



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC CASE NO 440 OF 2017

(FORMALLY NKU HIGH COURT CIVIL CASE NO. 212/2005)

STANLEY THEURI (Suing as the legal Representative of

the Estate of FRANCIS K. MWAI.....PLAINTIFF

VERSUS

DAVID KAMAU KARIUKI (Sued as the legal Representative

of the Estate of ESTHER WAIRIMU KIRII).....1st DEFENDANT

DISTRICT LAND REGISTRAR NYANDARUA.....2nd DEFENDANT

HON ATTORNEY GENERAL.....3rd DEFENDANT

JUDGEMENT

1. Vide a further amended plaint dated the 30th August 2012, and filed at the Nakuru High Court on the same date, the Plaintiff's suit against the Defendant seeks for the following orders:

i. A declaration that the 2nd Defendant's determination of the boundary dispute between the Plaintiff and the 1st Defendant on the 14th July, 2005 is null and void.

ii. A declaration that the Plaintiff is the legal owner of the 6 acres of plot No. 249 whereby the 1st Defendant is in illegal occupation and which is shown in the map, and she be removed therefrom by an order of eviction.

iii. A permanent injunction against the Defendant,(sic) her agents or servants occupying, interfering or dealing in any manner however with the Plaintiff's peaceful and quiet enjoyment of all or any part of that parcel of land known as Nyandarua/Wanjohi/249.

iv. Costs of this suit and interest at court rate.

2. Upon the filing of the suit, the 1st Defendant entered appearance on the 24th August 2005 and filed her defence on the 9th September 2005. On the 14th February 2008, by consent the Plaintiff's application to enjoin the 2nd and 3rd Defendants was allowed wherein they entered their appearance and filed their defence on the 20th June 2008.

3. In the pendency of the trial, the 1st Defendant passed away wherein an application dated the 19th July 2012 was filed seeking for her substitution. By consent, the same was allowed.

4. Subsequently, vide an application dated the 12th September, 2012, the Plaintiff sought orders directing the District land Surveyor to visit the suit land being Nyandarua/Wanjohi/249 and Nyandarua/Wanjohi 250, the Plaintiff and 1st Defendant's suit land respectively, so as to determine the acreage on the ground. On the 12th July 2013, the application was allowed as unopposed by the court wherein it was directed that the surveyor files his report in court within 60 days.

5. On the 13th November 2013, when the matter was mentioned before the Deputy Registrar, the court was informed that although the surveyor had filed his report as directed, the same had been removed from the court file. Orders were then issued to the effect that the matter be mentioned again before the Judge so that the surveyor could resubmit his report.

6. On the 4th December 2013, the court directed that the hearing of the surveyor's evidence would proceed on the 6th February 2014. On the said date, the District surveyor gave his evidence and produced his report but was stood down for cross examination which was set for the 22nd May 2014. The court record does not however indicate whether any proceedings took place on the said date.
7. On the 8th October, 2014, the matter proceeded on with the testimony of the Land surveyor but unfortunately the said proceedings (pages 26-27) are somehow missing from the court file.
8. After receiving the surveyor's report, parties agreed to treat the surveyor as Plaintiff witness (PW1) and sought leave to comply with the provisions of Order 11 of the Civil Procedure Rules which leave was granted.
9. On the 31st March 2016, the court, having noted that despite the Plaintiff having complied, the Defendants had not complied, directed the Defendants to file their documents within 14 days failure to which it would be taken that they were neither calling any witnesses nor filing any response. The Plaintiff was directed to set down the matter for hearing.
10. The matter was subsequently transferred to this court upon its establishment wherein on the 15th June 2017 it was mentioned before myself. Having taken note of the directions issued on the 3rd March 2016 and further having noted that the said directions had not been complied with, more than 1 (one) year later, the matter was fixed for hearing for the 2nd October 2017.
11. Come the said date there was representation for all parties save for the Hon the Attorney General on behalf of the 2nd and 3rd Defendants. The court having confirmed that the hearing notice had been properly served and received, proceeded with the hearing.

Plaintiff's case

12. The Plaintiff testified that he was the son of Francis Kihungi Mwai who was the registered proprietor of the suit land situate in a scheme known as Wanjohi scheme. That the same was registered as No. Nyandarua/ Wanjohi/ 249. That after the said Francis Kihungi passed away in the year 1993, he had petitioned for letters of Administration as per the gazette notice No. 3283 of 3rd April 2009 herein produced as Pf exh 1. He also produced a copy of the title deed as Pf exh 2.
13. The witness testified that upon the demise of their father, he and his siblings had decided to subdivide the suit land. That subsequently when they summoned a surveyor to do so, it was discovered that the acreage of the land on the ground did not tally with the measurement indicated on the title deed in that it was less by 5 acres which acres had been added to parcel No. 250 which was their neighbor's land, the Defendant herein.
14. The Plaintiff further testified that upon the discovery of the discrepancy in the acreage of their land, in the year 2003, he had sent elders to the original deceased Defendant to inform her that there was a boundary dispute between their respective parcels of land. That initially, the Defendant (Deceased) had confirmed that indeed part of the Plaintiff's land was on her land and that a surveyor ought to be called to rectify the anomaly, but later she had changed her mind stating that she could not invite the said surveyor to take away her land.
15. That it was due to her change of mind that he had escalated the matter to the Land Registrar Nyahururu who then visited the suit land in the years between 2005 and 2006.
16. That later upon invitation, the Plaintiff had visited the Land Registrar's office, wherein he had found a different Registrar. It had then been agreed that the parties and their witnesses do gather at the suit site so as to solve the dispute. This was done and the land Registrar formed his opinion that the Defendant (deceased) was entitled to the land.
17. That the Plaintiff, being aggrieved by this verdict, decided to file the present case in court wherein the court had directed the Land Surveyor to visit the suit land and file a report in court.
18. By consent, the said report dated the 16th September 2013 together with 2 maps, was produced as Pf exh 3 (a-c).
19. The Plaintiff sought for the court's intervention to render justice to the matter.
20. In cross examination, the Plaintiff reconfirmed his examination in chief and stated that both his deceased father and the Defendant (deceased) had taken possession of their respective parcels of land in the year 1963, where his father had occupied 15 acres.
21. That they had come to know of the difference in the acreage in the year 2000 before which there had been no issues between the parties. That after the verdict of the land Registrar, he did not file an appeal to contest the same.
22. He confirmed that the title to his deceased's father's land had been issued on the 17th February 1989 and that it indicated the acreage of the suit land as 9 (nine) hectares.
23. The Plaintiff closed its case wherein the Defence case was slated for hearing on the 6th December 2017 with orders that the 1st defendant files their list of witness statement within 14 days.
24. Prior to the hearing of the defence case, the 1st Defendant herein filed a notice of Preliminary Objection dated the 30th October 2017 wherein they sought to have the suit herein dismissed for being time barred as per the provisions of the Section 4(7) of the Limitations of

Actions Act and also for being Res Judicata by virtue of the determination by the Nyandarua District Land Registrar.

25. On the 6th December 2017, the matter did not proceed for defence hearing, because the court opted that the Preliminary Objection be dispensed with in the first instance by way of written submissions and gave parties 14 days within which to file their submissions.

26. Failure to comply with said directives led to the dismissal of the application dated the 30th October 2017 on the 25th April 2018, for want of prosecution.

27. Following the said dismissal, the Plaintiff filed an application dated the 5th July 2018 seeking leave to re-open its case so as to produce the grant of letters of Administration ad litem for the estate of the late Francis Kihungi Mwai. The said application was not opposed and hence on the 11th July 2018 the same was allowed wherein the Plaintiff's case was re-opened.

28. On the 29th November 2018, the Plaintiff was recalled wherein he produced the letters of Administration ad litem dated the 26th July 2005 as Pf exh 4 and the closed his case.

29. Suffice to point out that at the time the Plaintiff closed its case, the Defendants had not complied with the provisions of Order 11 of the Civil procedure Rules as directed and neither had they indicated that they would be calling any evidence. Their cases were closed on the 29th November 2018 wherein parties were directed to file their submissions within 21 days.

30. Whereas the Plaintiff filed their submissions dated the 8th January 2019 on the 16th January 2019, the 1st Defendants submissions dated the 18th February 2019 were filed on the 22nd February 2019. The 2nd and 3rd Defendants did not file their submissions.

Plaintiff's Submissions.

31. It was the Plaintiff's submission that the dispute herein concerned the area of land measuring approximately 6 (six) acres between the land parcels No. Nyandarua /Wanjohi/249 registered in the name of the deceased Francis K. Mwai and land No. Nyandarua /Wanjohi/250 registered in the name of the deceased Esther W. Kirii where the Plaintiff's claim was to the effect that the said 6 acres belonged to the deceased- Francis K. Mwai.

32. That the dispute came about in the year 2003 when a survey was conducted on the Plaintiff's parcel of land which survey had revealed that the Defendant herein was in occupation of 6 (six) acres of the Plaintiff's land. That despite notice to the deceased Defendant, she had failed to comply with the Plaintiff's demand to leave his land hence the reason for filing of the present suit.

33. The Plaintiff framed his issues for determination as follows;

- i. What is the true status of the boundary between parcels No. Nyandarua /Wanjohi/249 and Nyandarua /Wanjohi/250.
- ii. Whether the Plaintiff is deserving of the prayers sought.

34. On the first issue, it was the Plaintiff's submission that based on the surveyor's report dated the 16th September 2013, the same was clear to the effect that parcel No. Nyandarua /Wanjohi/250 had encroached into parcel No. Nyandarua /Wanjohi/249 by 2.10 hectares(approximately)

35. That the said conclusion was arrived upon after a survey was carried out by two surveyors on the affected parcels of land on the 11th September 2013. The Plaintiff placed reliance on the decided case of **Samwel Wangau vs AG & 2 others [2009] eKLR** to submit that the survey had been carried out professionally and in adherence to the required methodology.

36. The Plaintiff further submitted that the surveyor's findings had been corroborated by the fact that just as their report had placed the acreage of parcel No. 259 to be 6.6 Hectares on the ground, the title deed had placed the acreage at 9 hectares confirming the fact that the Defendant had encroached on the Plaintiff's 2.10 hectares (approximately).

37. That the District Land Registrar's report dated the 12th June 2005 awarding ownership of the affected land to the 1st Defendant had therefore been flawed and lacked factual foundation as it had been based on the testimonies of laymen. That further the latter report by the surveyor dated the 16th September 2013 had not been challenged.

38. On the second issue for determination, it was the Plaintiff's submission that he was entitled to the prayers sought in his plaint keeping in mind that the court was clothed with jurisdiction to issue the same since the boundary dispute had been addressed by the District Land Registrar at the first instance.

39. That following the Land Registrar's decision and the Plaintiff's dissatisfaction thereafter, the present suit was filed in compliance to the provisions of Section 18(2) of the Land Registration Act. He relied on the decided case of **Wills Ocholla vs Mary Ndege[2016] eKLR**.

40. That the correct boundary had never been marked to date making it vital for the court to intervene. That having found that the 6 acres of the disputed land lay squarely in the 1st Defendant's land, the 1st Defendant was therefore in illegal occupation of the 6 acres and the only remedy was for the court to issue orders of eviction upon the 1st Defendant.

41. That since the 1st Defendant was adamant in vacating the disputed 6 acres of land, there had been a real threat of trespass, thus it would be prudent that an order of permanent injunction be issued against him, his agents, servants and the Estate of the late Esther W. Kirii.

42. That since the Title deed herein produced as Pf Exhibit 2 clearly indicated the acreage of the Plaintiff's parcel of land at 9, registered in the name of the deceased Francis Kihungi Mwai, the court should affirm the Plaintiff's right as provided for under Section 27 of the Registration Land Act. That the Plaintiff had proved his case to the required standard of proof and therefore the court was obliged to grant him the prayers so sought with costs.

The 1st Defendant's Submission.

43. The Defendant's submission was to the effect that the Plaintiff's suit which was amended severally was in effect couched in terms of an appeal filed as a result of the dissatisfaction of the ruling delivered on the 12th July 2005 by the 2nd Defendant herein expressing its decision on the boundary dispute between the parties.

44. That it was not in dispute as to the proprietorship of parcels No. Nyandarua /Wanjohi/249 and Nyandarua /Wanjohi/250 which parcels of land were acquired in the year 1963 from the settlement Fund Trustee wherein titles were issued in the year 1989 and 1987 respectively. Both parties had lived harmoniously on their respective parcels of land until after the demise of the proprietor of land parcel No 249 when his estate had discovered in 1999 the anomalies in the measurements of both parcels of land.

45. That pursuant to the lodging of the boundary dispute with the Land Registrar and further pursuant to the delivery of the ruling on the 12th June 2005, the Plaintiff had failed to lodge an appeal to the High Court within 30 days as stipulated in the decision, but had instead elected to file the present suit.

46. The Defendant thus framed their matters for determination as follows:

- i. Whether the Nyandarua District Land Registrar had the requisite original jurisdiction to hear and determine the boundary dispute between the parties herein resulting into the ruling delivered on the 12th June 2005.
- ii. Whether the Plaintiff herein appealed against the ruling delivered on the 12th June 2005 or the instant suit is res judicata the 2nd Defendant's ruling of 12th June 2005.
- iii. Whether the Plaintiff's case is fatally defective and lacks in form to warrant dismissal of the same.
- iv. Whether the Plaintiff has proved his case to the required standard on a balance of probabilities so as to warrant granting of the orders sought.

47. On the first issue, it was the 1st Defendant's submission and while relying on the case of **Owners of Motor Vessel Lillian S' vs Caltex Oil (Kenya) Limited (1989) KLR 1** that indeed the District Land Registrar had the first jurisdiction to hear and determine the issues raised before it which led to the ruling of 12th June 2005, a ruling which was informed by the provisions of Section 22 of the Registered Land Act (now repealed) which was the law at the time the 2nd Defendant carried out the exercise that gave rise to the present issue.

48. That the Defendant had filed their notice of Preliminary Objection pursuant to the contents of paragraph 9 of their statement of defence, hence it was incumbent for the said objections to be heard and determined before delving to the substantive issues raised therein.

49. It was their submission that pursuant to Section 18 of the Land Registration Act the court could not entertain any action or other proceedings relating to a dispute on the boundaries of the registered land unless the boundaries have been determined in accordance with this section.

50. The 1st Defendant's submission further was that the present suit had been filed on the 5th September, 2005 which was 20 years after the 1st Defendant had occupied the suit parcel of land. That by virtue of the provisions of Section 7 of the Limitation of Actions Act, the current suit was barred as the same was brought to recover land after the expiry of 12 years from the date from which the right of action accrued. No explanation had been tendered by the Plaintiff as to why the suit was filed in violation of the provisions of the law.

51. On the second issue for determination, it was the 1st Defendant's submission and while relying on the case of **Gerald Mwangi Kaguria vs Borad of Governors St Mary Karuthi Sec School & Another [2018] eKLR** that since he failed to appeal to the Chief Land Registrar in the prescribed form on the ruling delivered on the 12th June 2005, the said ruling ought to be upheld and implemented.

52. On the third issue, it was their submission that vide the present plaint, the Plaintiff herein sought to challenge the decision of the 2nd Defendant delivered on the 12th June 2005 which decision had favored him. That the 2nd Defendant being a state organ whose mandate and function at arriving at the said ruling was premised on the provisions of Sections 22, 23, and 24 of the Registration of Land Act (repealed), the Plaintiff's first port of call when he was aggrieved would have been either to file a Judicial Review application or an Appeal as per the provisions of Section 150 of the Registered Land Act.

53. That the filing of a fresh suit as was done in the present case, was in violation of the provisions of both Sections 7 of Fair Administrative Actions Act and Section 7 of the Civil Procedure Act respectively. The 1st Defendant hence prayed that the Plaintiff's suit to be dismissed with costs to the 1st Defendant.

Analyses and Determination.

54. I have considered the evidence adduced in court as well as the submission by counsel and the applicable law herein. From the summation of the same, I find matters for determination as being:

- i. Whether the Land Registrar's finding and ruling of 12th July 2002 complied with the provisions of Section 21(2) of the Registered Land Act.
- ii. Whether the court has jurisdiction to hear the matter before it.
- iii. Whether the Plaintiff is entitled to the orders sought.

55. The evidence on record is clear to the effect that parcels of land No. Nyandarua /Wanjohi/249 and Nyandarua /Wanjohi/250 border each other and were registered under the Registered Land Act (now repealed) in the names of the deceased Francis K. Mwai and Esther W. Kirii respectively.

56. That both the deceased Plaintiff and Defendant herein had been occupying their respective parcels of land since the allotment by the Settlement Fund Trustee in the year 1963 wherein they had registered their land in the year 1989 and 1987 respectively.

57. That following the death of the deceased Plaintiff in the year 1993, his estate sought to subdivide the suit land and called in surveyor to carry out the exercise in the year 2003. That it had been in the cause of this exercise, that they had discovered that land No. Nyandarua /Wanjohi/250 had encroached into land No. Nyandarua /Wanjohi/249 by approximately 6 acres. The Plaintiff's land No. Nyandarua /Wanjohi/249 had thus been reduced by 6 acres.

58. On the first issue for determination, I find that upon the discovery of an anomaly on the acreage of the their respective parcels of land, the Plaintiff herein had referred the dispute to the Land Registrar for determination as a boundary dispute pursuant to the provisions of Section 21 of the Registered Land Act, Cap. 300, Laws of Kenya (now repealed). The hearing was conducted on the 5th April 2005 in the presence of the parties being Stanley Theuri Kihungi and Esther Wairimu Kirii . In his deliberation and finding dated the 12th July 2005, the Land Registrar had stated as follows:

The Chief Land Registrar one (sic) in one of his practice instructions to the land Registrar on boundary disputes has stated- among other things that a map (RIM) is not per se an authority on boundaries-he went further and had the same message inscribed on the map. I have read the message to the parties.

My ruling is that the disputed portion of land belongs to Esther Wairimu (Owner P/No. 250) –the complainant should desist from claiming it. This part of the land has all the time has been occupied by Esther- the Development Map also shows the land as belonging to P/No.250 (Esther's land)

The Map should be amended to correspond with the manner the parties have been occupying their lands since land allocation was done by the Settlement Fund Trustees.

The aggrieved party allowed 30 days appeal period to the high court.

59. Section 21 (2) of the Registered Land Act stipulates as follows:

Where any uncertainty or dispute arises as to the position of any boundary, the Registrar, on the application of any interested party, shall, on such evidence as the Registrar considers relevant, determine and indicate the position of the uncertain or disputed boundary. (Emphasis mine)

60. Pursuant to the said finding, the Plaintiff herein had filed suit at the Nakuru the High Court on the 10th August 2005, which plaint was amended on the 21st February 2008 and on 30th August 2012.

61. At paragraph 7 of the pleadings, the Plaintiff had stated that he was appealing against the said ruling of 12th July 2005 which was in express contravention of the power granted to the Land Registrar by virtue of Section 21 of the Registered Land Act. He therefore sought for a declaration that he was the rightful owner of the 6 acres of plot No. 249.

62. Clearly from the above findings by the Land Registrar, there was no disclosure of the position of the disputed boundary. What comes out clearly was that his finding was based on the "occupation of the parties since the land allocation by the Settlement Fund Trustees". Indeed the said finding did not *determine and/or indicate the position of the uncertain or disputed boundary. Instead it was bent on the determination of proprietorship of the parcels of land in dispute.*

63. It was the statutory duty of the Registrar to determine and indicate the position of the uncertain or disputed boundary. I therefore find that the Land Registrar abrogated the duty placed upon him by the provision of section 21(2) of the Registered Land Act.

64. On the second issue on jurisdiction, the court of Appeal in the case of **Owners of the Motor Vessel "Lilian "S" v. Caltex Oil (Kenya) Ltd [1989] KLR1** held as follows:

“...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

65. The suit properties herein were registered under the Registered Land Act (Cap 300) which was repealed upon the passage of the **Land Registration Act, 2012**.

66. Section 18 of the Land Registration Act stipulates as follows:

Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.

(2) The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.

(3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary:

67. Section 19 of Land Registration Act, 2012 is clear that the duty to fix boundaries to registered land is vested in the Land Registrar. It provides as follows:

(1) If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.

2) The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.

(3) Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section.

68. By virtue of Sections 18 and Section 19 of the Land Registration Act, the Land Registrar is empowered to fix boundaries.

69. That the provisions of **Section 18 (2) of the Land Registration Act** shows clearly that the court is without jurisdiction on boundary disputes of registered land until after the land Registrar's determination on the same has been rendered.

70. Section 21(4) of the Land Registration Act Cap 300 (now repealed) deprived this Court the power to entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided in that section.

71. Section 18(2), the Land Registration Act, 2012, similarly prohibits this Court from entertaining any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided in that section.

72. In relation to that section, the Court of Appeal held as follows in **Wamutu vs Kiarie (1982) KLR 480** ;

“Section 21(4) of the Registered Land Act provides that the court has no jurisdiction to hear a matter relating to boundary disputes or registered land, unless the boundaries have first been determined by the Land Registrar. The court, in this instance, had no inherent power to hear and determine the suit because Section 21(4) of the Registered Land Act (Cap 300), deprives it of jurisdiction.”

73. The jurisdiction of this Court flows from Art 162(2) (b) of the Constitution as read with the provisions of section 13(2) of the Environment and Land Act. The latter provides as follows;

“In exercise of its jurisdiction under Article 162(2) (b) of the Constitution, the Court shall have power to hear and determine disputes—

a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

b) relating to compulsory acquisition of land;

c) relating to land administration and management;

d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable

interests in land; and

e) any other dispute relating to environment and land

74. For avoidance of doubt Section. 13 of the Environment and Land Act in my view does not oust the jurisdiction of the court to determine boundaries. However when it comes to general boundaries section 18(2) of the Land Registration Act provides in mandatory terms that the dispute should be submitted to the Land Registrar.

75. It is only after the Land Registrar had determined the dispute that the matter was escalated to this Court, following which the court, on the 12th November 2013 directed that a land surveyor do visit the suit land and file his report thereafter.

76. *Section 86 (1) of the Land Registration Act 2012* is wide in scope in that apart from the Registrar, it also allows **“any aggrieved person”** to seek the opinion of the Court. It reads:

“If any question arises with regard to the exercise of any power or the performance of any duty conferred or imposed on the by this Act, the Registrar or any aggrieved person shall state a case for the opinion of the Court and thereupon the Court shall give its opinion, which shall be binding upon the parties”

77. I find that this court has the jurisdiction to determine the said suit.

78. Having found that the court is clothed with jurisdiction, I shall now look at the merit of the case which will cover the third issue for determination.

79. Pursuant to the filing of the present suit, the court on the 12th July 2013 directed the surveyor to file his report in court within 60 days wherein a report dated the 16th September 2013 was filed but the same went missing from the court file. This prompted the Plaintiff to file an application dated the 13th November 2013 to have the surveyor resubmit another report.

80. Not only was this done, but the surveyor also testified on the same on the 8th October 2014, but again the proceedings on his testimony are missing from the court file.

81. By consent however, during the testimony of the Plaintiff, the surveyor’s report and the 2 Maps accompanying it were tendered in evidence as Plaintiff’s exhibit 3(a-c)

82. The said report described the equipment that was used to carry out the survey on the disputed parcels of land and had an attachment of two diagrams showing the encroachment area.

83. The said maps tally with the map of the Wanjohi settlement scheme attached to the Defendants, pleadings.

84. It is not in dispute that both diagrams/Maps show that the land in dispute has what seems to be fixed beacons (boundaries).

85. At the conclusion of the exercise, the surveyor, formed his opinion as follows;

‘As per the RIM, parcel No. 250 has encroached into parcel No. 249 by 2.10 Ha (approx).’

86. The findings of the Surveyor that the position of parcel No. 250 compared with the parcel No 249 agrees reasonably with the Registered Index Map which also confirmed the fact that there was encroachment on parcel No 249 by approximately 2.10 Hectares by parcel No. 250.

87. Indeed, the law recognizes the fact that the Registered Index Maps only indicate the approximate boundaries and the approximate situation on the ground (see Section 18 (1) of the Land Registration Act). However I find that the surveyor herein, used the correct methodology in determining the boundaries in the suit parcels of land in dispute between the Plaintiff and the Defendant.

88. It thus emerged from the evidence on record, and the Surveyor’s report dated 16th September 2013, that the Defendant had encroached into the Plaintiff’s land.

89. The Defendant on the other hand chose not to adduce any evidence in her defence but to file her submissions instead which submission were a mere denial not backed by any evidence, to the effect that she had not in any way interfered with the Plaintiff’s land.

90. The Oxford Dictionary defines a boundary as

“A line which marks the limits of an area; a dividing line

91. The issue that the parties had placed before the Land Registrar was that of determining the boundary between the two parcels of land within the meaning of section 21 of the repealed Registered Land Act. However upon consideration of the surveyor’s report, the evidence on record as well as the acreage depicted on title deed herein produced as Pf exhibit 2, I find that the dispute between the two parties entailed a substantial reduction, on the ground, of the size of one parcel, and corresponding increment of the size of another by 6 acres. This was

therefore a land claim for a chunk of land, which in my humble opinion, was beyond the jurisdiction of the Land Registrar, as it was not merely a boundary dispute but trespass, encroachment or invasion of land.

92. The remedy for the Plaintiff's complaint therefore lay elsewhere other than before the Land Registrar as per the provisions of *Section 21* of the repealed Registration Land Act. I therefore believe that the Plaintiff's recourse thus lay directly to court as established under Article 162 of the Constitution.

93. There being sufficient evidence on record to prove that the Defendant had encroached into the Plaintiff's land, I find and hold that the Plaintiff has proved his case against the Defendant on a balance of probabilities. I accordingly enter judgment in favour of the Plaintiff as against the Defendant in the terms as prayed.

94. Further orders are that the Defendant shall vacate the 6 acres of plot No. 249 within 30 days upon delivery of this judgment failure to which an order of eviction shall be issued against him.

Dated and delivered at Nyahururu this 7th day of May 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE