

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KITALE**  
**ELC NO. 169 OF 2007**

**MARY MUTHONI**  
**MBUGUA-----PLAINTIFF**

**VERSUS**

**LILIAN WANGARE MBUGUA-----1<sup>ST</sup>**  
**DEFENDANT**

**SARAH JEPTPKENY BUSIENEI-----**  
**2<sup>ND</sup> DEFENDANT**

**EMILY JEPKEMBOI MUTWOL-----3<sup>RD</sup>**  
**DEFENDANT**

**AND**

**MESHACK KIMUTAI KETEL-----**  
**INTERESTED PARTY**

**JUDGMENT**

1. By a further amended plaint dated **14/1/2026**, the plaintiff seeks:
  - (a) **Declaration that the 3<sup>rd</sup> defendant has encroached onto her Parcel No. Chepsiro/Kibuswa Block 1/Kelchinet/200, hereinafter the suit land, and wrongfully occupied 15 acres or so.**
  - (b) **An order directing the County Surveyor and Land Registrar, Trans Nzoia, to re-establish on the ground the boundary between the suit land and Parcel No. Chepsiro/Kibuswa Block 1/Kelchinet/137,**

using the relevant Registry Index Map (RIM).

(c) **Permanent injunction restraining the 3<sup>rd</sup> defendant from future encroachment beyond the re-established boundary between the two parcels of land.**

(d) **Kshs.2,160,000/= loss of user for 12 years up to 2018, and a further sum of Kshs. 180,000/= p.a., with effect from 2019 until the date of judgment.**

2. The plaintiff contends that until **31/5/2012**, she was the absolute registered owner of Title No. **Chepsiro/Kibuswa Block 1/Kelchinet/136**, whereas the 1<sup>st</sup> defendant was the owner of land title **No. Chepsiro/Kibuswa Block 1/Kelchinet/137**, until **11/5/2006**, both parcels measuring **20.2 Ha (48.894 acres)**, having been resultant subdivision through partition of parcel **No. 117**, belonging to the father of the plaintiff and the 1<sup>st</sup> defendant, who shared a common boundary, which parcels were perfected on **14/1/1997**.

3. The plaintiff avers that on or about **2006**, the 1<sup>st</sup> defendant encroached onto her land, established a new boundary between the two, to the extent of having off **15 acres** thereof, to which she engaged the services of both the District Surveyor and the

Land Registrar to re-establish the boundary, but the 1<sup>st</sup> defendant became non-cooperative, prompting the filing of the suit.

4. The plaintiff avers that, unknown to her, during the time of the alleged encroachment in **2006**, the 1<sup>st</sup> defendant sold and transferred parcel **No. Chepsiro/Kibuswa Block 1/Kelchinet/137** to the 2<sup>nd</sup> defendant, obtained a title deed on **11/5/2006**, and took possession of **15 acres** comprised of her land, previously encroached upon by the 1<sup>st</sup> defendant.
5. The plaintiff avers that again, unknown to her, the 2<sup>nd</sup> defendant, by an agreement dated **17/4/2007**, sold the said land to the 3<sup>rd</sup> defendant, obtained a title on **31/4/2011**, of the land comprised in title **No. Chepsiro/Kibuswa Block 1/Kelchinet/137**, inclusive of the encroached **15 acres** or so, which remain as an offensive and unlawful occupation of the plaintiff's land.
6. The plaintiff avers that on or about **2013**, she subdivided her land into three parcels, namely **Chepsiro/Kibuswa Block 1/Kelchinet/198, 199,** and **200**, measuring **10.12 Ha, 4.04 Ha,** and **6.07 Ha** respectively, with the latter sharing a common

boundary with the 3<sup>rd</sup> defendant. The plaintiff avers that due to the encroachment, the common boundary between parcel No. **137** and **200** as per Registry Index Map, is not the boundary between the two parcel on the ground as **15 acres** or so comprised of parcel No. **200**, have been encroached by the 3<sup>rd</sup> defendant, which the plaintiff terms as illegal, and as per the RIM, should be re-established and the 3<sup>rd</sup> defendant be ordered to confine herself with her parcel No. **137**.

- 7.** The plaintiff avers that a conservative lease consideration of **Kshs.10,000/=** per acre, per year, would yield an income of **Kshs.180,000/=** per annum, hence the loss of a user of **Kshs. 2,160,000/=** for **12** years is claimed.
- 8.** The court record shows that upon service with the plaint and summons, the 1<sup>st</sup> defendant entered an appearance by a memorandum of appearance dated **12/11/2008**. An amended plaint was filed to introduce the 2<sup>nd</sup> defendant, dated **17/11/2009**, and a summons dated **17/11/2009** was extracted and served through registered post.
- 9.** The court record shows that an order was issued on **19/11/2012** for the Land Registrar and Surveyor to

visit parcels No. **136** and **137** to determine the boundary. Proceedings thereof were conducted by the two officers, who forwarded a report to the court dated **12/4/2013**.

- 10.** By an order dated **12/9/2013**, the court adopted the report as an order of the court. By an order dated **28/11/2013**, the provincial surveyor is to survey and ascertain the exact acreage over the two parcels and a report be filed before the court. The record shows that the 2<sup>nd</sup> defendant filed a notice of appointment dated **4/11/2013**.
- 11.** The 3<sup>rd</sup> defendant, by a statement of defence and counterclaim dated **4/3/2019**, strongly denied the alleged trespass. The 3<sup>rd</sup> defendant averred that she lawfully and procedurally purchased parcel No. **Chepsiro/Kibuswa Block 1/Kelchinet/137** for value from the 2<sup>nd</sup> defendant.
- 12.** The 3<sup>rd</sup> defendant averred that she bought the suitland as was identified on the ground marks, boundaries, and fences shown to her, being no dispute, she purchased the land and obtained a title deed, whose acreage is similar to parcel **No. 136**.
- 13.** The 3<sup>rd</sup> defendant averred that the land she bought was and remains clearly demarcated from the

plaintiff's land and hence she has never encroached onto the said land as alleged or at all. The 3<sup>rd</sup> defendant averred that pursuant to the court order dated **19/11/2012**, the surveyor carried out a survey as per the implementation of the court order and filed a report on **16/4/2013**, confirming that parcels **No. 136** and **137** measure **20.2 Ha** each, making the suit an abuse of the court process.

- 14.** Further, the 3<sup>rd</sup> defendant averred that the subdivision of the plaintiff's land during the pendency of this suit was both malicious and designed to be unjust; otherwise, she has not committed any alleged trespass, and insisted that the suit discloses no known cause of action against her.
- 15.** By way of a counterclaim, the 3<sup>rd</sup> defendant avers that the initial land, measuring **1,000 acres**, belonged to the plaintiff's and the 1<sup>st</sup> defendant's late father, from which several parcels of land were created from parcel **No. 120** up to **137**, which borders the river, out of which the resultant subdivision by the surveyor were demarcated, beacons, boundaries and marks clearly established and each party settled on their parcels.

- 16.** The 3<sup>rd</sup> defendant averred that she purchased plot **No. 137** for value from the 2<sup>nd</sup> defendant, as identified on the ground marks, shown boundaries and fences, since there was no dispute or restriction against the land she purchased and the title issued to her in **2011**. The 3<sup>rd</sup> defendant avers that at the plaintiff's application, the court ordered that a surveyor visit the parcels, and according to the report dated **16/4/2013**, it confirmed the acreage of each party, making the suit malicious, ill-conceived, and unjust.
- 17.** The 3<sup>rd</sup> defendant counterclaims for a permanent injunction restraining the plaintiff, her agents, servants, and assignees from interfering with her possession of land title No. **Chepsiro/Kibuswa Block 1/Kelchinet/137**, special and general damages.
- 18.** At the trial, **Mary Muthoni Mbugua** testified as **PW1**. She relied on a witness statement dated **3/5/2019**. Her testimony was that she owned title No. **136** while her sister owned parcel No. **137**, and that they were a subdivision of parcel No. **117**, initially owned by their late father, Nahashon Mbugua.

- 19.** PW1 told the court that her sister had encroached on her land with effect from **2006**, her land by approximately **15** acres, without her knowledge, before she sold and transferred the same in **2007** and **2011**, respectively, to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.
- 20.** PW1 said that in **2013**, she caused her land to be subdivided into three portions, **Nos. 198, 199, and 200**. The latter now borders the 3<sup>rd</sup> defendant's land. PW1 said that the exact locality of each of the three parcels in dispute in relation to their boundaries, as per the RIM, compared to the ground, is different. PW1 termed the encroachment onto her land by the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> defendants as unlawful and unjustified. PW1 said that she had suffered a loss due to the encroachment; otherwise, the land, if it were under lease per year, would have fetched her **Kshs. 2,160,000/=** for **12 years**.
- 21.** PW1 relied on copies of: the title for parcel No. **136**, No. **137**, green cards for parcel No. **136** and **137**, a surveyor's report brought to court on **16/4/2012**, a mutation form, an agreement dated **17/4/2007**, a surveyor's report dated **3/9/2018**, as **P. Exhibits No. (1), (2), (3), (4), PMFI(5), (6), and (7)**.

- 22.** In cross-examination, PW1 told the court that after the surveyor subdivided the land following succession proceedings, boundaries between parcels **No. 136** and **137** were established, after which each of them took vacant possession of the respective parcels, which had a common boundary as set by the surveyor, though the same on the ground had not been fixed.
- 23.** PW1 said that for the **10 years** her land was alleged to have been encroached, she never lodged a caution, nor was she aware when her sister sold the land twice. Shown **PMFI-(5)**, PW1 said that the boundary only exists on the RIM, but not on the ground. PW1 said that she was aware of where the boundary was since **1997**, which the 1<sup>st</sup> defendant interfered with in **2000**. PW1 said that between **1997** and **2007**, she was the one utilising her land with no dispute as to its boundary and acreage. PW1 said that parcel **No. 200** is **6.07 Ha**, and which 3<sup>rd</sup> defendant was encroaching out.
- 24. Simiyu Edmund David Wekesa**, a Land Surveyor, testified as **PW2**. He told the court that in **2018**, the plaintiff instructed him to go and establish the acreage of parcels No. **198, 199, and 200** as per the

RIM. PW2 said that using the RIM, he was able to pick the boundaries between parcels No. **198** and **199** since there is an existing road in between. Regarding parcels No. **200** and **137**, PW2 said that there is no existing boundary as the entire area has a maize plantation from the boundary of parcel No. 199 toward the river. He produced **PMFI-(5)** as **P. Exhibit No. (5)** dated **3/9/2019**.

- 25.** PW2 confirmed that there exists no defined boundary on the ground between parcels No. **173** and **200**. PW2 said that there are general boundaries with no beacons and ought to have hedges, posts, and wire in between.
- 26.** PW2 said that without the defined boundary on the ground between the two parcels, he was unable to ascertain the exact acreage of the two parcels of land. PW2 said that parcel No. **137** goes all the way to the river as per **PMFI-(6)**. PW2 said that, going by the RIM, if there was a boundary dispute, the Land Registrar would be able to resolve the issue.
- 27.** Further, PW2 said that the acreage and the area of parcels No. **200** and **137**, as per the title deed, should have arisen from the mutation form that was used in partitioning the initial parcel of land. PW2

said that the defined boundary between the two plots must have been tampered with.

- 28. Boaz Onduso** testified as **PW3**. He produced the RIM for parcels **No. 197, 198, 199, 200, and 137** as published and authenticated by the Director of Surveys of Kenya on **10/12/2025**, namely on **PMFI-(6)** as **P. Exhibit No. (6)**. According to him, there is an access road between parcels No. **198** and **199** to access parcel No. **136**, and at the end of parcel No. **200**. PW3 said that between parcels **No. 137** and **200**, there is a clear boundary.
- 29. Emily Mutwol** testified as **DW1**. She relied on a witness statement dated **9/5/2019** as her evidence-in-chief. DW1 told the court that she is the registered owner of land title No. **Chepsiro/Kibuswa Block 1/Kelchinet/137** measuring **20.2 Ha**, which she bought from the 2<sup>nd</sup> defendant, after she had acquired it from the 1<sup>st</sup> defendant, who is a sister to the plaintiff.
- 30.** DW1 said that the two parcels had been inherited from the land of their late father, measuring over **1000**, which created several parcels of land from **No. 120 -137**, which borders a river. DW1 said the parcels **No. 136** and **137** were each **20.3 Ha** in size.

DW1 said that she bought the land from the 2<sup>nd</sup> defendant after being shown the boundaries, which had no dispute with anyone or a prohibitory order registered over the title register.

- 31.** DW1 said that she followed all the procedures to acquire the land before it was transferred to her. DW1 said that a surveyor had visited her land at the time of purchase, and was shown the boundaries and clear marks as demarcated before she took vacant possession to date.
- 32.** DW1 said that after the court order, the surveyor visited the land and compiled a report dated **12/4/2018**, in her absence. Aggrieved by that report, DW1 said that it was when she moved the court to join the suit. DW1 termed the subsequent subdivision of parcel No. **136** and the sale of some portion during the pendency of the suit as irregular.
- 33.** DW1 said that the official search certificate of parcel No. **199** shows that the land now belongs to Joel Chepkwony. DW1 denied any encroachment on the plaintiff's land, for she rightfully occupies what belongs to her.

- 34.** DW1 said that her parcel borders the riparian area of the river and that beacons were placed at the highest point as provided by the survey. DW1 said that approximately **10 acres** of her land is swampy, being an extension of a riparian land.
- 35.** Further, DW1 said that the plaintiff intended to get hold of the riparian land; otherwise, her land would remain **20.20 acres** as demarcated initially. DW1 said that she has no problem if the plaintiff can cross over and take up the riparian land, so long as her land remains **50 acres**.
- 36.** DW1 termed the suit as malicious out of the differences between the 1<sup>st</sup> defendant and the plaintiff, which hatred should not be visited upon her, as an innocent purchaser, to be denied her right to peaceful enjoyment of the land she rightfully acquired. DW1 relied on a copy of her title as **D. Exhibit No. (1)**.
- 37.** In cross-examination, DW1 said that she bought the land in **2010** and thereafter obtained her title deed on **21/4/2011**, without knowledge that there was an existing suit. DW1 did not produce the paper trail towards her acquisition, including the sale

agreement, before the court, the surveyor's report, before purchasing the land.

- 38.** DW1 said that she bought the land measuring **50 acres**, whose immediate neighbour was Joel Chepkowny. DW1 said that as per **P. Exhibit No. (6)**, Joel Chepkwony owns parcel No. **199** as per the official search certificate dated **1/5/2019**.
- 39.** DW1 was unable to tell where parcel No. **200**, shown in the map as existing between her land and parcel No. **199**, is on the ground. In re-examination, DW1 said that she took vacant possession of **50 acres** upon purchasing it in **2010**.
- 40.** The plaintiff relies on a written submission dated **12/3/2026**, isolating five issues for the court's determination. On encroachment, the plaintiff submits that the burden under **Sections 107** and **108** of the Evidence Act is on her to prove the same. It is submitted that by the time land parcel No. **137** was sold to the third parties, it was bigger than **20.2 Ha**, while her land has a shortfall of **15 acres**, such that after she has subdivided her land into three parcels, parcel No. **200** measuring **6.07 Ha** remains non-existent on the ground.

- 41.** From the testimony tendered, the plaintiff submits that what is supposed to be parcel No. **200** on the ground is fully occupied by the 3<sup>rd</sup> defendant, who says she bought the land on **21/4/2011**. The plaintiff submits that the 3<sup>rd</sup> defendant has not produced any sale agreement, as well as the surveyor's report at the time she took possession of the land, or the interested party. The plaintiff submits that the interference is that it is more likely than not that the size of the land in the sale agreement is bigger than **20.2 Ha**.
- 42.** The plaintiff submits that, though the 1<sup>st</sup> defendant alleges to have sold the land to the 2<sup>nd</sup> and 3<sup>rd</sup> defendant, she is still the one utilising the land. The plaintiff submits that the 3<sup>rd</sup> defendant confirmed from the RIM that parcel No. **200** does not exist on the ground, and hence was part of parcel No. **137**, going by the evidence of PW2.
- 43.** The plaintiff submits that her parcel measuring **6.07 Ha** has, since **2006**, been taken up by the 1<sup>st</sup> defendant, hence depriving her of the user rights to the entitlement to special damages of **Kshs.3,600,000/=** for the last **3** years of illegal occupation. Reliance is placed on **Kenya Power and**

**Lighting Company -vs- Ringera [2022] KELCA 104 [KLR] (4<sup>th</sup> February 2020) (Judgment).**

44. The issues calling for determination are:
- (1) If the plaintiff has proved trespass of her land by the defendants to the extent of 15 acres.**
  - (2) If the plaintiff is entitled to the re-establishment of the ground boundary between Parcels No. 137 and 200.**
  - (3) If the plaintiff has pleaded and proved loss of user for 12 years.**
  - (4) If he 3<sup>rd</sup> defendant has proved the counterclaim to be entitled to the reliefs sought.**
  - (5) What is the order as to costs?**
45. The law on trespass to land was recently discussed in **Mohamed -vs- Board of Management Patrose Community School & Another Civil Appeal No. E136 of 2023 [2026], KECA 501 [KLR] (13<sup>th</sup> March 2026) (Judgment).**
46. The court said that trespass is the unlawful intrusion by a person upon the land of another who is in possession and ownership thereof. The court cited *Clerk & Lindsell on Torts 21<sup>st</sup> Edition, page 1345*, that trespass occurs where there is entry into another person's land without the consent of the owner or

lawful justification. The court held that there must be a physical entry onto the land of another, and such entry must be without the permission of the land owner or without any reasonable or lawful excuse.

- 47.** In citing with approval in the **Church Commissioners for Kenya of the Anglican Church of Kenya -vs- Wayuga [2024] KECA 1048 [KLR]**. The court said that for a claim of trespass to be founded, the person alleging trespass must demonstrate a valid proprietary interest in the land in question.
- 48.** It is trite law that where there are two competing claims over the same piece of land, each party must bring evidence supporting his or her root of title, and establish an unbroken chain of acquisition.
- 49.** **Article 40** of the Constitution and **Section 26** of the Land Registration Act only offer protection to titles whose acquisition was regular, procedural, formal, and obtained free of any irregularities or encumbrances, including those not captured on the title register.
- 50.** The burden of proof is on the one who alleges the existence of certain facts on which he wants the

court to find his right or liability under **Sections 107 - 112** of the Evidence Act.

- 51.** To establish a violation of ownership rights in trespass, the claimant must prove immediate exclusive possession and wrongful entry, or occupation without justification or valid reason. See **Kenya Power and Lighting Company -vs- Ringera** (*supra*) and **M'Mukanya -vs- M'Mbijiwe** **[1983] eKLR**.
- 52.** Survey reports and cadastral maps play a major role in resolving land disputes, especially trespass claims. In this case, there is no dispute that parcel **Nos. 136** and **137** were the resultant subdivision of the portion of land title No. **Chepsiro/Kibuswa Block 1/Kelchinet/117**, going by the copy of title for parcels No. **136** and **137**, opened on **14/1/1997**, measuring **20.2 Ha**, falling under RIM No. **(1)**. After the suit was filed, an order dated **19/11/2012** was issued to the Land Registrar and Surveyor to determine the boundary. A report dated **10/4/2013** was availed before the court.
- 53.** The findings were that parcel No. **137** borders the river and neighbours parcel No. **118** and had encroached to the extent of **10 acres** into parcel No.

- 136.** The surveyor found that the acreage of parcel No. **137** was in excess of approximately ten acres.
- 54.** The Land Registrar's report, on the other hand, attached a boundary dispute letter dated **7/3/2013**. The Land Registrar report confirmed that the 1<sup>st</sup> defendant had transferred the land to the 3<sup>rd</sup> defendant on **21/4/2001**, when the buyer was not aware of the boundary dispute. The two plots were found to be on equal acreage.
- 55.** The copy of the title for parcel **No. 136** shows that the plaintiff became the registered owner on **14/1/1997** and collected a deed on **12/6/2006**, while the 1<sup>st</sup> defendant obtained hers on **30/1/1997**. From the evidence, the plaintiff had paid **Kshs. 18,000/=** for the land boundary dispute vide receipt **No. 5290975** on **1/3/2006**, and after the 1<sup>st</sup> defendant was summoned, she refused to attend the same. This was before the 2<sup>nd</sup> defendant became the registered owner, taking up a larger part of the plaintiff's land on the ground that was on the title register.
- 56.** In the sale agreement dated **17/4/2007**, between the 2<sup>nd</sup> and the 3<sup>rd</sup> defendants. Clause No. **3** states that the suit property was being sold free of

encumbrances. Already from the court record, the 1<sup>st</sup> defendant had been served with a summons to enter an appearance and instructed counsel to come on record on **12/11/2008**.

**57.** In a replying affidavit sworn on **10/10/2016**, the 3<sup>rd</sup> defendant swore that he visited the land before the purchase and identified boundary marks and fences.

**58.** DW1 in the said affidavit, her witness statement, and before this did not state the name and the details of the surveyor she was with when viewing the land or at the taking of vacant possession. If at all, the issue of boundary dispute was a non-issue, as pleaded in paragraph **4** of the defence that there was no dispute over the land or restriction to that effect when she acquired the land.

**59.** In my view, that fact cannot be true in view of the boundary dispute letter aforementioned and a caution as per entry No. **6** in the copy of records of the title register for parcel No. **137** registered by the plaintiff herein after the 2<sup>nd</sup> defendant became the registered owner on **11/5/2006**. So, the 2<sup>nd</sup> defendant knew of the encumbrance and adverse claim by the plaintiff. The concept of buyer beware comes into play.

- 60.** Equally, by **12/11/2009**, the 2<sup>nd</sup> defendant was already a party to this suit, and therefore, by the time she transferred the land to the 3<sup>rd</sup> defendant on **21/4/2011**, as per entry No. **8**, in the copy of the register, there were known adverse claims of the plaintiff by both the 1<sup>st</sup> and 2<sup>nd</sup> defendants.
- 61.** Indeed, in the supporting affidavit of the 3<sup>rd</sup> defendant, sworn on **4/11/2013**, to review the orders to the Land Registrar and surveyor, she admitted purchasing the land on **17/4/2007** as per the sale agreement annexed as **EJ-(1)** and becoming the registered owner as per annexure **EJ-2(a)** and **(b)** and taking possession with the knowledge of the plaintiff. In that affidavit, the 3<sup>rd</sup> defendant swore on oath that the survey report should have taken into account the wetland area, which, according to her, did not form part of her land title.
- 62.** Following the 3<sup>rd</sup> defendant's application, an order was made dated **23/12/2013** for a Provincial Surveyor, Nakuru, to survey and ascertain the exact acreage on the ground of the two parcels, including the area alleged to be covered by the wetland. The report was to be filed within **48** days before the court. The said order was later reviewed by another

one dated **30/1/2014** for the District Land Surveyor, Trans Nzoia, to carry out the exercise.

- 63.** The 3<sup>rd</sup> defendant did not make a follow-up of her order until the court on **25/6/2014** adopted the earlier as part of its records. The 3<sup>rd</sup> defendant swore an affidavit on **10/10/2016** in relation to parcel No. **200**, where she termed herself as an innocent purchaser caught up by wrangles between sisters or a family matter. She admitted that the land survey report, which had been directed at her request, was yet to be filed.
- 64.** After the amendment of **5/12/2018** to bring on board the new changes to parcel No. **136**, the 3<sup>rd</sup> defendant did not plead to the illegality and irregularity of the subdivision to parcel No. **136** and its resultant parcel **Nos. 198, 199, and 200**, or raise any issue in relation to the illegality of the Land Surveyor's and Registrar's report finding encroachment of the former parcel No. **136** of **10 acres**.
- 65.** Equally, the 3<sup>rd</sup> defendant did not plead to any portion of a wetland or riparian land, which should not have been included in her parcel number as per the surveyors and the land registrar's report already on record. the 3<sup>rd</sup> defendant in her defence and

counterclaim did not plead the doctrine of innocent purchaser for value without notice generally, and or plead to the question of obtaining title to the land during the pendency of a suit, which went to the very core of the land she was purchasing or obtaining a title for.

- 66.** By an application dated **30/4/2019**, the 3<sup>rd</sup> defendant swore an affidavit dated **3/4/2019**, admitting that she was not aware of the alleged boundary dispute between the 1<sup>st</sup> defendant and the plaintiff. It after all those developments that the plaintiff filed her list of documents and witness statement dated **3/5/2019** which she has used as her exhibits before this court including the 3<sup>rd</sup> defendant sale agreement dated **17/4/2007**, extracts of the register for **136, 137**, letter No. **136, 137**, survey report dated **16/4/2013**, implementation report, mutation from survey report dated **3/9/1998**, and the RIM.
- 67.** PW2 in his report dated **3/9/2018**, confirmed that parcel No. **137** has encroached upon parcel No. **200**.
- 68.** The 3<sup>rd</sup> defendant did not dispute, oppose, or challenge the production of the RIM published by the Director Survey of Kenya **2021**, produced as **P**.

**Exhibit No. (6).** The 3<sup>rd</sup> defendant in her witness statement did not allude to any due diligence made before purchasing the land as to its correct acreage, boundaries, size, extent, and locality in line with any survey maps, survey reports, and official search at the Land Registrar to rule out any pre-adverse claims before the land was sold and transferred to her. The witness statement and list of documents do not allude to any paper trail, which the 3<sup>rd</sup> defendant obtained from the 2<sup>nd</sup> and 1<sup>st</sup> defendants to acquire the title.

- 69.** The 3<sup>rd</sup> defendant in her witness statement and testimony before the court was extremely silent on all the affidavits alluded to above generally and in particular, as regards the rival report she had sought for and obtained a valid court order for the Land Surveyor and Registrar to revisit the site, to re-ascertain the acreage and boundaries beacons, especially along the alleged wetland and riparian area.
- 70.** The absence of any rival reports and documentation on the acreage, size, boundaries, and encroachment, the court finds that the exhibits produced by the

plaintiff have not been impeached by the defendants.  
See the Ark Limited.

- 71.** In **Jacob Kawti Lumunge -vs- China City Construction Co. Ltd & Others, Mombasa Civil Appeal No. E007 of 2023**, rendered on **27/2/2026**, one of the issues under consideration was the extent of the encroachment on the suit property by the 3<sup>rd</sup> respondent by way of the survey report and whether the land was on a road reserve. The court relied on the topographical cadastral survey map, which indicated the extent of the road, ruling out any encroachment, as the developments were on a road reserve.
- 72.** In **Barmasai -vs- Rono & Others Civil Appeal No. E068 of 2023 [2025] KECA 1489 [KLR] (19<sup>th</sup> September 2025) (Judgment)**, the court said a RIM serves as the primary and authoritative record of land boundaries and parcels, as the definitive document for the Land Registrar and demarcation, which is also used to settle boundary disputes.
- 73.** The court held that a RIM is a crucial cadastral document which usually represents the location and boundaries of land parcels and is an official record

maintained by the Director of Surveys, being an integral part of the land registration and ownership system, which, unlike a title deed, certifies ownership. It provides a geographical context, mapping out the physical existence and the precise location of a property relative to its surroundings, giving a detailed layout of land parcels, their shapes, and boundaries.

**74.** In this suit, the 3<sup>rd</sup> defendant has relied on what she was solely told or shown by the seller as the size, locality, shape, and dimensions of the suit land, which she was purchasing. There is no evidence or any scientific verification of that information as part of due diligence by the 3<sup>rd</sup> defendant. All indications on record are that there was a pending boundary dispute as early as **2006**, lodged with the Land Registrar and Surveyor, who are the custodians of both the land register, green cards, title registers, and survey maps, including RIM. There is no evidence that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants had visited those offices for official inquiries other than relying on the words of the 1<sup>st</sup> defendant.

**75.** In ***Abed -vs- Ali Civil Appeal No. E140 of 2022 [2025] KECA 1323 [KLR] (18<sup>th</sup> July 2025)***

**(Judgment)**, the court cited the doctrine of *nemo dat quod non habet*, that one can only give what he or she has, or can only transfer what he or she owns. Further, the court cited **Macfoy -vs- United African Co. Ltd [1961] 3 ALLER 1169**, that if an act is void, then it is in law a nullity, and that every proceeding which is founded on it is also bad and incurably bad.

**76.** The 3<sup>rd</sup> defendant pleads that she is an innocent purchaser for value without notice. *Black's Law Dictionary 9<sup>th</sup> Edition*, defines such a purchase as one who buys something for value without notice of another claim of the property, and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller of title, one who has in good faith paid valuable consideration for the property without notice of any prior adverse claim.

**77.** In **Kemboi -vs- Macharia & 2 Others Civil Appeal No. 17 of 2020 [2025] KECA 1665 [KLR] 21<sup>st</sup> October 2025** **(Judgment)**, the court said that to be recognized as a *bona fide* purchaser for value, a person must demonstrate three key elements:

**(a)** *That they obtained a valid and legally recognized title.*

**(b)** *That they conducted adequate due diligence to verify the rightful owner from when they acquired a legitimate title.*

**(c)** *They paid genuine consideration for the property.*

**78.** In **Doshi -vs- Chemutat & Others Civil Appeal No. E020 of 2023 [2025] KECA 776 [KLR] (9<sup>th</sup> May 2025) (Judgment)**, the court held that one cannot transfer a better title than what he possesses, more so, since there was evidence that the title of the appellant had been unprocedurally obtained. The court emphasized that allegations of fraud must be specifically pleaded and proved to a standard higher than on a balance of probabilities.

**79.** In **Sehmi & Another -vs- Tarabana Co. Ltd & Others [2023] eKLR**, the court said that the doctrine of an innocent purchaser for value as a defence is successful if the elements of innocence, purchase for value, and a legal estate are demonstrated. The court said that innocence is where a purchaser acts in good faith, purchaser for value is where there is consideration in money or money's worth paid in return for the land, and a legal estate is in reference to a legal estate vis-à-vis an equitable interest. The court said that the absence of

notice is in reference to the existence of an equitable interest in the land and not the incidence of illegality or irregularity of the title in question.

- 80.** Further, the court said that the doctrine of innocent purchaser for value without notice cannot protect a purchaser of an illegally obtained title, especially public land. The court said that the 1<sup>st</sup> respondent was not a bona fide purchaser of the suit land, without notice of an existing equitable interest in the land, given the fact that the 2<sup>nd</sup> respondent was incapable of passing a valid title. The court said that the 1<sup>st</sup> respondent was not a bona fide purchaser of the suit land, without notice of an existing equitable interest in the land, given the fact that the 2<sup>nd</sup> respondent was incapable of passing a valid title.
- 81.** In this suit, the copy of the records is clear that there was in existence a caution mounted against the title register by the plaintiff before the 3<sup>rd</sup> defendant transferred the land. The 2<sup>nd</sup> defendant was also, at the time, aware of a pending suit going by the record alluded to above. The transfer and registration of the title in favour of the 3<sup>rd</sup> defendant took place during the pendency of this suit.

- 82.** *Lis pendens*, as a concept, has the objective of maintaining the status quo of the property in dispute until the suit is determined. It bars the transfer of such property until the conclusion of the matter. In **Cove Investments Ltd -vs- Rono & Others Civil Appl. No. E051 of 2025 [2025] KECA 1089 [KLR] (10<sup>th</sup> June 2025) (Ruling)**, the court held that the assertion that the suit property was transferred *pendente lite* was a pure point of law which touched on the maintainability of the appeal.
- 83.** The court cited *Black's Law Dictionary, 10<sup>th</sup> Edition*, that the doctrine is in common law, defining the jurisdictional power or control acquired by a court over property while a legal action is pending. The court cited *Ex parte Thornton [1967] 2Ch. P. 178*, that as soon as proceedings commenced to recover or charge a specific property, there is a *lis pendens*, the consequence of which is that until the litigation is at an end, neither litigant can deal with the property to the prejudice of the other.
- 84.** The court cited **Jayaram Mudaliar -vs- Ayyaswami AIR 1973 SC 569**, where the Supreme Court of India held that a court has control or dominion over such subject matter outside of the power of the court to

deal with it in accordance with law and thereby render the proceedings infructuous.

- 85.** In this suit, the court record is clear that the 1<sup>st</sup> defendant had been reported to the Land Registrar and Land Surveyor by her sister over encroachment in **2006**. This suit was later filed, and the 1<sup>st</sup> defendant was served with a summons to enter an appearance and other interim orders. Due to a change of title status, the initial plaint has been amended several times to bring on board the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The 3<sup>rd</sup> defendant became the registered owner of the land on **21/4/2011**. This suit was already five years old. There was already a caution on the title by the plaintiff on **4/7/2006**.
- 86. Section 3(2)(c)** of the Judicature Act provides that the doctrines of common law and equity are applicable in Kenya. **Section 106** of the Land Registration Act preserves such a doctrine. See **Naflati Ruthi Kinyua -vs- Patrick Thuita Gachure & Others [2015] eKLR**. The evidence in this suit shows that the 1<sup>st</sup> and 2<sup>nd</sup> defendants were privy to the suit before the transfer of the land occurred to the 3<sup>rd</sup> defendant in **2011**. This means that the 3<sup>rd</sup> defendant cannot invoke the doctrine of

innocent purchaser for value without notice and the adverse claim by the plaintiff over the land she was buying, even if she was not initially a party in the suit at inception.

- 87.** The 2<sup>nd</sup> defendant has not denied that the transfer of the suit property during the lifetime of the suit seems to undermine the judicial process and could lead to a miscarriage of justice or prejudice the plaintiff's claim.
- 88.** In **Mawji -vs- United States International University [1976-80] KLR 229**, the court held that where a litigation is pending, between a plaintiff and a defendant, as to the right of a particular estate, the necessities of mankind require that the decision of the court in the suit shall be binding, not only on the litigating parties, but also on those who derive title under them by alienating pending the suit whether such alienees had or had no notice of proceedings and if that were so, there could be no certainty that the proceedings could ever end.
- 89.** A party who purchases a property or invests in it while a suit is pending does so at his own risk, notwithstanding the absence of an injunctive order registered against the title. See **Abdalla Omar**

**Nabhan -vs- Executor of the Estate of Saad Bin Abdalla Bin Aboud & 2 others [2013] KEELC 104 (KLR).**

- 90.** In **Marete -vs- Ndegwa & Others Civil Appeal No. E042 of 2021 [2024] KECA 545 [KLR] (24<sup>th</sup> May 2024) (Judgment)**, the court said that while the parties are automatically duty-bound to preserve the property during the pendency of active proceedings, the same cannot be said of fresh proceedings that have just been filed and whose prosecution is yet to begin. The court said that the doctrine, unlike in India, where there is an active stay of dealings, is imposed automatically and sets in upon the active proceedings of the suit.
- 91.** Further, the court said that the cardinal and indispensable requirement flowing from **Section 52** of the repealed Indian Transfer of Property Act is that, the transfer or dealing of the property, which is subject to a proceeding in court, where it is carried out by a party to the proceedings, the clause refers to the disability of such a party to transfer or otherwise deal with the property, pending adjudication. The court said that this embargo is

intertwined with the beneficiary of the veto against such transfer, being any other party thereto.

- 92.** The court said that the doctrine does not annul the transaction, but runs with the suit so that its application depends on the outcome of the suit and where the person relying on the doctrine succeeds in the suit. The doctrine may come to its aid in setting aside a transaction that might have been entered into between the other party to the suit and a third party without necessarily affecting the other party's disability to the third party.
- 93.** As recently observed in **Kiprono -vs- Kiprono Civil Appeal No. 100 of 2020 [2026] KECA 331 [KLR] (27<sup>th</sup> February 2026) (Judgment)**, courts exist, among other purposes, to ensure that the law does not become a tool of oppression between those who ought to be bound by ties of family and mutual trust.
- 94.** The plaintiff had raised serious complaints against her sister, the 1<sup>st</sup> defendant, since **2006** to date. The 1<sup>st</sup> defendant has not filed a single statement of defence or witness statement to deny the contents of the claims as to the ownership, size, boundaries, or locality of the suit property. The 3<sup>rd</sup> defendant did not seek any witness statement from the immediate

owner of the suit land, that is, the 2<sup>nd</sup> defendant, who also had opted to file no statement of defence or witness statement to oppose the plaintiff's suit.

**95.** This is a case of one sister said to have unjustly initially encroached onto the suit land before and after a complaint was addressed and moved with speed to dispose of the land during the pendency of the suit. The 1<sup>st</sup> and 2<sup>nd</sup> defendants transacted with the land without awaiting the issue pending before the court on the boundaries, size, and occupation of the ground, which was resolved. The officers who would have resolved the issue at the instance of the plaintiff have testified and produced expert reports showing both the ownership and the encroachment of the plaintiff's land by the 3<sup>rd</sup> defendant without any explanation or justification by the 1<sup>st</sup> and 2<sup>nd</sup> defendants, why there was initially the acts of trespass, now transferred to the 3<sup>rd</sup> defendant, who continues to perpetuate those acts.

**96.** In **Nabiswa & another -vs- Onyango (Civil Appeal E57 of 2020) [2026] KECA 328 (KLR) (27 February 2026) (Judgment)**, the court cited with approval **Stellenbosch Farmers Winery Group Ltd & Another -vs- Martell & Others [2003] (1)**

**SA 11 (SCA) at 14J-15**, that when faced with two mutually destructive versions, the court must make findings on:

**(a)** *The credibility of the various factual witnesses.*

**(b)** *Their reliability.*

**(c)** *The probabilities.*

- 97.** On credibility, the court said that it looks into witness candour, demeanour, bias, external contradiction, the probability or improbability of particular aspects of his version, caliber or cogency of his performance compared to other witnesses. On reliability, the court also looks, among other factors above, at his experience or observance of the event, the quality, integrity, and independence of his recall thereof.
- 98.** On probabilities, the court said it evaluates the probability or improbability of each party's version on each of the disputed facts. Based on the foregoing, it was observed that a court must look at the inherent strengths, weaknesses, probabilities, and improbabilities of the evidence tendered by both sides. The court held that trespass to land, as a tort, involves direct, physical, and unauthorized interference with the possession of land, which is actionable per se.

**99.** Further, the court held that, as a violation of the right to exclusive possession, the owner is entitled to mesne profits. The court cited with approval **Union of India -vs- M/s. Banwari Lal & Sons (P) Ltd (2004)**, that damages can be based on the income or profit the owner would have derived or a fair rental value, and where trespass is wanton, highhanded or malicious, courts can award more serious compensatory or exemplary damages. The occupation of the land in this case was over **25** years. The Court of Appeal affirmed an award of **Kshs. 2,000,000/=**.

**100.** In this suit, the plaintiff has pleaded and testified that the occupation has been on since **2006**, and she quotes a rental income of **Kshs. 180,000/=** per annum, making a total of **Kshs. 2,160,000/=** up to **2018**. The surveyor's report captures that the land is under a maize plantation. The 3<sup>rd</sup> defendant protested the site visit, hence the reasons she was joined as an interested party instead and later as a 3<sup>rd</sup> defendant.

**101.** In the statement of defence and counterclaim, paragraph **12**, the 3<sup>rd</sup> defendant denies any loss or damage occasioned to the plaintiff. The 3<sup>rd</sup> defendant

has confirmed that entry into the land occurred during the pendency of this suit. The plaintiff has therefore been denied use, occupation, and possession of the land, not only by the 1<sup>st</sup> and 2<sup>nd</sup> defendants, but also by the 3<sup>rd</sup> defendant, who has been on the land with effect from **2007**.

**102.** The 1<sup>st</sup> defendant did not have the requisite right or authority to sell the property belonging to the plaintiff to the 2<sup>nd</sup> defendant, who later sold it to the 3<sup>rd</sup> defendant, without disclosing to the 2<sup>nd</sup> defendant on that there was a pending issue of an alleged boundary dispute or encroachment raised by her sister with the Land Registrar and Surveyor and later in court which had not been resolved either at that level or before the court. Equally, the buyer had a duty to undertake due diligence to rule out any adverse claims against the title. The witness statement of the 2<sup>nd</sup> defendant and an affidavit dated **14/7/2020** do not refer to any site visit as part of due diligence.

**103.** The distinctive features between the 1<sup>st</sup> defendant's land and that of the plaintiff, as far as the ground locality, its size, boundaries, and

beacons, had not been resolved by the time the 2<sup>nd</sup> and 3<sup>rd</sup> defendants became registered owners.

**104.** Without the determination, what baffles this court is how the 3<sup>rd</sup> defendant was able to distinguish the two parcels without the input of a County Land Registrar and a Surveyor, as far as the exact boundaries are concerned, to rule out encroaching onto a neighbour's land.

**105.** In **Jones -vs- National Coal Board [1957] 2 ALL ER 155 at p 1594-B**, Lord Denning held that truth is best discovered by powerful statements on both sides of the question.

**106.** The credibility, veracity, reliability, and authenticity of public documents such as rim, title deeds, copies of records, and survey maps relied upon by the plaintiff have not been questioned or challenged by the defendants. The same applies to the expert reports availed by the defendants. Right or permission to enter into, remain, and develop the portion of the plaintiff belonging to parcel No. **136** was not sought by the 3<sup>rd</sup> defendant to date. The 3<sup>rd</sup> defendant has not called any expert witness or the seller who certified to her the correct boundaries or

extent of parcel No. **137** when she was buying it or taking vacant possession.

**107.** The 1<sup>st</sup> defendant was invited to appear at the locus in quo through the letters produced by the plaintiff in **2006**. She refused to attend to the same. Equally, after the plaintiff filed the suit. The 2<sup>nd</sup> defendant attended the site visit of **22/1/2020**, where the surveyor's report dated **27/1/2020** was made, which says that the ground does not agree with the RIM and that the court should intervene for the boundary to be fixed. It is the same officer who had visited the land and drawn a report dated **25/11/2019**. The 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> defendants refused to attend the same meeting pursuant to the order dated **29/7/2019**.

**108.** The counterclaim by the 3<sup>rd</sup> defendant is not supported by any other expert reports why the court should find the reliefs in the plaint unmerited and those in the counterclaim merited.

**109.** The proceedings, findings, and conclusion of boundary determination on **26/3/2012**, dated **12/4/2013**, and those of the Land Surveyor remain as persuasive expert evidence insofar as the encroachment is concerned. The determination was

made under **Section 18(2)** of the Land Registration Act. See **Mberia -vs- Mbai Civil appeal No. 102 of 2020 [2025] KECA 954 [KLR] (Judgment).**

**110.** In **Estate of Sonrisa Ltd & Another -vs- S.K. Macharia & Others [2020] eKLR**, the court held that the ascertainment and fixing of boundaries involve three parties before the Land Registrar, with a notice to the affected parties. **Section 20(1)** of the Land Registration Act provides that every proprietor of the land shall maintain in good order fences, hedges, stones, pillars, beacons, or other features that delineate the boundaries.

**111.** In this suit, the 3<sup>rd</sup> defendant has been unable to tell this court what her boundary features are with either parcel No. **136** or its resultant subdivisions generally, and in particular parcel No. **200**. It is the Land Surveyor who has the technical expertise on the boundary issue. The expert opinion is that the 3<sup>rd</sup> defendant is occupying excess land than in her title, which belongs to the parcel No. **136** and its resultant parcel No. **200**. Interfering with a boundary feature is illegal under **Section 21** of the Land Registration Act.

**112.** Interfering with a boundary feature is illegal under **Section 21** of the Land Registration Act. The 3<sup>rd</sup> defendant, if aggrieved by the boundary determination report, had a recourse to seek the setting aside of the proceedings, determination, recommendation, and conclusion. The statement of defence and counterclaim does not dispute the findings. There is no evidence before the court from the defendants that, upon determination of the boundary, the 3<sup>rd</sup> defendant appealed against the decision before this court within **30** days of the decision as provided under Regulation **40(6)** of the Land Registration (General) Regulations, **2017**.

**113.** In **Azzuri Ltd -vs- Pink Properties Ltd [2018] eKLR**, the court affirmed that the jurisdiction of the Land Registrar is in disputes on the general boundary area. The plaintiff had invoked **Section 19(1)** of the Land Registration Act. The 1<sup>st</sup> defendant did not wait for that determination. She instead took the law into her own hands and disposed of the land to the 2<sup>nd</sup> defendant, who, despite the existence of a caution and a pending suit, sold and transferred the land to the 3<sup>rd</sup> defendant. The 3<sup>rd</sup> defendant is liable for the encroachment. She obtained the title subject to

overriding interests or an adverse claim by the plaintiff.

**114.** As held in **Vaz -vs- Oyatsi & Others [2025] KECA 251 [KLR] (21<sup>st</sup> February 2025) (Judgment)**, each action of trespass constitutes a fresh and distinct cause of action.

**115.** The 3<sup>rd</sup> defendant continued the unauthorized entry into the land to date. The plaintiff's rights to occupation of the **10 acres** have been infringed by not only the 1<sup>st</sup> and 2<sup>nd</sup> defendants but also by the 3<sup>rd</sup> defendant. She is entitled to a permanent injunction.

**116.** After trespass is proved, this court, as held in **Park Towers Ltd -vs- John Mithamo Njika & Others [2014] eKLR**, and in **KPLC -vs- Ringera (supra)**, has a duty to assess the damages awardable based on the unique facts and circumstances of each case. The court finds the figure of **Kshs. 2,160,000/=**, reasonable as representing the loss of the user.

**117.** The counterclaim is dismissed with costs.

**118.** This court issues orders that;

**a) A declaration is hereby issued that the 3<sup>rd</sup> defendant has encroached onto her Parcel No. Chepsiro/Kibuswa Block 1/Kelchinet/200, and wrongfully occupied 15 acres or so.**

**b)An order is hereby issued directing the County Surveyor and the Land Registrar, Trans Nzoia, to implement on the ground the boundary between Parcel No. Chepsiro/Kibuswa Block 1/Kelchinet/200 and Parcel No. Chepsiro/Kibuswa Block 1/Kelchinet/137, using the Registry Index Map pursuant to the reports presented before this court.**

**c)An order of permanent injunction is hereby issued, restraining the 3<sup>rd</sup> defendant from further encroachment beyond the re-established boundary between Parcel No. Chepsiro/Kibuswa Block 1/Kelchinet/200 and Parcel No. Chepsiro/Kibuswa Block 1/Kelchinet/137.**

**d)Kshs.2,160,000/= is hereby granted for loss of user for 12 years up to 2018, and a further sum of Kshs. 180,000/= p.a., with effect from 2019 until the date of judgment. The amount is to be apportioned between the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> defendants, depending on the dates of the illegal entry for each of them.**

**e)Costs to the plaintiff.**

**119.** Orders accordingly.

**Judgment dated, signed, and delivered via Microsoft Teams/Open Court at Kitale on this 24<sup>th</sup> day of March 2026.**

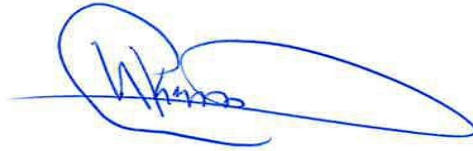
**In the presence of:**

Court Assistant - Dennis

Mr. Kiarie for the plaintiff present

Wainaina for the 3<sup>rd</sup> defendant and the Interested  
Party present

1<sup>st</sup> and 2<sup>nd</sup> defendants absent

A handwritten signature in blue ink, appearing to read 'Wainaina', is written over a horizontal line.

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