



**Barta (Suing as the Legal Representative to the Estate of the Late Oloishuro ole Barta Kura) v Farah & another (Civil Appeal 48 of 2020) [2026] KECA 764 (KLR) (24 April 2026) (Judgment)**

Neutral citation: [2026] KECA 764 (KLR)

**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL AT NAKURU**  
**CIVIL APPEAL 48 OF 2020**  
**JM MATIVO, PM GACHOKA & JO OKELLO, JJA**  
**APRIL 24, 2026**

**BETWEEN**

**MORETET OLE BARTA (SUING AS THE LEGAL REPRESENTATIVE TO THE ESTATE OF THE LATE OLOISHURO OLE BARTA KURA) ..... APPELLANT**

**AND**

**ALI FARAH ..... 1<sup>ST</sup> RESPONDENT**

**SONKOI OLE MUNKASIA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgment & decree of the Environment & Land Court at Narok (M.N. Kullow J.) dated 28th February, 2019 in ELC Case No. 390 of 2017 (Formerly Kisii ELC NO. 286 OF 2013))*

**JUDGMENT**

**Background**

1. The appeal relates to land reference No. Transmara/Kerrinkani/530 (the suit property). The appellant, Mortet Ole Berta (suing as the Legal Representative to the Estate of the Late Oloishuro Ole Kura) was aggrieved by the judgment of the Environment and Land Court (ELC) (M.N. Kullow J.) delivered on 28<sup>th</sup> February, 2019 in ELC Case No. 390 of 2017 in favour of the respondents, Ali Farah the 1<sup>st</sup> respondent & Sonkoi Ole Munkasia, the 2<sup>nd</sup> respondent whereby it was held that the Land Registrar having visited the area and determined conclusively that there existed distinct boundary markings by way of trench and remnant of beacons that was uprooted and that it was the appellant that had encroached on the respondents' land by 83.9 acres.
2. To put the appeal in context, we shall give a brief background.  
The main issue in dispute is the judgement of the Court, which dismissed the appellant's case that the respondent had not trespassed the appellant's land and that the suit Property Transmara/



Kerrinkani/530 belongs to the respondent and it is the appellant who had actually trespassed on the respondents' land. The court further held that the boundaries set by the Land Registrar and the Surveyor be deemed as the actual, final and determined boundaries between Land Parcel No. Trans Mara/Kerrinkani/530 and Transmara/Kerrinkani/8.

3. From the Plaint dated 24<sup>th</sup> June, 2013, the appellant (now deceased) lodged a suit against the respondents contending that the deceased was the registered owner of LR No. Transmara/Kerrinkani/9 which land parcel was subdivided and birthed parcels No. 388, 399, 400, 530 and 531.
4. From the record, the appellant filed a suit in Narok against the respondents on 26<sup>th</sup> June, 2013 in, ELC No. 390 of 2017 (formerly Kisii ELC NO. 286 of 2013), seeking various declarations in respect of that property known as LR No. Trans- Mara/Kerrinkani/530 which parcels of land were excised from the parcel land known as LR NO. Transmara/Kerrinkani/9.
5. The appellant avers that the deceased sold the subsequent subdivisions leaving only parcels nos 530 and 399 registered in the name of the deceased. It's the appellant's case that the respondents trespassed into LR No. Transmara/ Kerrinkani/530 (the Suit Property) without the consent of the appellant and her co-administrator who was a party in the suit before the superior court and that the trespass deprived her of the rightful possession of the suit property.
6. The Respondents lodged their amended statement of defense denying trespassing onto the suit property. The 1<sup>st</sup> Respondent stated that LR NO. Transmara/Kerrinkani/8 was registered in the name of Farah Award (now deceased). They further aver in their defence that before LR NO. Transmara/Kerrinkani/9 was subdivided, the registered owner was shown the extent of his boundary and that the said parcel of land shared a common boundary with LR NO. Transmara/Kerrinkani/8. The Respondents further stated that the portion of the suit property being alleged to have been trespassed onto was part of LR NO. Transmara/Kerrinkani/8 and that the allegations of trespass were misconceived and untenable.
7. In determining the matter, the ELC framed two issues: —
  - i. Whether the defendants (respondents) had trespassed on the plaintiff's land;
  - ii. Whether the Plaintiffs (appellant) are entitled to the orders sought.
8. The ELC found for the respondents as follows—

“Having considered the evidence and the testimony of the witness, I find that the Plaintiffs had failed to discharge the burden of proof on a balance of probabilities. Furthermore, it emerged that the Defendant has not encroached on Land Parcel No. Transmara/ Kerikani/530 which was confirmed by the report of the Surveyor and Land Registrar who visited the parcels of land and determined the actual boundaries thereof.

The Registrar in his report filed in court on 2<sup>nd</sup> July, 2018 confirmed that land parcel No. Transmara/Kerikani/530 had encroached on the defendants' land.”
9. Dissatisfied with the judgment, the appellant lodged an appeal on 13<sup>th</sup> August, 2020, stating 11 grounds of appeal as set out in the memorandum of appeal. The grounds of appeal are that —
  - a. the learned judge erred in law and fact by wrongly evaluating the evidence on record and hence coming to a wrong conclusion;



- b. the learned judge erred in law and fact in dismissing the appellant's case when the same was proved on a balance of probability;
- c. the decision in dismissing the appellant's case was against the totality of evidence on record;
- d. the learned judge erred in law and fact in failing to make a finding that there was enough evidence on record to warrant allowing the appellant's case;
- e. the learned judge erred in law and fact in failing to make a finding that parcel LR Transmara/Kerinkani/8 was put on the ground through amending the Registry index Map as contained in the Report of the District Land Register dated 26<sup>th</sup> April, 2026;
- f. the learned Judge erred in law and fact in failing to make a finding that the land that forming title Transmara/Kerinkani/8 was reserved as cattle deep and not allocated to any member of the Group Ranch during the adjudication section;
- g. the learned judge erred in law and fact in failing to make a finding that since the land that was reserved by the Kerinkani Group Ranch as cattle deep and was the last and bordering Oloirien Group Ranch as being converted as a private land and allegedly registered in the name of the deceased Farah Awadh and did not exist on the ground and original map and vide Report by the then Land Registrar Mr. David Dunya Omol dated 17<sup>th</sup> May, 2002 and without Registering Index Map (RIM) amended accordingly and was not registered, led the respondents to trespass on the applicant's deceased husband's title Transmara/Kerinkani/9 closed on subdivision 530.
- h. the learned Judge erred in law and fact in failing to make a finding that based on the totality of evidence on record, the appellant proved her case on a balance of probability;
- i. that the learned Judge erred in law and fact in failing to make a finding that title Transmara/Kerinkani/8 was a creation by the land officers and not the Kerinkani Group Ranch;
  - j. that the learned Judge erred in law and fact in failing to make a finding that based on the totality of evidence on record, the appellant proved her case on a balance of probability; and
  - k. that the judgment of 28<sup>th</sup> February, 2019 was against the weight of evidence on record.

10. The appeal was heard virtually on 23<sup>rd</sup> February, 2026, by way of written submissions with oral highlights. At the hearing, learned counsel J.O Bunde, holding brief for Mr. Ochilo appeared for the appellant, while learned counsel Ms. Ochwal, appeared for the respondents.

11. The appellant written submissions are dated 26<sup>th</sup> February, 2024, the main ground raised being that the dispute herein is the unlawful creation of title No. Transmara/Kerinkani/8 in the name of Farah Award (Deceased) adjudicated and registered unto the name of Oloishuro Ole Barta Kura (Deceased), the husband of the appellant now subdivided to Transmara/Kerinkani/530 and which led to the respondents trespassing in 2013 into title No. Transmara/Kerinkani/9.



12. The appellant further submits that parcels No. 2-8 in the Kerinkani Group Ranch are public utilities and in particular parcel Transmara/Kerinkani/8 was reserved and allocated as a cattle dip. She submits further that the appellant's deceased husband's original parcel No. Transmara/Kerinkani/9 does not border parcel No. Transmara/Kerinkani/8, but only borders parcels No. 29, 17, 10 & 117 Kerinkani Adjudication Section. That Parcel No. Transmara/Kerinkani/8 in the name of Farah Award (deceased) does not exist physically on the ground. It was created on papers and map.
13. It is on this basis that the appellant submits that the Transmara district land registrar perfected the unlawful creation of parcel of land Transmara/Kerinkani/8 out of parcel No. Transmara/Kerinkani/9, which did not exist for private individual adjudication and registration, but was reserved as a cattle dip, a public utility land in kerinkani Group Ranch.
14. The appellant further avers that the respondent unlawfully and unconstitutionally converted, created and reinstated land parcel Transmara/ Kerinkani/8 to private use while it was set aside for public use i.e., cattle dip. Thus, he avers that the conversion does not confer upon the respondents with overriding interests under section 30(g) of the repealed Cap 300, in whatever nature, the same does not get any protection of Article 40(6) of *the constitution*. He invites this court to consider among others the decision of this Court in Munyu Maina Vs. Hiram Gathiha Maina (2013) eKLR a matter dealing exclusively with the root of title where the court observed that when a registered proprietor's root of title is under challenge, it's not sufficient to dangle the instrument of title as proof of ownership.
15. The respondents in their submissions dated 13<sup>th</sup> February, 2026, aver that they never trespassed onto the suit property. They urge that Transmara/Kerinkani/8 was registered in the name of Farah Award (deceased), that before LR No. Transmara/Kerrinkani/9 was sub divided, the registered owner was shown the extent of his boundary and that the said parcel of land shared a common boundary with LR No. Transmara/Kerrinkani/8. It is their submission that the portion of the suit property alleged to have been trespassed onto was part of LR No. Transmara/Kerrinkani/8 and that the allegations of trespass was misconceived and untenable in law.
16. The respondents further submit that on the application of the appellant, the Land Registrar and Surveyor visited the suit property and LR No. Transmara/Kerrinkani/8 for purposes of complying with orders of the court and lodged their Reports dated 26<sup>th</sup> and 30<sup>th</sup> April, 2018. The Reports were lodged on 8<sup>th</sup> May, 2018. The Reports confirmed that the appellant had encroached onto the 1<sup>st</sup> respondent's land namely LR No. Transmara/Kerrinkani/8 by 33.95 HA (83.9 acres). The Reports were admitted as part of the evidence in the suit. On these grounds, the respondents close by averring that the learned judge correctly held that the appellant had failed to demonstrate that the respondents had encroached onto the suit property. The learned judge was also correct in relying on the Reports by the Land Registrar and the Surveyor who confirmed that trespassers were the appellant and his co-administrator. That the Reports lodged in court on 8<sup>th</sup> May, 2018 established the truth by clearly stating that the encroachment was done by the appellant and not the respondents.
17. The respondents drew the attention of this court to the case of James Mucheru vs. National Bank of Kenya Limited [2019] eKLR, where the court of appeal held that in civil cases the standard of proof is on a balance of probability. The respondents aver that the burden of proving is on the person alleging, which burden the appellant has not discharged.
18. On ground 5 of the grounds of appeal, the respondents submit that LR No. Transmara/Kerrinkani/8 had been adjudicated to one Farah Award(deceased) as at 23<sup>rd</sup> September, 1976, was discernible on the ground as captured in Map Sheet 144/4 and was registered in the name of the deceased on 16<sup>th</sup> June, 1977. That in 2002, the Land Registrar confirmed that the Registry Index Map had not been



amended and therefore did not capture the suit property. It is their submission that the Registrar then recommended that the Provincial Surveyor amend the Registry Index Map to be a true reflection of the ground.

19. As to grounds 6,7 & 8 of the memorandum of appeal, the respondents submit that there was no evidence adduced to demonstrate that the said LR No. Transmara/Kerrinkani/8 was reserved for a cattle dip. Indeed, the 1<sup>st</sup> respondent produced the Adjudication records, title deed, certificate of official search Report dated 17<sup>th</sup> May, 2002 and relied on Reports by the Land Registrar and Surveyor to confirm that the said property was demarcated and registered in the name of Farah Award (deceased).
20. Relying on the case of Charles Ogejo Ochieng vs Geoffrey Okumu [1995] eKLR where it was held that ‘...an injury to a possessory right, and therefore the proper plaintiff in an action of trespass to land is the person who has title to it, or a person who is deemed to have been in possession at the time of the trespass...’ they aver that the appellant was not the owner of LR Transmara/Kerrinkani/8 reserved for a cattle dip and could not therefor litigate over the purported parcel of land whose title or ownership was not established before the superior court.
21. This being a first appeal, this Court has the power to re-appraise the evidence and examine both facts and law. Rule 31(1)(a) of this Court’s Rules, empowers the Court to reconsider the entire record, evaluate evidence, analyse the findings of the trial court, draw its own inference of facts and reach its own independent conclusions, but bearing in mind that we did not have the benefit of seeing the witness first hand. Rule 31 (1)(a) of the Court of Appeal Rules, 2022, provides —

“On an appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the court shall have power —

  - (a) to re-appraise the evidence and draw inferences of fact;”
22. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the court observed thus;

“.. being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.”
23. We must also be guided by the Court of Appeal for East Africa decision in *Peters vs Sunday Post Limited* [1958] EA page 424, where the court stated that:

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.”
24. We have carefully considered the record, the grounds of appeal, and the parties’ submissions and the issues for determination by this Court.



25. We discern two primary issues for determination, to wit, whether the ELC erred—
- i. by not addressing its mind on whether there was unlawful creation of title No. Transmara/Kerinkani/8 out of title No. Transmara/Kerinkani/9? and
  - ii. Whether ELC erred in finding that the respondents did not trespass on the suit property parcel No. Transmara/Kerinkani/530 being a division of the original title No. Transmara/Kerinkani/9?
26. The appellant’s contention is that at the heart of this appeal and dispute is the unlawful creation of title No. Transmara/Kerinkani/8 in the name of Farah Award (deceased) the father of the 1<sup>st</sup> respondent out of title No. Transmara/Kerinkani/9 adjudicated and registered in the name of Oloishuro Ole Barta Kura(deceased), the husband of the appellant now subdivided to Transmara/Kerinkani/530 (the suit property) which made the respondents to trespass onto title No. Transmara/Kerinkani/9.
27. An analysis of the record of appeal, the parties’ submissions and the evidence on record, it is clear that whereas the appellant avers that there was the unlawful creation of title No. Transmara/Kerinkani/8 in the name of Farah Award (deceased), she did not adduce any evidence challenging the propriety of the respondent’s title. Title No. Transmara/Kerinkani/8 existed and was registered in the name of Farah Awadh (Deceased) in 1972.
28. Section 98(1) of the *Evidence Act* provides that evidence can be adduced to invalidate any document. In the instant appeal, other than alleging unprocedural means and referring to the conversion of the appellant’s suit property into a public utility, the appellant did not call independent evidence to demonstrate that the creation of title No. Transmara/Kerinkani/8 was unlawful, fraudulent, unprocedural, illegal, informal or invalid. Further, the appellant failed to produce any authentic documents to show that title No. Transmara/Kerinkani/8 was unconstitutionally created or ‘reinstated’ nor that it was a public utility.
29. We are conscious of the fact that the appellant and the co- administrator lodged an application on 13<sup>th</sup> October, 2017 seeking orders that the sub-county Land Registrar, Transmara East/West visit the ground and establish the exact boundary and the position of the suit property and LR No. Transmara/Kerrinkani/8. They further sought orders that the Report of the Land Registrar therein be admitted as part of the evidence for consideration while making determination of the issues in dispute in the suit. The trial court determined the application and granted the prayers sought and accordingly, the Report of the land registrar dated 26<sup>th</sup> April, 2018 and filed in court on 2<sup>nd</sup> July, 2018 formed part of the evidence on record.
30. In the circumstances and considering the record of appeal and the written submissions, we find that there was no unlawful creation of LR NO. Transmara/Kerrinkani/8 and that the said parcel of land did actually exist as title No. Transmara/Kerinkani/8 registered in the name of Farah Award (deceased) and contained in Registry Map Sheet No. 144.4.
31. There is another issue relating to the unlawful creation of title No. Transmara/Kerinkani/8 that the appellant has alluded to severally in her case from the grounds of appeal to her submissions. The appellant has averred that land parcel No. Transmara/Kerrinkani/8 had been set aside for public utility. We, however, note that this issue was not raised or argued in the ELC and is therefore being raised for the first time on appeal. We are cognizant of Rule 107 of the Court of Appeal Rules, 2022, which permits an appellate court to delve into issues that were never before the trial court. However, raising the issue at the appeal stage is an afterthought and is intended to steal a match against the other party. The power of the Court is to determine issues that parties have raised in their pleadings and are on



- record and written submissions should and must not be used as pleadings neither can they amount to evidence. We therefore decline to consider that ground as it ought to have been pleaded and specifically raised before the ELC.
32. The second issue for determination by this court is whether the respondents trespassed onto the suit property. The appellant avers that the respondents encroached and trespassed on the suit property. The appellant invited this Court to consider the case of Paul Audi Ochodo vs Joshua Ombura Orwa (2014 (eKLR) where the court defined trespass as the act of intrusion into another's land without his permission or authority.
33. As to whether or not there was trespass in the instant case, regard must be had to the ownership of the suit property. It is not in dispute that the suit property is registered in the name of the appellant's deceased husband. It is also not in dispute that the respondents are not claiming any portion of the suit property. At the hearing, while seeking clarification, this Court sought to know from the appellant's counsel whether the respondents were in occupation of the suit property, registered in the name of Ole Barta Oloishuro Kura emanating from the sub division of Plot No
397. This was not the case.
34. It should also not be lost that from the record of appeal placed before us, the appellant applied to the trial court on 13<sup>th</sup> October, 2017 seeking orders that the sub county land registrar Transmara East/West do visit the ground and establish the position of the suit property and LR No. Transmara/Kerrinkani/8. The appellant further sought orders that the Report of the Land Registrar be admitted as part of the evidence for consideration while making determination of the issues in dispute in the suit. Those prayers were granted and the Report of the land registrar dated 26<sup>th</sup> April, 2018 was admitted as part of the evidence and record of the court.
35. This begs the question whether the learned judge erred in admitting the report of the Land Registrar as evidence. The answer is in the negative. The learned judge analysed the evidence and properly applied his mind as to the findings by the Land Registrar. Before determining whether there was trespass, it was incumbent on the parties and by extension the superior court to determine the boundaries of the property of the appellant and the respondents respectively. The function of determining boundary is exclusively the realm of the Land Registrar and courts are very slow if at all to interfere with the findings of the Land Registrar in matters relating to boundaries.
36. Section 18(2) of the *Land Act* provides "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". Conscious of the appellant's submission that this is not a boundary issue but a case of trespass, the Court must first establish the boundary issue in order to determine the ownership which then provides a proper basis for an action for trespass.
37. Under the *Land Registration Act*, 2012, the Land Registrar has the primary authority to fix and determine boundaries for registered land. Courts generally will not entertain boundary disputes until the Land Registrar has exercised this power. These provisions existed in the repealed Registered *Land Act* (Cap 300) where the Land Registrar held exclusive and primary jurisdiction to determine boundary disputes for land registered under that Act. These powers are primarily found in Sections 21 and 22 of the Act. If a dispute or uncertainty arose regarding a boundary, the Registrar was required by law to determine and indicate the position of the disputed boundary upon application by an interested party. A reading of the above provisions shows that the Land Registrar had exclusive jurisdiction. Under the RLA, Courts generally had no power to entertain boundary dispute proceedings until the Registrar had first made a determination under Section 21. A decision under the above provisions was appealable to the High Court. There is nothing before us to show that the said decision was appealed against.



38. Accordingly, the Land Registrar having visited the area and determined that there existed distinct boundary markings by way of trench and remnant of beacons that was uprooted and that it was the appellant that had encroached on the respondents' land by 83.9 acres and on the basis of that Report, found that the plaintiff had failed to demonstrate that indeed the defendants encroached on her parcel of land. In the circumstances, it was only proper that the Report be admitted as part of the evidence. Based on the Registrar's Report presented during the site visit and the evidence presented before the court, the learned judge concluded and rightly so, that the reports of the Registrar and Surveyor be admitted and adopted as part of the judgment and the boundaries set out by the Registrar and the surveyor be deemed as the actual, final and determined boundaries between Land Parcel No. Transmara/ Kerinkani/530 and Transmara/Kerinkani/8.
39. We see no reason to interfere with the learned judge's findings.
- The Land Registrar powers to determine a boundary dispute is conclusive. The Report filed by the Land Registrar is expert evidence and the same was not controverted. The Report was created after a site visit where both parties were present. It therefore carries a significant evidential weight and having not been controverted or appealed against, we consider it as conclusive in so far as determining the boundaries between Land Parcel No. Transmara/Kerinkani/530 and Transmara/ Kerinkani/8.
40. Having considered the record of appeal, the impugned judgment, the parties' submissions, the highlight by counsel, the authorities cited and the law, we are persuaded that there was no trespass by the respondents onto the suit property. It is the appellant who encroached onto the respondents' parcel No. Transmara/Kerrinkani/8 by 33.95 Ha (83.9 acres).
41. Consequently, and for the reasons above, we find —
- i. that there was no unlawful creation of LR No. Transmara/Kerrinkani/8 and that the said parcel of land did actually exist as title No. Transmara/ Kerinkani/8 registered in the name of Farah Award (deceased) and contained in Registry Map Sheet No. 144.4;
  - ii. there was no trespass by the respondents onto the suit property. Indeed, it is the appellant who encroached onto the respondents' parcel No. Transmara/ Kerrinkani/8 by 33.95 Ha (83.9 acres).
1. Consequently, we find that this appeal has no merit and proceed to dismiss the same with costs to the defendants. The judgment of the ELC dated 28<sup>th</sup> February, 2019 is confirmed.

**DATED AND DELIVERED AT NAKURU THIS 24<sup>TH</sup> DAY OF APRIL, 2026.**

**J. MATIVO**

..... **JUDGE OF APPEAL**

**M. GACHOKA C.Arb, FCI Arb.**

..... **JUDGE OF APPEAL**

**DR. J. O. OKELLO**

..... **JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR.**

