an offence. The court cited **M'Mukunya -vs- M'Mbijiwe [1984] eKLR**, that trespass is a violation of the right to possession and that the plaintiff must prove the right to immediate and exclusive possession of the land.
93. In **Margaret Iminza Luyayi -vs- Moses Opudo Mudaka [2020] KEELC 1091 (KLR)**, trespass was defined as wrongful entry or violation of the plaintiff's right to possession. In **Ochako Obincho -vs-**

Zachary Oyoti Nyamongo [2018] eKLR, the court said that to prove trespass, one has to demonstrate invasion and occupation by the intruder without any justifiable cause.

- 94.** In **Bandi -vs- Dzomo & Others [2022] KECA 584 [KLR]**, the court emphasized the need for an evidential burden to show whether the appellant had acquired the title to the land in a regular, law-compliant fashion and not in an opaque manner.
- 95.** In this suit, I think the issues raised are beyond a boundary dispute. The 2nd-25th defendants allege that they regularly and in a law-compliant manner obtained their title deed over land initially falling on an isolated space, which the plaintiffs' predecessors in title were occupying as a licensee and which the 2nd plaintiff was enjoying as an easement, but has also trespassed into it, hence the counterclaim on eviction.
- 96.** The next issue is whether the parties have discharged their burden of the legality of their titles, which they respectively hold as a basis of the alleged encroachment on both the plaintiffs' side and the 2nd - 25th defendants' side, since when a title to land is under challenge, it is not enough to dangle the

instrument of title without evidence that it was acquired legally, formally and free of any encumbrances, or interest that would not necessarily be noted in the register. See **Munyu Maina -vs- Hiram Gathiha Maina [2023] eKLR.**

- 97.** The law is that it is protective of a title unless challenged on account of fraud, illegality, or for being unprocedurally acquired. See **Elijah Makeri Nyagwara -vs- Stephen Mungai Njuguna & Another [2013] eKLR,** and **Joseph Arap Ngok -vs- Justice Moijo Ole Keiwua (supra).**
- 98.** In **Caroget Investments Ltd -vs- Aster Holdings Ltd & Others [2019] eKLR,** the court observed that where two parties are asserting competing proprietary interests over one parcel of land, each must produce evidence in support of their claims.
- 99.** **Section 48** of the Survey Act provides the powers of a surveyor in re-establishing missing beacons and making a report to the Director.
- 100.** In **Kenya Rural Roads Authority -vs- Vipingo Ridge Limited & 2 others (Civil Appeal 18 of 2019) [2022] KECA 1089 (KLR) (7 October 2022) (Judgment),** the court held that the establishment of a public road and land acquisition

are regulated by statutes. The court further held that the classification of a public road under **Section 47** of the First Schedule to the Kenya Roads Act **2007** can only be done after such conversion designates of a line of travel of a public road, through a gazette notice, a cadastral survey to establish, marks and document the legal boundaries between the road and private land as per **Sections 24** and **32** of the Survey Act.

- 101.** In **Elizabeth Wambui Githinji & Others -vs- Kenya Rural Roads Authority -& Others [2019]**, the court held that the width of a public road was a technical question that an ordinary purchaser of land next to a road would not comprehend, let alone be expected to know; otherwise, it is maps and planning that would show what the road reserve measurements were.
- 102.** In **Merry Beach Ltd -vs- Attorney General & Others [2015] eKLR**, the court observed that without amending a Registry Index Map to reflect the subdivision, any attempt to move and block the road that existed before the said subdivision was done, amounted to illegalities on the rights of the petitioners to access their land. See also **Alexander**

Ngoto Ngunyi & Another -vs- John Ngugi Gachau [2016] eKLR.

103. In this suit, the evidence by DW5 on behalf of the 26th defendant has been clear about encroachment of a gazetted public road, which issues it raised with the Land Registrar as the authority or general boundaries, contrary to the existing RIM, and survey plans showing its width as **60.98** meters. The documentary evidence produced by DW5 clearly shows that the 2nd-25th defendant's alleged parcel of land falls within the road reserve. The said report and documents were not challenged by the 2nd - 25th defendants. See **Abdalla Ali Nassoro -vs- Wycliff Lukio & Another [2021] eKLR.**

104. Conversion of land from public to private use must be done in line with **Articles 40, 51, and 62** of the Constitution, as read together with **Sections 107 and 133** of the Land Act. Denial of the right to ownership and enjoyment of the right of way is contrary to **Article 40** of the Constitution. See **Arnacherry Ltd -vs- Attorney General & Others [2014] eKLR,**

105. In the process of acquisition of the land by the 2nd - 25th defendants did not follow the law and

infringed on the right of way or access to the public road; the plaintiffs are entitled to raise the issues of encroachment or trespass, under **Section 3(3)** of the Trespass Act. Part **V111** of the Land Act has an elaborate procedure of documentation and protection of public land. The 26th defendant has produced records and a gazette notice that the stretch of **60.98** meters between the disputed parcel of land is public land as per the Survey Plan and Registry Index Map.

106. The 1st defendant had no jurisdiction to tamper with a gazetted public road measuring **60.98** meters without the concurrence of the 26th defendant. The surveyor's report dated **14/4/2021** is neither certified nor authenticated by the Director of Surveys and does not rely on authentic survey maps, survey plans, such as the ones relied upon by the 26th defendant. The 1st defendant acted ultra vires its mandate to purport to interfere with the boundary of the road reserve without the involvement of the 26th defendant and the Land Registrar.

107. In **CKK Estates [1973] Ltd -vs- County Government of Kiambu & Another [2022] KEELC 1488 [KLR]**, the court said that anything outside the

law was an illegality which the law frowns upon. The court cited **Entick -vs- Carrington [1965]**, that the property of every man is so sacred that no man can set foot upon his neighbour's close without his leave.

108. The acts of the 1st - 25th defendants have not been substantiated at all. The 1st defendant failed to tender evidence to show the basis upon which it realigned the boundary affecting a gazetted public road vis-à-vis the plaintiffs' parcel of land without complying with the provisions of the Statutes on public roads and **Article 47** of the Constitution. The basis of the survey report is on authentic survey maps and not on any Registry Index Map. The Registry Index Maps appearing on some of the 2nd - 25th defendants' title deeds produced as **D. Exhibit. No. 11(a) - (g)** were not used by the surveyor to make his report, produced as **D. Exhibit No. (9)**.

109. As held in **Barmasai -vs- Rono & Others Civil Appeal No. E068 of 2023 [2025] KECA 1489 [KLR] (15th September 2025) (Judgment)**, a Registry Index Map serves as the primary and authoritative record of land boundaries. **Section 79(1)(C)** of the Land Registration Act cannot be invoked to rectify a title or affect a parcel without

giving notice to all interested persons. Any party aggrieved by the decision of the Registrar can move to court under **Section 86** of the Land Registration Act for redress.

- 110.** **Sections 22** and **23** of the Land Registration Act have the procedure for combination, subdivision, and re-parcellation of land. The 2nd - 25th defendants presented no evidence to sustain their defence and counterclaim on how their title deeds were created over a public road. **Section 22** of the Survey Act relates to the survey of land under the superintendence of the Director of Surveys.
- 111.** There is no evidence that the 1st defendant involved the Land Registrar to undertake the process. See **Azzuri Properties -vs- Pink Properties [2018] eKLR**, and **Estate Sonrisa Ltd & Another -vs- Samuel Kamau Macharia (supra)**.
- 112.** In **George Kamau Macharia -vs- Dexka Ltd (supra)**, the court observed that a Registry Index Map only indicates an approximate boundary and the approximate situation on the ground. The court said that the Land Registrar has the technical advice and resources to determine and ascertain the boundary.

113. The 2nd - 25th defendants relied on an illegal process to invade or encroach on the plaintiffs' parcel of land. The acts of the 1st - 25th defendants interfered with the rights to property of the plaintiffs. This has been confirmed by DW5.

114. I find the suit proved to the required standard. It is allowed with costs, in terms of prayers **(a)**, **(ai)**, **(aii)**, and **(aiii)** of the plaint dated **11/4/2024**. To be precise, this court issues a declaration that:-

(a) Title Nos. Kaisagat/Chepkoilel Block 2/Kipsogon/38, measuring approximately 10.52 Ha, and Kaisagat/Chepkoilel Block 2/Kipsogon/9, belong to the plaintiffs. therefore, an injunction is issued restraining the defendants, their agents, servants, or employees from entering into or in any way interfering with the plaintiffs' quiet enjoyment and use of the said parcels of land.

(ai) The title deeds issued to the 2nd - 25th defendants, in respect of the plots hived from the plaintiffs' parcel of land and the road reserve, are null and void and should be cancelled.

(aii) The Maili Saba Centre, Kwanza Road, is a public road and an easement meant to be enjoyed by the plaintiffs' access to their farm, which is located along the said road.

(aiii) A permanent injunction restraining the defendants, by themselves, their servants,

agents, employees, proxies, or any other person acting on their behalf, from blocking the public access road by creating plots on the road reserve belonging to Kenya Rural Roads Authority (KERRA), and on the plaintiffs' parcels of land.

115. The 2nd - 25th defendants' defence and counterclaim is dismissed for being incompetent and lacking merit.

116. Orders accordingly.

Judgment dated, signed, and delivered via Microsoft Teams/Open Court at Kitale on this 10th day of December 2025.

In the presence of:

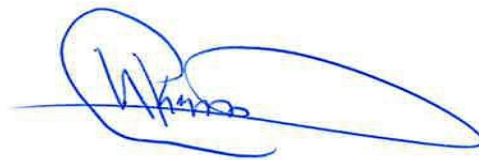
Court Assistant - Dennis

Nabwire for the plaintiffs - present

Nakitare for the 1st defendant - present

Ngemenet for the 22nd- 25th defendants present

26th defendant- absent



**HON. C.K. NZILI
JUDGE, ELC KITALE.**