



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC NO 183 OF 2017

(FORMERLY NAKURU ELC NO 331 OF 2014)

PELIS MUTHONI WAMBUGU (Suing as legal representative of the estate of

ROBERT WAMBUGU WARUI.....PLAINTIFF

VERSUS

BENARD KANJAU NGAMAU.....DEFENDANT

JUDGEMENT

1. Vide a plaint dated the 1st December 2014, and filed at the Nakuru High Court on the 4th December 2014, the Plaintiff's suit against the Defendant seeks for the following orders:

- i. A declaration that the whole parcel of land known as Nyandarua/Oljoro Orok Salient/8254 belongs to the Plaintiff.
- ii. A cancellation of the title document held by the Defendant of the subject parcel of land
- iii. A permanent injunction restraining the Defendant his representatives and or employees from adversely interfering with the Plaintiff's possession of that whole parcel of land known as Nyandarua/Oljoro Orok Salient/8254
- iv. Costs of this suit

2. Upon the filing of the suit, the Defendant entered appearance on the 23rd December 2014 and filed his defence on the 21st April 2015 stating that the Plaintiff's parcel of land was different from his land.

3. By an Order of the 19th July 2016, the County Surveyor was directed to visit the suit land to establish the physical location and/ or boundary between the two parcels of land, identify and/or place beacons and the other appropriate boundary markings and thereafter, file a report and a sketch on the party in actual possession and the extent of encroachment thereof. The surveyor's report dated the 14th November 2015 was filed in court on the 7th February 2017.

4. This matter was subsequently transferred from Nakuru Environment and Land Court to this Court upon its establishment where it was registered under the present number. Hearing commenced on the 12th June 2017.

Plaintiff's case.

5. The opening of the Plaintiff's case was by PW 1 the Land Surveyor at the District Surveyor office Nyandarua, who testified that he was conversant with the dispute before court that related to Nyandarua/Oljoro Orok Salient/5581. That he had filed the survey report dated 14th November 2015 in court after having attended the dispute on 26th October 2016 between parcels No. 5581 versus parcel No. 7782 and 8254. That at the time, both parties were present wherein he had used the Registry Index Map (RIM) from their office to establish the boundaries. That parcel No. 1850 was the original parcel that gave rise to parcels No.7781-7786 upon its sub-division. That Parcel No.8254 was therefore a subdivision of parcel No. 7781.

6. That he had implemented the measurement of parcel No.1850 and the number that came after. That there had been a problem on the ground to the effect that parcel No. 1850 was not in correspondence with the mutation on the ground. That the boundary defined in the map was not tallying with the division on the ground. Parcel No. 1850 was roughly 4.56 hectares wherein the registered measurement was 10.8 hectares. The land had therefore doubled.

7. That as a surveyor, he depended on the map to guide him when they had found that there was an overlap. Parcel No. 1850 was smaller on the map. The increase in area was however not amended on the map so that when implementing what was on the map, parcel No. 1850 intruded on parcel No. 5581 which was an overlap. That he had showed the parties where parcel No. 5581 ought to have been as per the map. When he went on the ground, parcel No. 7782 was fenced, while Parcel No. 8254 shared a line with Parcel No 7782. He further testified that the map at the registry was drawn in 1990 and had not been amended to solve the difference of the acreage. That the cartographic department was meant to have amended the map because what was on the ground was 9.17 hectares approximately 22.7 acres.

8. He testified that what was reflected on the title deed should have reflected on the map. He also confirmed that the maps came from the survey of Kenya and produced them as the map dated 17th August 2011 for parcel No.1850, and 5581 sheet No 4 and 5 as Pf exh 1 (a, b, and c) He stated that map for parcel No 5581, sheet 5 was an amendment within Oljoro Orok salient and was not a sub division.

9. He also testified that the procedure for amending could only be described well by the Settlement office since all parcels were allotted to the people by that office. He confirmed that unlike the 2011 map, the 2015 map captured Parcel No 5581 but what was on the map was not what had been implemented on the ground. He produced his report dated the 14th November 2015 as Pf exhibit 2. His conclusion as per his report was that since the acreage did not correspondent with the index number and because he could not tell what had happened, any implementation as a surveyor would become difficult. He testified that the map was normally prepared before persons are shown the area after which they are issued with titles.

10. On cross examination it was the witness's testimony that ordinarily a map is drawn before a title is issued. In regard to parcel No. 5581, the title and the RIM agreed in terms of acreage which was different on the ground because on the ground, parcel No. 1850 had overlapped on parcel No. 5581 due to the increase in acreage. That there was more acreage shown in 1850 on the title deed then on the original map on the ground wherein ordinarily, they should agree.

11. That on paper, parcel No. 1850 had more acreage than what was on the ground. That practically, parcel No. 1850 had overlapped, and interfered with the acreage of parcel No. 5581 during the subdivision of parcel No. 1850. That Pf exhibit 1(b) sheet 5 dated 15th January 2015 showed the position of parcel No. 5581. That although parcel No. 7781 gave rise to parcel No. 8254 and parcel No. 8255, yet parcel No 5581 came earlier than parcel No. 7782-7786 during the subdivision.

12. That although sheet 4 captured a bit of parcel No.1850, it was not complete and did not capture everything. That sheet No.5 issued on 29th June 2011 did not reflect the amendment. That Pf exhibit 2 showed the mutation as per page 3. Further that the total acreage was 9.17 hectares which did not tally with the title being that the subdivision was 10.8 hectares. That on the back of page 2 of Pf exhibit 2, there was a comment advising that there to be an amendment on the RIM to conform to the area on the ground. At Page 4 of Pf exhibit 2, the shaded area depicted the overlapping. That the subdivision was the cause of the overlapping on parcel No.5581 with the result that the new subdivision had created a title on top of an existing land. That since no amendment was made to accommodate an increase in the area, an overlap was created which was irregular.

13. On re-examination, the witness had confirmed that parcel No.5581 was an original allocation. That he had not seen any marks on the ground and there could not have been a series with parcel No.1850. That the original acreage of parcel No.1850 was 10.8 hectares as per title wherein on the map the acreage was 4.56 hectares. That parcel No. 5581 was not a series of parcel No.7781.

14. The Nyandarua Land Registrar testified as PW 2 wherein he stated that upon a complaint raised by one Bernard Kanjau, the proprietor of parcel No. Nyandarua/Oljoro orok Salient/5581, they had visited the site on the 14th February 2017 in the company of the area deputy County Commissioner Mr. Bett, the area chief Mr. Macharia, the complainant of parcel No.5581, Mr. Leonard Wachira, the proprietor of parcel No. 7782, and Mr. Robert Warui proprietor of parcel No.8254, a neighbour Mary Jine who was the proprietor of parcel No.1845, amongst others.

15. That PW1 had overseen the survey work in the company of a representative from each parcel of land wherein they had established the beacons of the affected plots. That after the survey, they had established that the area in the RIM and on the ground did not tally to the effect that whereas the acreage on the ground was 4.5 hectares, the registered area was approximately 10.8 hectares reasons being that parcel No.1850, which had been subdivided was not amended to accommodate the extra acreage.

16. He further confirmed that the title of the deceased Plaintiff, Robert Wambugu in regard to property No 8254, herein produced as Pf exh No 3 was genuine having been issued on the 3rd October 1996 by their office.

17. On cross examination, the witness confirmed that the complaint had been made by Mr. Bernard Kanjau (the Defendant) to the effect that the Plaintiff, who was his neighbour, had encroached on his property. While on the ground, they had established that the complainant was the proprietor of parcel No. 5581 whose approximate area was 22.5 hectares approximately 50 acres. That his title had been registered on 25th February 2009 and it had no encumbrances. That the acreage in the title had agreed with the acreage on the ground. They had also established that the deceased, Robert Wambugu was the proprietor of parcel No. 8254 measuring approximately 1.825 hectares. The title had been issued on 4th October 1996. That on the ground, the measurement was of less acreage then what was depicted on the title which was absurd because ordinarily, the acreage on the survey should tally with the acreage on the title. That whoever had done the survey to create the subdivision, had overlapped on parcel No. 5581 which overlapping was irregular because it disturbed the owner of plot No 5581. They established that the Plaintiff was among the many persons who had encroached on the Defendant's land.

18. He further testified that as a Land Registrar, he could only rectify the error on the title by inserting the correct acreage after receiving a letter from the District Surveyor confirming the acreage on the ground. He blamed the office of the Settlement Fund Trustee for having issued land that was small in size and which in turn had created the present conflict.

19. The witness confirmed that whereas the Defendant had planted blue gum trees on his parcel of land, there was also a small dam on the Plaintiff's parcel of land.

20. On re-examination, the witness reiterated that the deceased Plaintiff's title did not tally with the RIM because after the person who had done the survey had overlapped, the measurements had been forwarded to the District Land Registrar who had adopted them thus causing the present problem which problem could not have been picked by the Land Registrar. He confirmed that before titles are issued, the mutation plans are normally taken to them by the surveyor, wherein the Land Registrar then opens a registry and issues titles as per the acreages depicted thereon.

21. The Plaintiff testified as PW 3 wherein she informed the court that she was testifying as an administrator of her late husband as per the letters of probate dated the 5th May 2014, herein produced as Pf exh 3, her husband having passed away in the year 2000. That her late husband was the proprietor of the suit land being parcel No. Nyandarua/Oljoro Orok Salient/8254 as per Pf exh Exhibit 4, measuring 4 acres, having bought the same in the year 1985 from one Mr. Wangondu where the title was issued on the 4th October 1996.

22. That after purchasing the land, they had fenced the same and dug a pit latrine. That they lived in Nyeri from where they used to supervise the land. That after Martin Wachira, one of their children secured a job in Oljoro orok, he had left Nyeri to go and live in Oljoro orok. That one day, he had called to inform her that somebody had fenced the suit land herein, and inquired from her whether she had sold it. That together with another of her sons called Charles Warui who lived in Nairobi, they had gone to see what was on the ground wherein they had been directed to the Defendant.

23. That after she had showed him her title deed, the Defendant had suggested that since they all held titles given by the government (although she did not see his) that she ought to investigate her own title. She had thus gone to the land's office and conducted a search where she had found that the land was still registered in her late husband's name. They had also been given a map which bore her husband's name. Her children then visited the surveyor's office wherein they had paid the necessary fees and surveyor had put bacons on the suit land, a process which took a whole year to conclude. That it was while they were in the process of fencing the suit land that the Defendant had arrived in the company of police officers wherein she had been arrested and taken to Oljoro Orok Police station leaving her workers on the ground. At the station, she had been informed that the Defendant had also purchased the land. Both parties had been advised to go through the process of re-surveying the land in order to know the legitimate registered owner.

24. Later her children took up the matter and after several visits to the surveyor's office with no help forthcoming, they had decided to seek legal address thus the filing of the present case where she sought for orders of permanent injunction against the Defendant, as well as costs of the suit.

25. She also sought for investigations into the Defendant's title, if he had one, so as to establish whether it was fraudulently obtained because she had visited all the lands offices including the headquarters where she had found that the land belonged to her late husband. That her documents were genuine but she had never seen the Defendant's title which she sought to be cancelled.

26. On Cross examination, it was the Plaintiff's testimony that her husband had bought the suit land measuring 4 acres from one Samuel Wangondu Mutai who had also sold land to several other people. That thereafter, they had put up a semi-permanent house containing two rooms. They then embarked on farming and keeping animals. That later, they had stopped these activities such that by the time the Defendant trespassed, the land was bare wherein he fenced it alongside other people like Wachira her neighbour's land.

27. She confirmed that at first, when the Defendant had been summoned, he had refused to go on the ground. That during both times the surveyors had gone to the ground, although she was not present, her children were present. That her map and the Defendant's map were different although she did not inquire about the anomaly. That it had been the vendor and the surveyor who had subdivided the suit land for them and it was not true that her land had overlapped the Defendant's land.

28. PW4, Samuel Wangondu Mutahi confirmed to having sold 4 acres of the suit land to the deceased Robert Wambugu in the year 1996 wherein they had executed the sale agreement, herein produced as Pf exh 5, on the 18th October 1996. He further testified that the suit land had been a sub-division of No Nyandarua/Oljoro Orok Salient 1850 which had measured 27¹/₂ acres and which land his father had given him in the year 1993.

29. He also confirmed that when the land was surveyed, on the ground, the acreage was small but the documents in the Nairobi office showed that it was 27 ½ acres. On the ground, the surveyor had underestimated the land by about 7 ½ acres. That whilst he was still thinking on what to do, the present case was filed.

30. That after he had been given the land, and had paid all the dues for Settlement Fund Trustee, the surveyor had showed him the land, wherein he had put beacons and moved thereon in the year 1997. That upon his father's death, he sold 20 acres of the land to about 7 people where he remained with 7 ½ acres of land upon which he had built his house before moving back to Nyeri in the year 1999. That the 7 ½ acres was later subdivided to produce parcel No 8254, the suit land herein. He testified that it was not true that his piece of land had overlapped the Defendant's land. He also confirmed that as per the green card which was in his father's name, the original acreage of the land was 10.8 hectares.

31. On cross examination the witness confirmed that his father had given him parcel No. Nyandarua/Oljoro Orok Salient/1850 measuring 10.8 ha. Wherein he had first paid the debt to Settlement Fund Trustee. After payment, the surveyor had showed him the land, but there was a problem with the acreage as it did not reflect what was on the map, the difference being 7¹/₂ acres wherein he had been advised to go back to the land's office in Nairobi if he was not satisfied. He was adamant that the 7¹/₂ acres were included in the title of parcel No. 1850. That although he had not taken his title deed, yet before he sold the land, he had subdivided the same into 7 plots.

32. He confirmed from Pf exh 2, of the mutation at page 3 of the report that:

- i. The mutation showed that the land measured 9.17 hectares

- ii. The plot was subdivided into 6 parcels of land wherein;
- iii. The first was parcel No. 7781 and measured 2.23 hectares
- iv. The second was parcel No. 7782 and measured 0.81 hectares
- v. The third was parcel No. 7783 and measured 0.81 hectares
- vi. The fourth was parcel No. 7784 and measured 1.21 hectares
- vii. The fifth was parcel No. 7785 and measured 2.02 hectares
- viii. The sixth was parcel No. 7786 and measuring 2.02 hectares

33. The witness testified that the land he had sold to the Plaintiff did not reflect in the subdivision herein as the mutation plan did not reflect the same. He further confirmed that a copy of the green card herein marked as DMF 1 reflected parcel No. 1850 which was registered on the 15th August 1990 in his father's name. That the 2nd entry dated 24th April 1996 was still in his father's name, Mr. Mutahi Nganga Nduginya. The 3rd entry dated the 24th April 1996 now read his name, the 4th entry was also made on the 24th April 1996 wherein the title was closed.

34. The witness however testified that the consent he had did not reflect the 4th entry. That there were 6 new numbers on the green card which were the same on the mutation. That the record was not correct because he could not have been given the piece of land and sell and subdivide the same on the same date, therefore the green card was a forgery.

35. That he had sold to the Plaintiff the plot marked as A at page 2 of the report which is not reflected. That parcel No. 7781 was further divided into two plots wherein he took 1 acre and left 5 acres for the Plaintiff. The map that contained his piece of land was sheet No 4 herein produced as Pf exhibit 1(a). He further testified that after he had sold the land, he was not present when the Plaintiff and surveyor visited the land. That he did not sell or give the Defendant the piece of land No 1851 and that parcel No 1850 had its own title and map.

36. On re-examination, the witness testified that he did not have title to parcel No. 1850 as the same could not be found. That although the 7^{1/2} acres of land were less on the ground, yet in the documents held at the land's office, the same showed that the acreage was included in his piece of land. That the 7^{1/2} acres of land had not been sold to anybody as it was not included in the 20 acres of land he had sold.

37. PW 5, the Land and Adjudication Settlement Officer Nyandarua North testified that according to their final area list for Nyandarua/Oljoro Orok Salient Settlement Scheme No 207, parcel No. 8254 was as a result of the sub division of the original parcel No 1850 which is found in sheet 4 and 5 of the RIM. That it had measured 10.8 hectares which was approximately 22 acres. That the original numbers of Ojoro Orok Salient run from No. 2714 which was the last number and which parcels of land were all allotted. That any number after 2714 was a subdivision of that number and was not the original number. He produced the copy of the final area list for Nyandarua/Oljoro Orok Salient/207 as Pf exhibit 6 and stated that he did not have the records for Nyandarua/Oljoro Orok salient/5581.

38. On cross examination, the witness confirmed that once a number was subdivided, it could not appear on the map again. That he could see parcel No 5581 and explained that the process of how a number would get its way to the map was through mutation, if it was not originally there, which was the preserve of a surveyor. That a number ought to be in existence before it could be allocated and a survey must be carried out before the number is allocated. That According to the Oljoro Orok Scheme, the last number was 2714 and that No 5581 must have been a subdivision of another number.

39. When the witness was referred to the green card for parcel No. 1850, (DMF1) he testified that the RIM was No. 4 and 5, the area measured 10.8 hectares. That the 1st entry was Settlement Fund Trustee, the 2nd entry was in the name of Mutai Nyaga Nduguya and further that the green card corresponded to their records in as far as the RIM and sheet number referred. When he was referred to the green card in relation to parcel No 5581, herein marked as Df exh 1(b), he testified that the acreage was 22.5 hectares and it reflected on RIM No. 5 where the 1st entry was in the name of the Settlement Fund Trustee and entry No 6 was in the name of Bernard Wanjau Ngamau who was issued with a title deed on the 26th February 2009.

40. He confirmed that there were no records to this property despite having looked for the same even at the headquarters in Nairobi. He also testified that had it been a sub division, there would have been an indication as to where the number had come from. That the Settlement Fund Trustee had subdivisions which were sometimes as a result of repossessed parcels of land but which entry would always indicate them as the 1st entry and where the land came from. That the indication of parcel No 5581 was that it was an original allotment. That allotments were not uniform as they varied according to potentiality of the land. He also confirmed that there were no complaints received by their office regarding the two parcels of land.

41. The Plaintiff closed their case wherein the Defendant testified in his defence to the effect that he knew the persons who had sued him but was not aware that they owned property in Nyandarua/ Oljoro Orok Salient scheme. He confirmed that he was the proprietor of Nyandarua/Oljoro Orok Salient/ 5581 measuring 22.5 hectares having had bought the same from one Mr. Josephat Wanyeki and obtained title thereafter.

42. When he was referred to Green card marked as DFMI 1 (b), he confirmed that the 1st entry dated 30th December 1993 was in the name of Settlement Fund Trustee, entry No 4 dated 26th August 1999 was in the name of Josephat S.K Wanyeki Chege, who had been issued with a title deed on the 26th August 1999 and from whom he had bought the land. That entry No. 6 was dated the 26th February 2009 in his name

wherein he had been issued with the title on the same date.

43. It was his evidence that before buying the land, he had conducted a search, and had visited the land too. That at the time, the same had neither been occupied nor fenced. That after the land had been transferred to him, he had fenced the entire 22.5 hectares using barbed wires and posts that he had also planted 40,000 seedling of eucalyptus trees that were on site to date. That immediately he had fenced the land, about 4 people had gone there claiming between 3 and 8 acres of land, each. The Plaintiff had been one of three people. That she had some documents which made no sense to him wherein he had lodged a complaint with the land registrar. Parties had been summoned to the office of the department community at Oljoro Orok West and whereas they had been asked to settle the matter between themselves, it had proved impossible as he knew he was the legal owner of the land. That subsequently, one party had gone and hived off a portion of his land, built and put somebody thereon. That the Plaintiff herein had also tried to fence a section of his land too but had not put up any structures. He produced the green card as Df exh 1.

44. When he was referred to DMGI 1(a), the Defendant testified that he had obtained the document from the land's office. He produced it as Df exh 1(a). He further testified, when referred to Pf exh 1(b), that it corresponded to his title and the copy of the green card. He testified that he could see his property No 5581 on the map as well as parcel No 8254 on the far end of the map. That he had no doubt on the existence of the property because he had conducted due diligence on the same. That when the court sent a surveyor on the ground, both parties were present. He confirmed that from the conclusion of the report herein produced as Pf Exhibit 2, there had been an overlap created by the Plaintiff's property No. 1850 into his property.

45. He testified that he was not a trespasser and therefore should not be evicted and/or restricted from his land wherein he had planted about 40,000 eucalyptus trees in last 5-8 years. That secondly his title should not be cancelled as its issuance was prior to the Plaintiff's title. That he was the original owner of the property, and his title was clean hence the people on his land, the Plaintiff inclusive, should be evicted from thereon.

46. When he was referred to Pf Exhibit 6, he testified that he did not consider the record as a conclusive record of the area. When referred to Df Exhibit 1(b) together with Pf Exhibit 6, he testified that the Plaintiff did not produce the records of Df Exh 1 (b) which was reflecting in Pf Exh 1. He also confirmed that nobody had disowned Df Exh 1(b). He produced title to his land as Df exh 2, his statement recorded on the 20th April 2015 as Df exh 3, the list of exhibits to the statement as Df exh 4 and the rate payment receipts as DF Exhibit 5 (a –c).

47. On Cross examination, the Defendant, confirmed that their agreement was made through the Land Control Board although he did not have an agreement, but as the original records showed, he was the bona fide owner of the land and was the first allottee where his registration was first in time as compared to the Plaintiff's registration. Further, that nobody had questioned the authenticity of his documents.

48. At the close of the defence case, parties filed their written submissions. I have considered the same to which I shall summarize as follows;

Plaintiff's submission.

49. After the summary of the evidence in their case, the Plaintiff framed two issues for determination.

- i. Who is the legal and lawful owner of the suit parcel of land
- ii. Who possesses the genuine ownership documentation

50. Counsel's submission was that from the evidence adduced, there was an anomaly from the relevant government departments regarding the allocation of land and issuance of title. Three different government bodies produced conflicting information with each department blaming the other on the glaring disparities.

51. In contravention of the provisions of Section 3(3) of the law of Contract Act, the Defendant failed to produce any sale agreement between himself and the alleged vendor who purportedly sold him the land. It therefore follows that the Defendant legally had no land with regard to the present matter. The Plaintiff relied on the case of **Daudi Ledama Morintat vs Mary Christine Karie & 2 Others [2017] eKLR** to buttress their submissions.

52. It was further the Plaintiff's submission that although the original map sheet number 4 Pf exh 1(a) was amended to include the Defendant's suspicious parcel of land, the same lacked the procedures for amendment as was confirmed by the surveyor PW1. That there could only be one conclusion which is, that the Defendant may have colluded with government officials to confer to him a non-existent land.

53. Counsel submitted that the Plaintiff on the other hand gave coherent history on how she had obtained the suit parcel of land and produced a sale agreement between the said witness and her late husband dated the 1st October 1996 as Plaintiff exhibit 5. Her evidence was corroborated by the Director of Settlement who had records of the original parcel of land from where the Plaintiff's land was the excised. No records were available giving a history of the Defendant's parcel of land. This led to only one conclusion, that the suit property was originally allocated to the Plaintiff's deceased husband on the 4th October 1996.

54. That the Defendant's title which was registered on 24th February 2009 was, clearly without prejudice to the foregoing, either obtained illegally and in any event the Plaintiff's title should prevail against the Defendant's. In so submitting, the Plaintiff relied on the case of **Julius Kariuki vs Smart top Media Ltd & Another [2018] eKLR** where justice Gacheru adopted the holding in **Gitway Investment Ltd & 3 Others vs Commissioner of Lands Nairobi HCCC No. 1114 of 2002**.

55. There was further submission that the Plaintiff's title being first in time, should prevail. That the Plaintiff was a holder of a certificate of

registration and was therefore deemed to be the absolute and indefeasible owner. In conclusion, the Plaintiff was able to prove before the court how she acquired the title deed on the suit property which the Defendant did not rebut or produce any shred of evidence to the contrary. The Plaintiff was therefore the lawful and legal owner of parcel title No. Nyandarua/ Oljoro Orok Salient/8254 and the Defendant had no legal right to the same. Consequently the title deed issued to the Defendant should be cancelled forthwith.

The Defendant's submission.

56. The Defendant, in opposition of the Plaintiff's submission submitted that it was common ground that;

- i. The Plaintiff is the registered owner of Nyandarua/ Oljoro Orok Salient /8254
- ii. The Defendant is the registered owner of Nyandarua/ Oljoro Orok Salient/5581
- iii. The Plaintiff's parcel of land is a subdivision out of Nyandarua/ Oljoro Orok Salient/1850 which measured 4.56 hectares (approximately) on the ground while the registered area as per title is 10.8 hectares.
- iv. The registered area for the Defendant's land Nyandarua/ Oljoro Orok Salient/5581 corresponds with the area on the ground that 22.5 hectares(approximately)

57. That these facts were contained in the report prepared by the surveyor and produced as Plaintiff Exh 2. The evidence by the surveyor who testified as PW1 was to the effect that the map which was amended to accommodate an increase in acreage was faulty as it occasioned an overlap on to the Defendant's property. It was his testimony that the title should always reflect the survey since the survey always comes before issuance of title deeds. That the overlap was irregular as the same came after Nyandarua/ Oljoro Orok Salient/5581 was registered.

58. The Land Registrar who testified as PW2 had confirmed the evidenced by PW1 to the effect that when they went to visit the scene, they had established a problem on the ground as per the map produced in court as Plaintiff Exh 2 to the effect that whereas the ground measured 4.5 hectares, the title deed had showed an acreage of 10.84 hectares which was irregular.

59. That although PW 5, the settlement officer Nyandarua contradicted the evidence of both the Registrar and surveyor to the effect that the Defendant's land did not exist in the records at the Settlement office, yet he did not produce any complete records of the area in reference and was shy to comment on the authenticity of the title deeds and the survey maps as he was not qualified to do so. The Defendant framed his issues for determination as:

- i. Whether the Plaintiff and the Defendant, hold valid title deeds to their respective lands.
- ii. Whether there is a basis to cancel the Defendant's title deed.
- iii. Whether a restraining order can issue against the Defendant.
- iv. What remedies are available to the parties herein?

60. On the first issue, it was the Defendant's submission that both parties held titles and the court to take as prima facie evidence that a named proprietors of the land is the absolute and indefeasible owner as per the provisions of Section 26 of the Land Registration Act .The Land Registrar authenticated both titles and none of the parties has pleaded and proved any fraud, misrepresentation or illegality on the acquisition of the same.

61. On the second issue, it was the Defendant's submission that the Plaintiff had not laid any basis for cancellation of the title as is provided for by section 26 of the Land Registration Act.

62. It was the Defendant's submissions on the 3rd issue that the surveyor was categorical in his report, which was clear, that the land had been surveyed later in such a way that it had overlapped into the Defendant's land. This was a clear indication that the Defendant was on the ground earlier than the Plaintiff. That The Plaintiff had failed to establish any case against the Defendant, and her suit ought to be dismissed. The only remedy available in such a situation therefore was for parties to seek for rectification of the survey map and the records of titles from the Land Registrar who had powers under Section 15, 16 and 17 of the Land Act (sic).

Analyses and determination.

63. I have considered the evidence adduced in court as well as the submission by counsel and the applicable law herein. I remind myself that the Plaintiff in

her plaint seeks for the following orders;

- i. A declaration that the whole parcel of land known as Nyandarua/Oljo Orok Salient/8254 belongs to the Plaintiff.
- ii. A cancellation of the title document held by the Defendant of the subject parcel of land
- iii. A permanent injunction restraining the Defendant, his representatives and or employees from adversely interfering with the

Plaintiff's possession of that whole parcel of land known as Nyandarua/Oljo Orok Salient/8254

64. Having considered the testimony of the Plaintiff and her witnesses, as well as the evidence adduced by the Defendant, the Documents herein produced, the applicable laws as well as the submitted submissions, I find that the issue for determination before the court as being:-

- i. Whether the Plaintiff has established a prima facie case
- ii. Whether the Defendant's title should be cancelled.
- iii. Whether the Defendant has encroached onto the Plaintiff's land?
- iv. What orders shall be just to grant

65. In determining whether the Plaintiff has established a prima facie case, I must consider whether she has shown that she has any proprietary rights over the suit property. Evidently, from the above narration, it emerges quite clearly that the Plaintiff's deceased husband was indeed the registered proprietor of Nyandarua/Oljo Orok Salient/8254 in respect of which he held a valid title deed.

66. The evidence adduced by the Defendant on the other hand was to the same effect that he too was the registered proprietor of parcel of land No. Nyandarua/Oljo Orok Salient/5581. Indeed these were two titles pertained to two different parcels of land and both were genuine titles.

67. Having established that both parcels of land in question were registered under the Registered Land Act, Act (Cap 300) which was repealed upon the passage of the **Land Registration Act, 2012**, their registration was governed by the provisions of Section 26 (1) of the Land Registration Act of 2012 which provides as follows:-

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except;-

a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or

b. Where the certificate of title has been acquired illegally, unprocedurally, or through a corrupt scheme.

68. It thus follows that in order to challenge the Defendant's title so as to have it cancelled as prayed by the Plaintiff, evidence according to Section 26 of the Act ought to have been led to prove that the Defendant's title to parcel No. Nyandarua/Oljo Orok Salient/5581 was acquired fraudulently, through misrepresentation, illegally, unprocedurally, or through a corrupt scheme. It was not sufficient to testify and/or allege that the Defendant herein obtained title to his parcel of land through fraudulent means. The onus was on the Plaintiff to prove those allegations. Fraud is a serious matter which must be proved to the required standard as was held in the case of **R.G Patel vs Lalji Makanji 1957 E.A 314**, where the Court of Appeal stated as follows:

“Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required”.

69. I find that there was no evidence led that inferred either directly or indirectly that the Defendant had fraudulently and illegally presented conveyance to register himself as the owner of parcel No. Nyandarua/Oljo Orok Salient/5581. In brief, what I am saying is that there is no evidence upon which I can cancel the Defendant's title.

70. From the summation of both the Plaintiff and the Defendant's oral and documentary evidence, there is no dispute regarding the following issues:-

- i. The proprietorship of parcel No. Nyandarua/ Oljoro Orok Salient /8254
- ii. The proprietorship of parcel No. Nyandarua/ Oljoro Orok Salient/5581
- iii. That parcel No. 1850 was the original parcel that gave rise to parcels No.7781-7786. That Plaintiff's Parcel No. Nyandarua/ Oljoro Orok Salient/8254 was a subdivision of parcel No. 7781.
- iv. That the Defendant's parcel of land No. Oljoro Orok Salient/5581 was not a sub division.
- v. Further, that the registered area for the Defendant's land No. Nyandarua/ Oljoro Orok Salient/5581 corresponds both with the area on the ground and on this title deed.
- vi. It was also not in contention that the title deed to the Plaintiff's parcel of land No. Nyandarua/ Oljoro Orok Salient/8254 depicted its measurement as 1.825 hectares
- vii. The Defendants title deed depicted the acreage of his parcel of land No. Nyandarua/ Oljoro Orok Salient/8254 as 22.5 Hectares.

viii. That parcel No. 1850 did not correspond with the mutation on the ground and the RIM to the effect that on the ground, it measured roughly 4.56 hectares wherein the registered measurement was 10.8 hectares.

71. It was thus, based on this discrepancy that the parties herein traded allegations of encroachment and/ or trespass against each other, which I find, is the main contention in the present case.

72. It is worth noting that before the matter commenced hearing, the court vide its order of 19th July 2016 had directed for the surveyor to proceed to the suit land and file a report of his finding thereafter which report, dated the 14th November 2015, was filed in court on the 7th February 2017. In his evidence in court and in support of the report, which evidence has been fully captured in the body of this judgment, the District Surveyor Nyandarua, Mr. James Bageni testified that upon his visit on the disputed parcels of land being No. 5581, 7782 and 8254 on the 26th October 2016, and in the presence of both parties, using the Registry Index Map (RIM) from their office, he had established that Parcel No. 1850 was the original parcel that gave rise to parcels No.7781-7786 wherein parcel No.8254, the subject suit land herein, was a subdivision of parcel No. 7781.

73. That on the ground, parcel No. 1850 was not in correspondence with the mutation because the boundary defined in the map did not tally with the division on the ground to the effect that parcel No. 1850 measured roughly 4.56 hectares in contrast to the registered measurement of 10.8 hectares meaning that when implementing the said measurements, Parcel No. 1850 which was smaller on the map, had intruded on parcel No. 5581 thus creating an overlap.

74. He produced the Map issued by survey of Kenya and dated 17th August 2011 for parcel No.1850, and 5581 in sheet No 4 and 5 as Pf ex 1 (a, b, and c) and stated that map for parcel No 5581 in sheet No.5 was an amendment within Oljoro Orok salient and was not a sub division. He further testified that in regard to Parcel No. 5581, the title and the RIM agreed in terms of acreage which was different on the ground because on the ground, parcel No. 1850 had overlapped on parcel No. 5581 due to the increase in acreage on the title deed.

75. That the subdivision of parcel No. 1850 had interfered with parcel No.5581 both on the map and on the ground. That Pf exhibit 1(b) sheet 5 dated 15th January 2015 showed the position of parcel No. 5581 and the inset of the subdivision of parcel No. 1850. That parcel No. 7781 gave rise to parcel No. 8254 and parcel No. 8255. That parcel No 5581 came earlier than parcel No. 7782-7786 during the subdivision'

76. That page 3 of Pf exhibit 2, showed the mutation of parcel No.1850 which had a total acreage of 9.17 hectares which did not tally which was the cause of the comment on the back page 2 of Pf exhibit 2, that there to be an amendment on the RIM to conform to the area on the ground. At Page 4 of Pf exhibit 2 the surveyor had also indicated the shaded the area as that which was overlapping.

77. It is worth noting that the said report has not been challenged or rebutted and therefore it is the court's finding that the Plaintiff's land had overlapped on the Defendant's parcel of land. This conclusion is also backed by the surveyor who had physically visited the parcels of land concerned and had confirmed that the Plaintiff's land had indeed overlapped on the Defendant's land. Further this overlap was demonstrated by the production of surveyor's report which was accompanied by diagrams and sketches clearly marking out the area of the Plaintiff's land that had overlapped into the Defendant's parcel of land.

78. It thus appears that the indication of the acreage and the subsequent issuance of the Plaintiff's new title deed in respect of Plot Number 8254 was done without following the proper procedure wherein the Plaintiff's deceased husband had been misled on the actual acreage of Parcel No. 8254. The surveyor's report and evidence was also corroborated by the evidence of PW2.the Land Registrar.

79. From the above captioned evidence and finding, it is clear that during the sub-division of parcel No 1850 to give rise to parcels No 7781-7786 which in turn gave rise to the suit land, there was an intrusion into parcel No 5581 thereby causing an overlap. This is further confirmed by the anomaly in the measurements as indicated on the title deed being 10.84 hectares in contradiction of the measurements on the ground which was 4.5 hectares.

80. Regarding the reliefs sought by the Plaintiff that a declaration do issue that the whole parcel of land known as Nyandarua/Oljoro Orok Salient/8254 belongs to herself and therefore there should be an order of injunction to restrain the Defendant from interfering with the suit property, flowing from my finding that the Plaintiff's land had overlapped onto the Defendant's land, she is not entitled to the orders so sought.

81. I am satisfied that the Land Registrar and the surveyor duly exercised their mandate under the provisions of the Land Registration Act, 2012. Their report is well supported and I accept their finding that there was no encroachment by the Defendant on the Plaintiff's land parcel, on the contrary the Plaintiff was the one who had encroached on the Defendant's parcel of land.

82. I appreciate that under **Section 107(1) of the Evidence Act**, whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which (s) he asserts, must prove that those facts exist. In the absence of such proof, such as in this case, the same renders the Plaintiff's claim against the Defendant on encroachment on her land moot. See also **Halsbury's Laws of England Volume 12 (2015) para 702**.

83. In the circumstances, I find that the Plaintiff has not established on a balance of probabilities that she deserves the orders sought and her suit filed vide a Plaint dated 1st December 2014 is herein dismissed with costs.

Dated and delivered at Nyahururu this 28th day of October 2019.

M.C. OUNDO

