

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

LAND CASE NO 1145 OF 2016

MARTHA KEMUMA MAISIBA PLAINTIFF

VERSUS

SELINA BWARI MARUBE..... 1ST DEFENDANT

RAEL OTUNDO..... 2ND DEFENDANT

ONWONG'A KINANGA ISHMAEL..... 3RD DEFENDANT

ISAAC MISATI ABOKI..... 4TH DEFENDANT

DINNA MORAA ONDIEKI..... 5TH DEFENDANT

JUDGMENT

1. The plaintiff commenced this suit vide a plaint dated 19th July 2001, amended on 17th May 2017 and finally re-amended on 26th September, 2024. She stated that she brings the suit on behalf of the estate of Christopher Maisiba Mboga who was the registered owner of land West Kitutu/Bogusero/2282 measuring approximately 1.6Ha. It is pleaded that the 1st Defendant is the registered owner of the land West Kitutu/Bogusero/961 measuring 1.1Ha which land was subdivided during the pendency of this case into L.R. Nos 6777, 6778 and 6779.
2. The Plaintiff avers that the new subdivisions were registered in the names of the 1st to 3rd Defendants respectively. That the 4th and 5th Defendants

were joined to these proceedings after the 2nd Defendant transferred L.R No Bogusero/6778 wrongfully to them. The Plaintiff contends that during adjudication, parcel West Kitutu/Bugisero/960 measured 1.8Ha while parcel 961 measured 1.1Ha.

3. That in early 2000, the 1st Defendant lodged a boundary dispute at the Lands office in Kisii which resulted in the Land Registrar visiting the disputed boundary the same year. According to the Plaintiff, it is during this visit that the 1st Defendant claimed 45 meters of land. She stated that during the exercise, the Land Register noted an error in the RIM sheet No. 12 since it did not tally with the ground measurements. She asserted that the Land Registrar rectified the error by distributing the 45 meters equally between the plaintiff and the 1st Defendant.
4. She states that the 1st Defendant did not accept this distribution and the 1st Defendant became hostile claiming entitlement to the entire 45 meters. The 2nd to 5th Defendants are sued because their parcels 6778 and 6779 occupies part of the disputed portion. The Plaintiff prays against the Defendants jointly and severally for an order declaring that the subdivisions of L.R. NO. West Kitutu/Bogusero/961 was unlawful, illegal and irregular. Further, she prays for an order that the 45 meters be shared equally between her and the 1st Defendant.

5. Thus, the Plaintiff prays for judgment against the Defendants jointly and severally for orders;
- a. A declaration that the subdivision of L.R 961 was wrongful, illegal, irregular, null and void.
 - b. An order cancelling the subdivision of L.R. No 961 and the new numbers West Kitutu/Bogusero/6777,6778 and 6779 and restoring the original number 961 to the register.
 - c. After granting prayers (a) and (b), the honourable court do grant an order directing that the Plaintiff and the 1st defendant do share equally the disputed portion of land measuring approx. 45 meters was found as the error on the ground by the Land Registrar and Surveyor.
 - d. An order directing the Land Registrar to adjust the acreages of L.R. NO 2282 and 961 as per prayer (c) above and also an order directing the Director of Surveys to rectify the Registry Index Map sheet no 12 accordingly to reflect the actual acreages of the two parcels of land on the ground as per the findings of the Land Registrar and County Surveyor.
 - e. A permanent injunction restraining the Defendants by themselves, their agents, servants and or assigns from occupying, possessing, using entering onto, erecting structures

of whatsoever nature and or in any manner interfering with the portion of land measuring approximately 22.5Ha forming part of L.R No West Kitutu/Bogusero/2282.

f. Costs of the suit.

6. The suit was defended. The 1st Defendant filed a statement of defence dated 28th January, 2025, in response to the re-amended Plaint. She argued that the surveyor's report prepared pursuant to the court order (dated 6.5.2019) indicated that the ground size of parcel WEST KITUTU/BOGUSERO/960 was 1.29 Ha, contrary to the size registered during adjudication of 1.8 Ha. The ground size of parcel 961, according to the survey report, is 1.14 Ha, which equals 1.1 Ha in the adjudication records.
7. That the suit was filed in the Magistrate's court in 1999 as MCC374 of 1999, hence the 1st Defendant did not take the surveyors on site without the knowledge of the Court. That the Plaintiff was not satisfied with the report of the Land Registrar dated 2000. The 1st Defendant avers that she supports the three reports dated 23.6.2003, 14.12.2011, and 12.10.2020, all filed in court, which confirm that the Plaintiff has encroached on her land.
8. The 1st Defendant avers she has no objection to the Plaintiff receiving the 70 meters as per the distribution proposed in the survey report of

12.10.2020. The 1st Defendant in challenging the prayer for cancellation of her subdivisions of parcel 961 stated that the Plaintiff has not disclosed the regulations or laws which have been violated during the subdivision. She averred that the 2nd to 5th Defendants occupy parcel numbers 6778 and 6779 which are 70 meters from the disputed boundary.

9. The 1st Defendant prayed for the following reliefs
- a. **The Plaintiff's suit be dismissed**
 - b. **Judgment be entered for her and an order of eviction of the Plaintiff and or her agents from the said portion of land measuring 0.67ha forming part of parcel WEST KITUTU/ BOGUSERO/961 and L.R No 2282 forming part of 960 be rectified as per the ground to be confirmed with title whose acreage is excessive i.e title 2282 registered with 1.6ha less area discovered 0.51ha.**
 - c. **The 1st Defendant prays for an order directing the Land Registrar and County Surveyor to revisit the disputed land and fix the common boundary of L.R NO. 960 (subdivided into numbers 2282 & 2283) and 961 (subdivided into numbers 6777, 6778 and 6779) that was established during adjudication.**

10. I did not see any statement of defense filed by the 2nd to 5th Defendants. At the close of the pleadings, the parties called oral evidence. It is important to note that I did not take evidence from any of the witnesses. The hearing was conducted by Munyao Sila J, who gave directions for the filing of submissions. When the matter came up to confirm compliance, Munyao Sila had been appointed to serve in the Court of Appeal; therefore, the file could not be forwarded to him for judgment writing.
11. The Plaintiff called a total of five (5) witnesses while the Defendants called one witness- the 1st Defendant. The Plaintiff testified that she was 75 years old and married to Christopher Maisiba Mboga-deceased. It is her evidence that her husband sold a piece of his land to Yuvnalis Nyagoko in 1975. At the time of sale, adjudication had not been done in the area. She also testified that her husband was taken to hospital using the proceeds of the sale but he ran mad and started burning houses. This made the Plaintiff escape and return to her maternal home.
12. PW1 continued to state that she was told by her cousins that a road had been created from her aunt's place to their land. When she returned home, she found the road had been turned into a parcel of land, which someone was now claiming to have purchased for Kshs 400/=. She stated that her

husband denied selling this part. She added that her husband's madness increased, and she had to leave again. Later, he died.

13. She returned for her husband's burial, and at that time, she saw the 1st Defendant uprooting the "Omotembe" tree, claiming that the land where the tree stood belonged to them. She stated that when she tried to question them, they directed her to ask Nyagoko, who had sold the land to them. The witness said she chased them away and called the local authorities to address their complaint. Subsequently, the Chief and the elders attended, and those PW1 had complained about stated that Nyagoko should be called. Nyagoko was summoned, and he pointed out the land he had sold, extending from the anthill downwards. The Plaintiff said the Chief and the local elders told her the land had been stolen by the pen and advised her to seek justice in court. This prompted her to commence the legal process.
14. The witness further stated that several surveyors have visited the land in dispute, but they failed to measure the 1st Defendant's land parcel number 961. She confirmed she is the one using the disputed portion. She said the main contention was 45 meters, which she sought to be granted. In support of her case, she produced the documents on her list dated 23rd January, 2014, as Pex 1-17.

15. In cross-examination, Pw1 affirmed that it was her husband who sold the land to Nyagoko and the sale was before adjudication. She asserted that she stood at the boundary during the sale since her husband was unwell. She affirmed that she learned it is Nyagoko who later sold his land to Marube. Pw1 stated that Nyagoko's land started from the anthill to the road although she could not tell the size in acres.
16. The Plaintiff stated that during adjudication, Nyagoko's share was designated as parcel no. 961, while theirs was 960. Subsequently, a portion measuring 0.2ha was sold to Philip Onyancha Mboga, leading to the subdivision of parcel number 960 into L.R. numbers 2282 and 2283. She admitted having a case with Philip, accusing him of taking part of her land, but later abandoned the case. In this case, the witness averred that the dispute arose after Marube extended his land beyond what he purchased.
17. The plaintiff states that there was a house that became old and collapsed. She then moved and built another one in a different area, not too far away. She said that she had removed Marube from this portion, but they did not complain. During further cross-examination by Mr Nyatundo, learned counsel for the 2nd defendant, Pw1 stated that she did not know the owner of L.R. NO. 6778, but it was part of the land she was claiming.

18. Mr Peter Onyancha Bosire testified as PW2 and introduced himself as the cousin of Christopher Maisiba Mboga-deceased. He stated that he knows the 1st Defendant, who bought land from Yuvnalis Nyagoko. According to Pw2, he was present when Christopher sold land to Mr Nyagoko and saw the boundary marked where there was an anthill up to the road. He was recently informed there was a dispute after the boundary was removed from the anthill. He asserted that the boundary was the anthill, and there was also omotembe, omosocho, and mutaranganga trees.
19. Under cross-examination by Mr Sagwe, learned counsel for the 1st Defendant, PW2 said the land was sold to Nyagoko between 1970-1975. That he was present when the land was shown but was not present when the agreement was drawn. The witness could not tell whether the anthill, the omotembe, and the omosocho trees were still there, as he had not visited the site in a long time. Pw2 confirmed he did not witness the sale between Nyagoko and Marube.
20. PW3 is Joseph Ford Monyancha, who is a former Chief of the Bogusero location and retired in 2020. He stated that while he was Chief, he knew Martha Maisiba and Selina Bwari. He recalled that the dispute started in 1994, where the Plaintiff was complaining against the 1st Defendant over a boundary. PW3 and the local elders visited the scene and called the person who had bought the land since he was still alive. That this person

(Nyagoko) pointed to the anthill as the boundary of land sold to him but the 1st Defendant refused to acknowledge.

21. PW3 said the parties could not agree on the position of the boundary, with tempers continuing to flare. They met again a second time but still reached no agreement. He also stated that he was called when the surveyors visited the land to take measurements. When they asked the surveyors about their findings, the surveyors said they would report to court, except he recalls them mentioning there was an error when the map was drawn.
22. During cross-examination, PW3 stated that he was aware Yuvnalis Nyagoko was the first to buy the land, although he never inhabited it. He did not know the size of the land sold to him, but he knew that Sebastiano bought the entire Nyagoko land. He also mentioned that the anthill should still be there unless it has been interfered with, as he has not visited the land since he retired.
23. PW4 is David Lemaiyan who works with the Ministry of Lands based in Kisii as a Surveyor. He stated that he went to the ground and prepared the survey report dated 14th October, 2025. He averred that the adjudicated boundary of the two parcels (960 and 961) are okay on the RIM. Referred to the report dated 12.10.2020 bby Philip Wafula which said the ground

was smaller than the map, his comment is that the Plaintiff occupies an undisputed area of 1.31ha of the original parcel 960.

24. This witness stated that he measured the land according to the occupancy and analysed it with the records. He affirms that, as per the register, parcel 960 measures 1.8ha and is divided into two numbers: 2282, measuring 1.6ha, and 2283, measuring 0.2ha. Since the Plaintiff occupies 1.31ha on the ground, the witness conceded that the ground measurement does not match the map.
25. The witness gave the total ground area for the two parcels as 2.65ha while the registered area from the green card is 2.9ha leaving a difference of 0.25ha translated as 9% error. He avers that this error is within the margins of error for general boundaries. He said that he drew the diagram after picking the coordinates from the ground not a reflection of the RIM.
26. He pointed out that parcel 961 is no longer aligning with the revised positions on the map. He also noted that parcels 6778 and 6779, as shown on the map, run end to end (from the road that terminates on parcel 962), but on the ground they do not. The Court recalled the observation that behind parcels 6778 and 6779, there was planted nappier grass, which the 1st Defendant admitted was not part of these parcels. The witness also noted that the sizes as amended is way bigger than they are on the ground.

27. PW4 also commented on the variance of the mutation creating parcel numbers 6777, 6778 and 6779. He got areas from the numbering register which gave different sizes; 6777- 0.8ha; 6778- 0.15 and 6779- 0.15. On the mutation registered in the Lands registry, the sizes are indicated as follows; 6777- 0.6; 6778- 0.15 and 6779- 0.35. Again another numbering register had the following sizes; 6777- 0.97ha, 6778-0.08 and 6779- 0.005.
28. Mr Lemaiyan said that it is mutations used to amend a map while you cannot draw a mutation without a map. In this case, what was used to amend the map was the altered mutation. He had in his possession the original and the altered mutation. In their office is the unaltered mutation while what is in the Land Registry is the altered mutation.
29. The witness explained that a mutation is prepared in three sets, with one left in the survey office and two sent for registration. Once registered, a copy is kept in the parcel file and another is released to the survey office. In this case, the registered copy was not sent to the survey office, and the copy in the parcel file is not the same as the original left at the survey office. He states that the correct mutation is the one showing the sizes 6777-0.80ha, 6778-0.15, and 6779-0.15.

30. PW4 continued that there is an open field between parcel numbers 2282 and 6779 measuring 0.58ha. That it is the Plaintiff using this space. He produced his report as an exhibit.
31. Under cross-examination by learned counsels for the 1st and 2nd Defendants, the witness explained the areas marked A, B, C, D and E in his diagram. He added that total acreage of the parcels 2282 and 2283 on the ground is 1.52ha. He estimated the area occupied by the Plaintiff's homestead to be approximately $\frac{1}{4}$ acre. He affirmed that he identified the place the Plaintiff claimed as the boundary and marked it as X-Y.
32. He further stated that, according to the boundary pointed out by the Plaintiff, parcel 961 would measure 0.37ha (from the anthill to the road). He reiterated that the subdivision by the 1st Defendant contains discrepancies and inconsistencies. The location of parcel 6778 on the ground does not align with its position on the map, which was the area marked as C in the attached diagram. He also reiterates that the open space is land within parcel 961.
33. The Land Registrar Kisii, Ms Oswera Cecilia Harriet, testified as Pw5. She stated that she had the parcel files for numbers 960 and 961 as well as the adjudication record. The adjudication showed parcel 960 measured 1.8ha while parcel 961 measured 1.1ha. She avers that parcel 960 was

subdivided in 1980 into 2282 and 2283 while 961 was subdivided in 2013 to create 6777-6779.

34. PW5 states that the mutation subdividing parcel 961 was registered on 27th August 2013 and indicate the sizes as 0.6ha, 0.15ha and 0.35ha respectively. However, the green card for 6777 shows its size as 0.97 which does not tally with the mutation, similarly, 6778 in green card is 0.08 which also does not tally with the mutation. She said the green card for 6779 was missing from their records. She said she was unable to explain the inconsistency on the green card which contained erasers. These documents were produced as exhibits. This marked the close of the Plaintiff's case.
35. The 1st Defendant adopted her written witness statement dated 30th January 2024. She stated, that adjudication took place in 1973 and her husband was registered as the owner of land West Kitutu/Bogusero/961 measuring 1.1ha. She avers that the Plaintiff's husband was registered as the owner of West Kitutu/Bugisero/960, measuring 1.8ha.
36. That in 1980, the Plaintiff's husband subdivided the land into two- L.R Nos 2282 and 2283 with L.R No 2282 sharing a common boundary with their parcel number 960. She continued that in 1990, her husband transferred the land number 961 to her name by way of gift and she lived on it peacefully. The witness avers that in 1996, the Plaintiff without

permission wilfully and intentionally moved her home from her land L.R No. 2282 to parcel number 961.

37. She reported the matter to the local administration who was unable to resolve the matter. Subsequently, this case was filed and the 1st Defendant put in a counter-claim. She averred that the surveyors came to the land to take measurements and it was found that she had not encroached on to the Plaintiff's land. She urged the court to grant the reliefs sought in the counter-claim.
38. In cross-examination, the 1st Defendant recalled that during the site visit, the Plaintiff mentioned an anthill and omosocho/omotembe trees. She stated that there is a fence and gravellia trees which are hers, but she could not specify the year she planted the trees. She denied that it was the Plaintiff who was using the open field with grass and maize, insisting that she used it from 1972 to 2000.
39. She agreed that the survey report of Innocent Machuka, which stated that the Plaintiff was using 0.68ha of the disputed portion while she used 0.47ha, is correct, as the Chief had advised that the status quo be maintained. She denied that Nyagoko stated he was to show them the boundaries of the land sold during adjudication. She confirmed that she was not present when the agreement was drawn. Asked about the size of land described in the agreement, which stated the length as 84m, width

260m and height 270m, her answer was that she did not agree the width was bigger than the length.

40. Furthermore, the 1st Defendant stated that she does not know the size of the land she sold to the 2nd Defendant, but the surveyor would know. When asked about the three sets of mutations, the witness said she was curious because she discovered that even the portion she sold to the 2nd Defendant had shifted. She added that she reported this to the Land Registrar, though they have not acted on her complaint. She denied selling the grazing field to the 2nd and 3rd Defendants, as it is the part she had left to cultivate. She also denied that the Plaintiff's land extend to the anthill.

Analysis and Determination

41. I have reviewed the pleadings filed, the evidence adduced, and the submissions made, and for determination, I raise these questions.
- a. What is the common boundary of the original L.R. Nos 960 and 961.**
 - b. Whether or not the Plaintiff is entitled to the portion referred to as the "open field" and or measuring 0.67ha.**
 - c. Whether the subdivision of parcel 961 ought to be cancelled**
 - d. What orders to grant**

42. From the pleadings, what is undisputed is that the Plaintiff's husband sold part of his land to Yuvnalis Nyagoko in the early 1970s. Yuvnalis Nyagoko later sold this land to the 1st Defendant's husband. Subsequently, in 1980 or 1982, the Plaintiff's husband passed away, leaving the Plaintiff to inherit the remaining portion.
43. There is also no dispute that at the time of sale, the area had not been adjudicated, hence the land had no number. After adjudication, the land owned by the Plaintiff's husband was registered as West Kitutu/Bogusero/960, while the portion sold to Nyagoko and subsequently to the 1st Defendant's husband was registered as West Kitutu/Bogusero/961. The 1st Defendant stated that her husband later transferred the parcel 961 to her name as a gift and she was issued with a title deed in 1990.
44. Additionally, there is no dispute that both parcels of land have been subdivided. The Plaintiff's husband subdivided parcel 960 into two, with a portion measuring 0.2ha sold to Philip Mboga. That portion is not in dispute. The deceased retained the larger portion registered as West Kitutu/Bogusero/2282, measuring 1.6ha on the title. The 1st Defendant also subdivided her parcel 961 in 2013 into three portions—6777, 6778, and 6779.

45. This dispute arose sometime in 1994 when the 1st Defendant attempted to plant maize on a portion of the land the Plaintiff believed belonged to her. The Plaintiff, in her own words, stated that she chased the 1st Defendant from this disputed portion and called the local administration to try to resolve the dispute. The Chief of the area and the clan elders visited the site twice, but the two parties could not agree on where their common boundary was. Hence, the matter was filed in court, with the 1st Defendant stating that she had also intended to file the suit, but the Plaintiff was quick.
46. The Plaintiff has no problem with the sale to Yuvnalis Nyagoko. However, the problem arose regarding the extent of the land sold. According to her and her witnesses, the land sold was from the anthill to the road. Pw4 stated that if we adopted the pointed anthill as the boundary, then parcel 961 would be only 0.37ha, compared with the size on the title, which is indicated as 1.1 ha.
47. The 1st Defendant on her part states that the boundary was identified by the Omotembe and the Omosocho trees which she pointed out. The survey report dated 14.10.2025 cast doubt on the trees relied upon by the 1st Defendant on account that they looked younger taking into consideration the date of sale of the land in 1970-75.

48. I now proceed to compare the evidence on record, noting that the burden of proof was on the shoulders of both the Plaintiff and the 1st Defendant, who has a counter-claim. There are three sets of survey reports filed in court all prepared pursuant to a court order and they all confirm that the sizes of both parcels on paper (titles) are bigger than the ground size. These Reports are dated 23.7.2003, 12.10.2020 and 14.10.2025 except for the report of December 2011 that did not contain any measurements.
49. This dispute commenced in 1994 as per the evidence of the Plaintiff and the first survey report of 2003 should have helped the parties resolve the dispute but the parties were not satisfied. The subsequent reports of 2020 and 2025 reached almost close conclusion to the report of 2003. As at 2025, the surveyor who visited the land was not able to identify the anthill and doubted the reliability of the omosocho tree pointed by the 1st Defendant as being relatively young.
50. However, these marks referred to by the parties for identifying the common boundary were visible during the visit made by the Land Registrar and the County surveyor in the 2003 report. The surveyor drew a sketch plan which identified the following boundaries;
- a. The boundary, as pointed out by the plaintiff
 - b. The boundary as pointed by the 1st Defendant
 - c. The existing boundary

- d. The boundary as per the Map
- e. The surveyor's boundary

51. The report dated 12. 10.2020 marked out the disputed portion on the RIM and gave it a size of 0.67ha, which is the portion the Plaintiff is claiming. He also pointed to the boundary placed by the surveyor. The latest report of 14.10.2025 also pointed out the boundaries, as pointed out by the Plaintiff, the 1st Defendant, and the open field being utilised by the Plaintiff.
52. I now proceed to make an analysis of these reports vis-à-vis the evidence adduced in reaching my determination. Both the Plaintiff's and the 1st Defendant's evidence has been consistent on what they considered as the boundary marks. According to Pw4, the undisputed area utilized by the Plaintiff measures 1.31ha, add 0.2ha sold to Philip Mboga gives the total ground area of the Plaintiff's land at 1.51ha. The inference drawn is that the Plaintiff's land on the ground is less by 0.29ha.
53. PW4 also stated that the 1st Defendant occupies L.R 6777 measuring 0.42ha, 2nd Defendant occupies L.R. No 6778 measuring 0.08ha and 3rd Defendant occupies 0.05ha (L.R No 6779) all falling within parcel the original parcel number 961. These sizes give a total of 0.55ha of land occupied by the Defendants that is undisputed. Thus, the 1st Defendant's

occupancy is less by 0.55ha on what she owned originally in title no. 961 (1.1ha).

54. Thus, the total loss is 0.84ha that cannot be compensated according to the wishes of both parties, since the on-ground area reported as of 12.10.2020 is 0.67ha, whereas the report of 23.7.2003 calculated the disputed area at 0.68ha. Similarly, if the Plaintiff is added the entire area of 0.67/68 ha she claims, then she will be rewarded with more than what is provided for in her title. That will be unjust enrichment.
55. If the boundary is extended to the Omotembe/omosocho tree as per the wishes of the 1st Defendant, she will also get slightly more than what is contained in her title. Again, this will cause injustice for her to get more land than the original owner. This also in view of the evidence of Pw3 who is a former Chief.
56. Although PW3 stated that he had not returned to the land since his retirement in 2020, he confirmed that when they visited the land to try and resolve the dispute, they called Yuvnalis Nyagoko, who had bought the land directly from the Plaintiff's husband. Mr Nyagoko attended the meeting and indicated the anthill as the boundary, but the 1st Defendant protested.
57. The 1st Defendant produced a sale agreement executed between her husband, Sebastian Marube, and Yuvnalis Nyagoko on 4.12.1972. She

was not a party to this agreement. The transfer of the land to her name occurred in 1990, with the explanation that her husband had three wives and decided to allocate land to each of them in different locations. In her witness statement dated 30.1.2024, the 1st Defendant did not specify how she became aware of the boundary of the parcel 961.

58. She did not call any evidence to corroborate her assertion that the boundary was the omotembe and the omosocho trees. Further, she claimed that she was utilising the disputed portion before the Plaintiff transferred her home onto it. However, her evidence of utilisation of this land prior to the sale to the 2nd and 3rd Defendants is scant.
59. The survey report of 12.10.2020 recommended that, in a situation where the map and the ground don't tally, a one-on-one scale factor is used to distribute the error proportionately. His proposal was that 961 to get 239 meters instead of 258, parcel 960 to get 68 meters instead 70 meters. He introduced another parcel no 959 (which is not part of this dispute) that he said should receive 184 meters instead of 200m.
60. I wish to state that I will not discuss the recommendation on parcel 959 as to do so shall violate the principles of natural justice. This surveyor does not indicate who benefits from the 16meters he took from parcel 959 which has no boundary dispute between parcel 2282, 961 (6777-6779).

61. Therefore, having explained why it would be unjust to adopt the boundary marks relied upon by the Plaintiff and the 1st Defendant due to the error on the ground size vis a vi the title size. I am of the opinion and so hold that the correct boundary point to be adopted in resolution of this matter is referred to as the “existing boundary” in the sketch map attached to the survey report dated 23rd July 2003 by B. Ombudu Hussein.
62. This report was useful as it gave the size of each portion as per the different sets of boundaries identified on the ground during the site visit. The report of PW4 gave the global size of the disputed portion describing who is using which size/portion. He however did not propose a location for the common boundary and left it to the court to decide based on the information he had provided.
63. According to the 2003 report, the total size in dispute is given as $45m(4500) + 22m(2200) = 67m$ (converting to 0.67ha). Thus, I hold that the disputed portion shall be shared as follows; the 1st Defendant gets 45 meters (4500sqm or 0.45ha) as marked on the sketch from the existing boundary (as per this sketch, it ends at the fence behind the Plaintiff’s home), while the Plaintiff gets the portion sketched as 22 meters (2200 sqm or 0.22ha) also identified as such on the stated sketch map.
64. For clarity in the event I do not get it right on the size shared above, I am stating that the boundary sketched as defined as “per the existing RIM” is

not adopted as the common boundary between parcel 2282 and 961. Equally, the boundary described as “the survey boundary” in that sketch is not the one adopted. Further, the boundary described as the “motembe/omosocho tree” is not taken as the boundary, and lastly, the boundary defined by “an anthill” on that sketch is not adopted. Instead, the court adopt what is defined as “**the existing boundary**” which falls between the one defined as the anthill and the motembe/mosocho and behind the two houses.

65. I have given this description in the event that the awarding of 0.22ha and 0.45ha would result in awarding more land than what exists on the ground which ground size is already smaller than the title size.
66. I am aware that this sketch was drawn before the subdivision of L.R No. 961 into three portions comprised in L.R. Nos 6777-6779. From the evidence of the 1st Defendant, it is not certain that the Plaintiff’s current home is built on any part of the land she sold to the 2nd and 3rd Defendants.
67. The Plaintiff urged the court to cancel the subdivision of parcel 961 because it was irregular and unlawful, and the evidence was shown in the irregularity of the mutations used. The evidence provided by Pw4 included an analysis of the mutation, which identified inconsistencies in

the sizes of the resulting subdivisions. Pw4's evidence was corroborated by the evidence of the Land Registrar (Pw5).

68. However, the sale transaction was between the 1st Defendant on one side and the 2nd and 3rd Defendants on the other. The irregularity took place when there was already an existing boundary dispute. Hence the resulting titles of these parties shall only be interfered with to the extent necessary, in rectification of the register to reflect the ground size and positions of parcel numbers 2282 and 961 in execution of this judgment.

69. Additionally, the question of the ground location of the portions of land sold to the 2nd and 3rd Defendant can be dealt with in a separate suit if at all once the register, the map and the ground locations of the original suit parcels 2282 and 961 (6777-6779) are amended in execution of this judgment.

70. In the final disposition, I grant the following reliefs:

a. The honourable court does grant an order directing that the Plaintiff gets 0.22ha and the 1st defendant gets 0.45ha of the disputed portion of land measuring approx. 0.67ha as per the 2003 survey report or as described in paragraph 64 of this judgment.

b. An order directing the Land Registrar to adjust the acreages of L.R. Nos. 2282 and 961 as ordered in (a) above, and an

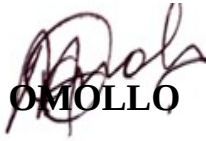
order directing the Director of Surveys to rectify the Registry Index Map sheet no. 12 accordingly to reflect the new acreages of the two parcels of land, matching the new ground sizes.

- c. If deemed necessary, an order is hereby granted cancelling the subdivision of L.R. No. 961 and the new numbers West Kitutu/Bogusero/6777, 6778, and 6779, to restore the original number 961 in the register and map, thereby facilitating the rectification of the map and the register to reflect the ground position as stated in (a) and (b) above.
- d. An order of permanent injunction is issued restraining the Defendants by themselves, their agents, servants and or assigns from occupying, possessing, using, entering onto, erecting structures of whatsoever nature and or in any manner interfering with the portion of land between the existing boundary and the RIM boundary of the sketch map attached to the survey report dated 23.7.2003.
- e. An order of permanent injunction does issue restraining the Plaintiff, her agents, servants, and or persons claiming through her from occupying, possessing, using, entering onto, erecting structures of whatsoever nature and or in any

manner interfering with the portion of land between the existing boundary and the anthill on the sketch map attached to the survey report dated 23.7.2003.

f. Each party to bear their respective costs of the suit.

Dated, signed and delivered at KISII on this 16th day of APRIL, 2026.


A. OMOLLO
JUDGE

ORIGINAL