



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MILIMANI

MILIMANI ELC CASE NO. 570 OF 2008

RAHAB MUMBI KIMANI.....PLAINTIFF

VERSUS

DAMARIS WANJIKU GACHOKA.....DEFENDANT

JUDGMENT

1. The plaintiff in this suit prays for judgment against the defendant for:

- a) A permanent injunction to restrain the defendant, her servants, agents and anybody claiming through the defendant from interfering with, alienating, sub-dividing, or trespassing upon all that parcel of land known as MUGUGA/GITARU/1994 or any part of it;
- b) A permanent injunction restraining the defendant, either by herself or through her servants, agents, or any one acting under her authority from interfering with the plaintiff's and other dependants of the deceased's possession and quiet enjoyment of all that parcel of land known as MUGUGA/GITARU/1994.
- c) A mandatory injunction compelling the defendant, either by herself or through her servants, agents or anyone to remove the construction materials and or fence she has constructed on all that parcel of land known as MUGUGA/GITARU/1994.
- d) General damages for trespass;
- e) Costs of the suit;
- f) Interest on (d) and (e) above;
- g) Such other further or consequential relief and remedies which this honourable court may deem fit to award.

2. The plaintiff, Rahab Mumbi Kimani, sued as the Administratrix of the Estate of the Late Henry Kimani Kagonye.

3. The plaintiff's supporting Affidavit sworn on **19th November, 2008** and filed on **20th November, 2008** elaborates the plaintiff's claim. It states as follows:

"I, RAHAB MUMBI KIMANI of Post Office Box Number, 34 Kikuyu within the Republic of Kenya make oath and state as follows:

1. That I am the plaintiff herein suing as an administrator of the estate of Henry Kimani Kagonye, fully conversant with the facts of this suit hence competent to swear this affidavit.

2. That Henry Kimani Kagonye (Deceased) is the registered owner of all that parcel of land Known as MUGUGA/GITARU/1994 (annexed hereto and marked "RMK-1" is a copy of the official search evidencing the same).

3. That the defendant without any colour of right has entered on to the aforesaid parcel of land and deposited construction materials and erected a corrugated iron sheet structure on the suit property without my consent or any lawful authority to the detriment of the estate of Henry Kimani Kagonye and his dependants.

4. That the defendant is continuing and will continue to deposit more materials and proceed with the construction of illegal structures unless restrained by this honourable court from so doing.

5. That I have severally notified the defendant that the land on which she has deposited her construction materials and erected a fence belong to my deceased husband and have asked her to vacate and remove the unlawful structures she has put on my deceased husband's land but the defendant has refused and or neglected to vacate the said land and or remove the structures she has erected thereon.

6. That instead of complying with my demand the defendant has recently heaped stones on the said parcel of land an indication that the defendant now intends to put up permanent structures thereon an event which could permanently alter the character of the said parcel of land.

7. That I am now apprehensive that unless the defendant is stopped by an order of this honourable court the defendant is likely to waste and or damage the said parcel of land by putting up permanent structures thereon, an eventuality that would render it almost impossible for deceased's dependants to occupy and develop the land in the manner we may intend.

8. That I swear this affidavit in support of my application filed herewith.

4. The defendant's Replying Affidavit sworn on 1st December, 2008 and filed on 2nd December, 2008 elucidates her assertions in opposition to the suit. It states:

"I DAMARIS WANJIRU GACHOKA residing in Kikuyu and of Post Office Box Number 1060, Kikuyu, in the Republic of Kenya do hereby make oath and solemnly state as follows:-

1. That I am the named defendant/respondent herein and I am fully conversant with the facts of this case.

2. That I have examined all the records, documents and circumstances relating to this suit and hence I am competent to swear this affidavit.

3. That I have read and understood, the same having been explained to me by my advocates on record, M/s Wekesa & Company, the plaintiff's/Applicant's Chamber Summons Application dated 19.11.2008 together with the Supporting Affidavit of Rahab Mumbi Kimani as well as the annexures thereto and now wish to respond as hereunder.

4. That I have been advised by my advocates on record, which advise I verily believe to be true that the application aforesaid is fatally defective, grossly incompetent, discloses no cause of action against me and hence amounts to blatant abuse of the process of this honourable court.

5. That the applicant has no locus to institute this suit as no evidence has been annexed to the application to confirm that indeed one Rahab Mumbi Kimani is the administratrix of the estate

of the late Henry Kimani Kagonye.

6. That the applicant has not exhibited a copy of the title to title number Muguga/Gitaru 1994 and if the said title exists, no evidence has been furnished before the honourable court to confirm that the applicant is the sole beneficiary of the said piece of land which is said to belong to one Henry Kimani Kagonye.

7. That I deny ever entering into title number Muguga/Gitaru/1994 and depositing construction materials and or erecting a corrugated iron sheet structure on the suit property without the consent and or lawful authority of the applicant to the detriment of the estate of Henry Kimani Kagonye and his dependants.

8. That it is not correct to say that I have deposited my construction materials and erected a fence on the land that belongs to the applicant's deceased husband either as alleged or at all.

9. That I have never heaped any stones on the applicant's or indeed anybody else's land as alleged in paragraph 6 of Rahab Mumbi Kimani's supporting affidavit and neither do I have any intention of putting up permanent structures that could alter the character of anybody's land including the applicant's.

10. That without prejudice to the foregoing, I would like to state that I have built a permanent house and reside on my parcel of land ie title number Muguga/Gitura/1634. A copy of the title deed to my property is annexed hereto and marked "DWG1"

11. That my parcel of land was initially referred to as Title Number Muguga/Gitaru/68. However, a portion of it was earlier acquired by the Government of the Republic of Kenya for the construction of a road and subsequently thereafter, I was issued with another title deed for the reduced parcel of land, i.e. Title Number Muguga/Gitaru/1634.

12. That the fact I own Title Number Muguga/Gitaru/1634 has further been confirmed by none other than the government of the Republic of Kenya when it further acquired 0.0130 Hectares of my land for purposes of construction of the Nairobi Southern Bypass.

13. That the intended acquisition of a portion of my land was effected through Gazettee Notice NO. 3788 which appeared at Page 1056 of the Kenya Gazette, Volume CVIII – No. 36 published on 26.05.2006. A copy of the relevant portion of the said Kenya Gazette is annexed hereto and marked "DWG 2".

14. That subsequently thereafter, I was duly compensated by the Government of the Republic of Kenya. Copies of the award as well as notice of taking possession and vesting are annexed herewith and marked "DWG 3 (a) and (b)".

15. That I acquired and took possession of my parcel of land in the year 1974 and since then, the plaintiff and or indeed anybody else for that matter, has not taken any issue with the fact of my ownership of my land.

16. That I verily believe that if my ownership of Title Number Muguga/Gitaru/1634 was not genuine and/or if there was any dispute regarding the boundaries to my land with any neighbour, then there is no way how the government of the Republic of Kenya would have compensated me without first satisfying itself as to the authenticity of my ownership of Title Number Muguga/Gitaru/1634.

17. That if the plaintiff or any other likeminded person had any claim or boundary dispute with me, then the most appropriate thing to do would have been to lodge a formal complaint with the relevant lands office during the course of the last thirty four (34) years that I have been occupying my land.

18. That I would like to categorically state that I have never stepped on, constructed, and/or put any material on Title Number Muguga/Gitaru/1994. Indeed, I have got nothing to do with that particular land and if the applicant has any problems with it of whatever nature, then the most appropriate person to lodge her claim with is office of the Land Registrar, and not me.

19. That I do not understand why I have been dragged into this particular case when I have got nothing to do with Title Number Muguga/Gitaru/1994. The plaintiff has not even furnished this honourable court with any evidence to show that I have encroached on her parcel of land.

20. That furthermore, there is no record to show the limits and or boundaries of Title Number Muguga/Gitaru/1994 and consequently, there is nothing to prove and or indicate which portion of the plaintiff's parcel of land I have deposited construction materials.

21. That in light of the foregoing, it is evident that the applicant's claim herein is totally misguided, baseless, malicious, vexatious, scandalous, frivolous and should thus be struck out with costs at the very earliest.

22. That I swear this affidavit in opposition to the plaintiff's/applicant's application dated 19th November, 2008.

23. That what is deponed to hereinabove is true to the best of my knowledge, information and belief, save where the sources of the latter two are otherwise stated.

5. PW1's witness statement which constitutes the plaintiff's position in this suit is dated **15th November, 2013** and states as follows:

WITNESS STATEMENT OF FREDRICK KAGIA KIMANI

I, **FREDRICK KAGIA KIMANI** a resident of Kikuyu and of care of post office box number 34 Kikuyu within the Republic of Kenya do hereby solemnly declare as follows:

1. I am a son of the Plaintiff (now deceased) who instituted this suit suing as an administratrix of the Estate of Henry Kimani Kagonye (deceased) and a beneficiary of the same estate.

2. Vide a court order dated 28th November, 2011 I was substituted as a joint administrator of the Plaintiff herein together with my brother Danson Ngururi Kimani.

3. The matters relating to this suit are matters within my personal knowledge and the facts declared to herein are also facts within my personal knowledge as I have from time to time been involved as a beneficiary of the estate of the deceased.

4. I am aware of my own knowledge that my deceased father, to wit, Henry Kimani Kagonye was/is the registered owner of MUGUGA/GITARU/1994 ("the suit property") measuring 3.32 Hectares.

5. I am also aware that my late father has been the registered owner of the suit property since the year 1959.

6. My siblings and I were born and raised on the suit premises and am aware that my deceased father never sold any portion of the suit property to anyone or at all.

7. I remember that in the year 1971 there was construction of the Ndenderu-Dagoretti road. While the said road construction was ongoing a small temporary road diversion was created to pass through the suit property. The creation of the road diversion was created to pass through the suit property. The creation of the road diversion was with the consent of my deceased father. I know of

my own knowledge that my father did not surrender any portion of his land for the diversion but temporarily allowed the construction company to use our land while the construction was ongoing. After the road construction was concluded we continued to use the said road diversion as it was convenient to us and our neighbours. We have continued using the said diversion to date.

8. I am aware that in or around the year 1974 the defendant herein, to wit, Damaris Wanjiku Gachoka (hereinafter the defendant) bought all that parcel of land known as MUGUGA/GITARU/1634. The said parcel of land is separated from the suit property by an old road known as C63. This road, which is next to a railway reserve, has existed as far as I can remember.

9. Subsequently in 1975 the defendant blocked the road C63 and started cultivating all that parcel of land that was on road and railway reserve and even extended the same to our land up to the point where the diversion created during the construction of Dagoretti – Ndenderu road was and which diversion formed part of our land.

10. In 1989 my deceased father invited a surveyor to subdivide the suit property into subplots. He subdivided the said land and the family continued to stay on the said sub divided plots forming the suit property.

11. My deceased father did not raise any issue at the time as firstly the defendant is a member of the family and secondly the defendant had not at the time attempted to change the boundaries of the suit property and her parcel of land.

12. In the year 2001 the defendant changed the boundaries between the suit property and her parcel of land at the Kiambu District Registry making her the owner of the road reserve and part of our land that extended upto the temporary diversion aforesaid.

13. Soon after changing the boundary the defendant informed our family that we were occupying part of her land. This was in the year 2001. It is at this time that we discovered that the maps covering the suit property and the defendant's parcel of land had been changed and there were new boundaries indicating that even the house belonging to my late father was on the road reserve.

14. We reported the matter to the District Registrar Kiambu in 2001. We then requested to have the suit property amalgamated in order to get a clear picture of the old demarcation carried out in the year 1959 as compared to the year 2001 demarcations as the two were contradictory. However it was not until the year 2004 that the process began and which process continued until the year 2007.

15. The amalgamation was done in the year 2007. Subsequently my father (the registered owner) passed on on 22nd September, 2007 and in 2008 my late mother took over the administration of my father's estate and informed the defendant herein that she was trespassing on land forming part of the estate of my deceased father.

16. We thereafter proposed that surveyors be invited to settle the issue of ownership of the disputed portion of the suit premises but the defendant did not cooperate. My deceased mother then filed the present suit so that the court could adjudicate on the issue at hand.

17. I am aware that while this suit was pending this court ordered and directed that the Kiambu District Surveyor and the Kiambu District Registrar in the company of the area chief to visit the disputed parcel of land and mark the boundaries as the year 1959 demarcations and to prepare a report for filing in court.

18. I am aware that the Kiambu District Surveyor and the Kiambu District Registrar in the company of the chief visited the suit property and marked out the beacons marking the boundaries of the disputed portion and a report to that effect was filed in court. The Kiambu District Registrar advised the parties not to interfere with the beacons they placed on the ground to await the decision

of the court.

19. I am aware that the Kiambu District Surveyor and the Kiambu District Registrar pointed out that the Defendant herein had encroached on the suit property.

20. Unfortunately in 2010 before the suit was finalized my mother passed on and vide a court order dated 28th November, 2011, I became a co-administrator of the estate of my mother together with my brother Danson Ngururi Kimani. We were also substituted as the plaintiffs in this matter.

21. The title deed of the said land still remains at the District Registry in Kiambu awaiting the outcome of this matter and also due to the fact that the registered owner passed on.

22. I therefore pray that this honourable court reverts the suit property to what it was before the encroachment by the defendant and to cancel the subdivisions carried out by the defendant leading to the said encroachment.

23. I now wish to take up this suit on behalf of the estate of Henry Kimani Kagonye together with my brother Danson Ngururi Kimani and have the matter of the boundaries determined to enable us complete the administration of the estate of my deceased father as there are other beneficiaries involved namely Stephen Nganga Kimani and Githiri Kimani whose entitlement has not been given to them due to the pending court case.

That is all.

DECLARED AT NAIROBI BY THE SAID

FREDRICK KAGIA KIMANI

.....

THIS 15TH DAY OF NOVEMBER, 2013

6. The defendant's witness statement dated 27th January, 2016 and filed on 28th January, 2017, which she adopted as her evidence in this suit states as follows:

DEFENDANT'S WITNESS STATEMENT

I DAMARIS WANJIKU GACHOKA resident of Kikuyu and of Post Office Box Number 1060 Kikuyu in the Republic of Kenya state as follows:-

1. I am an adult of sound mind and competent to make this statement of testimony on my own behalf as the defendant herein.

2. I have examined and perused the defendat's records, the court pleadings in this case and in addition to my personal knowledge of the matter the subject of this suit and state as hereunder.

3. I am the proprietor and the registered owner of parcel No. Muguga/Gitaru/1634 (a copy of certificate of title confirming proprietorship for the said parcel appears as number 1 on the defendant's bundle of documents).

4. I purchased the said property in the year 1974 and took possession of the same immediately; on it stood a permanent house which I reside in to date.

5. The said parcel of land was initially Muguga/Gitaru/68 and Muguga/Gitaru/157 when I purchased it.

6. In the year 1990 the Government compulsorily acquired a portion of it for purposes of quarrying stones. (Copies of correspondence and gazette notice confirming this appears as number 2 on the defendant's bundle of documents)

7. The suit property; Muguga/Gitaru/1994 and Muguga/Gitaru/1634 do not have a common boundary and are actually separated by an 18 metre road (I hereby annex a photo confirming this appears as number 3 on the defendant's bundle of documents) these roads (sic) are used by the public at large.

8. That I found this road the way it is when I purchased my parcel of land in 1974. This road is used by the general public including my other neighbours and no changes have taken place ever since I bought the property.

9. I wish to state that due to the fact that the two parcels are separated by the public road, there is no point of contact between Muguga/Gitaru/1994 and Muguga/Gitaru/1634.

10. In the year 2001, I decided to subdivide my parcel of land being Muguga/Gitaru/68. Therefore, the new parcel numbers that emanated there from were 1634, 1635 and 1636 (I hereby enclose a copy of the mutation form confirming this appears as number 4 on the defendant's bundle of documents).

11. On the said parcel of land I constructed semi-permanent houses for rental and also a two storey house for renting where at the ground floor I had commercial rentals and on the other two floors I had residential houses. (I hereby annex photos showing these houses appears (sic) as number 5 on the defendant's bundle of documents).

12. Apart from the house which I reside in, that was standing on Muguga/Gitaru/68 when I purchased the property, I have also constructed semi-permanent houses for renting and had also constructed another two storey permanent houses in the year (sic) for renting and the same have been in existence since the year 2001.

13. After subdivision, Muguga/Gitaru/1634 housed the following

a. My house that I reside in which was standing on the property when I purchased the property.

b. Semi-permanent houses for rentals (I hereby annex photos depicting this appears (sic) as number 6 on the defendant's bundle of documents)

c. Two storey building that had commercial rentals at the ground floor and residential rentals on the two floors. (I hereby annex photos depicting this appears as number 5 above on the defendant's bundle of documents)

14. Again in the year 2006 the Government of the Republic of Kenya while constructing the Southern by Pass compulsorily acquired 0.030 Hectares from Muguga/Gitaru/1634 and compensated me for the same. (I hereby annex copy of the gazette Notice confirming this appears as number 7 on the defendant's bundle of documents).

15. It is worth noting from the gazette notice the plaintiff's parcel of land was also compulsorily acquired, hence they were also compensated.

16. Before the government could compensate me, it did confirm that I was the lawful and registered owner of the said parcel Number Muguga/Gitaru/1634.

17. It is also worth noting that the compensation from the Government of Kenya was in the year 2006 which is 5 years after I had subdivided initial parcel Muguga/Gitaru/68 into

Muguga/Gitaru/1634-1636 in the year 2001

18. As can be seen from the photos above, my parcel of land is situated right next to the road and the two storey building I had built for commercial and residential rentals was right next to the road.

19. The two storey building that had residential and commercial houses for rentals was standing where the southern by pass was to pass; therefore, I had to demolish this house; as it was on the way for the bypass; this was the land that was acquired and which I was compensated for.

20. After demolishing the house some of the debris was left on the ground without being collected (I annex photos depicting this appears as number 8 on the defendant's bundle of documents marked (sic).)

21. From the time I bought the parcel of land in the year 1974 I have never had a problem with my neighbours at all. The plaintiff in this matter is my neighbour and I found her and her family on their parcel of land when I purchased the land.

23. My parcel of land and that of the plaintiff is separated by a clear road which from the maps it shows measures 18 metres wide. Therefore there is no common boundary between Muguga/Gitaru/1994 and Muguga/Gitaru/1634 meet (sic). (I hereby annex copies of the registered index map for the year 2001 and 2016 confirming this appears as number 9 on the defendant's bundle of documents).

23. As earlier indicated and from the gazette notice annexed above, one Henry Kimani Kagonye was compensated together with me in the year 2006. If at all he had an issue with the boundaries put during 2001 subdivision he would have raised it then.

24. If at all he was of the opinion that I had encroached on his property which is separated from mine by a road reserve, then there would have been no better forum to raise the issue than when the Government of Kenya was surveying the two parcels; Muguga/Gitaru/1994 and Muguga/Gitaru/1634 for compulsory acquisition in 2006.

25. I have never changed any boundaries knowingly or not. In the subdivisions that took place in the year 2001 I involved a qualified surveyor to conduct the subdivision. If indeed I had changed the beacons, and took a road reserve and extended my encroachment to the plaintiff's parcel then when the government came knocking and compulsorily acquiring my land in 2006 then, the same would have been brought to the light.

26. Since the plaintiff was compensated too during the hearings of the compensations he had a chance to voice any issue he had; especially if he felt that I was encroaching on his property.

27. It is therefore with utter shock and belief when one Henry Kimani Kagonye passed on, the family started raising baseless claims on my property.

28. From the plaint and the Supporting Affidavit the plaintiff claims that I entered into and started depositing construction materials and constructing a perimeter fence on the deceased's parcel of land Muguga/Gitaru/1994.

29. The plaintiff does not care to support her allegations with any evidence of the same. In essence what the plaintiff is imputing is that, I left my property, crossed the road reserve, went to her property and started depositing construction materials and even constructed a perimeter wall.

30. I have not constructed any perimeter wall on the plaintiff's parcel of land Muguga/Gitaru/1994 and have not deposited any construction materials and have no intentions whatsoever to do the same.

31. The fence covering my parcel of land to wit Muguga/Gitaru/1634 has been there since time immemorial, it is made of kei apple type of fence which the honourable court will appreciate takes years before it grows to this mature age. (the photos above confirm this).

32. That when it was apparent that the two storey building that I had built for commercial and residential rentals was in the way of the construction of the Nairobi Southern Bypass I had to demolish the said building and the debris are still lying where the said building was standing which is on Muguga/Gitaru/1634. I have not deposited any construction materials on Muguga/Gitaru/1994 at all and have no intentions of doing the same. This debris can be seen from the photos above.

33. The allegations contained in the witness statement of Fredrick Kagia Kimani are not only false but are marred with malice.

34. As earlier stated I purchased the property in the year 1974 and I found the deceased (Henry Kimani Kagonye) and his family on their parcel of land; therefore I am not averse to the state of the land before 1974. I am also not aware of the road diversion created in the year 1971.

35. I found the road as it is now and it has been existing and separating Muguga/Gitaru/1634 (previously Muguga/Gitaru/68) and Muguga/Gitaru/1994 (previously Muguga/Gitaru/68).

36. I have never interfered with the said road; therefore, I am a stranger to the allegations alleged in the witness statements of Fredrick Kagia Kimani.

37. It is worth noting that in 1975 I was only one year old on the property; yet I had the audacity to close a road reserve used by the public and even extend the same and encroach on to the deceased (Henry Kimani Kagonye) property (which he allegedly had owned from 1959) without him raising an alarm and even involving the relevant authorities.

38. During the deceased's lifetime no one raised an issue with my actions; only for Henry Kimani Kagonye to pass on and the family decide (sic) litigate on his behalf. It is quite perturbing that has it taken 33 years for them to realize I was encroaching on their father's property.

39. In the year 2001 I had my parcel of land subdivided to 1634 to 1636 and in 1635 the government took it to have a quarry. All this has happened when the deceased one Henry Kimani Kagonye was alive.

40. I have never changed any boundaries knowingly or not. In the subdivisions I involved a qualified surveyor to conduct the subdivision. If indeed I had changed the beacons, and took a road reserve and extended the same to the plaintiff's parcel then when the government came knocking and compulsorily acquiring my land then the same would have been brought to the light.

41. Since the plaintiff was compensated too during the hearings of the compensations he had a chance to voice any issue he had especially if he felt that I was encroaching on his property.

42. Instead immediately after the passing on of Henry Kimani Kagonye the family started bringing up issues and even issuing me with threats. (I hereby annex copies of correspondences depicting this appears as number 10 on the defendant's bundle of documents).

43. Upon bringing me to court the honourable court ordered that a surveyor does a survey and locate the beacons on the two properties of lands.

44. The said surveyor visited my parcel of land to wit Muguga/Gitaru/1634 and showed me my beacons; he did not indicate that I was on the plaintiff's parcels of land.

45. The issues being brought about by the report of the surveyor that the registry index map does not match with the machine plots is surely beyond me as I do not have powers over the same.

46. The said report acknowledges that the boundaries as they are on the ground have existed over the years. If indeed the plaintiff had an issue with our boundaries since they were around since 1959, nothing would have been easier than to raise it at the earliest opportunity. Not to wait for 34 years for them to bring such issues.

47. The plaintiff's claim fails on the above limbs totally, and I pray that the same be dismissed.

7. The plaintiff has listed the following issues which she considers require determination:

a. Whether or not the plaintiff has locus to institute and prosecute this suit?

b. Whether or not the late Henry Kimani Kagonye was the registered owner of all that parcel of land known as MUGUGA/GITARU/1994?

c. Whether or not the defendant trespassed onto all that parcel of land known as Title Number MUGUGA/GITARU/1994?

d. Whether or not the defendant has any legal interest in all that parcel of land Known as MUGUGA/GITARU/1994?

e. Whether the plaintiff is entitled to the prayers sought in the plaint?

f. Who is liable to pay costs?

8. The defendant has listed the following issues which she considers require determination:

a) Whether or not the plaintiff has locus standi to institute this suit.

b) Whether or not the defendant has trespassed and or encroached on the plaintiff's parcel of Land Muguga/Gitaru/1994.

c) Whether or not the plaintiff is suited against the defendant.

d) Whether or not the plaintiff's suit is time barred.

e) Who is liable to pay costs.

9. While regard will be had to the issues raised by the defendants as the ones which should be considered, I frame the main issue for determination as:

a) Has the defendant encroached upon the plaintiff's land as claimed?

b) Who will bear the costs

10. The following reports filed in court at different times are found useful and are reproduced herebeow in full.

A

A letter written to the Deputy Registrar, Nairobi, dated **23rd July, 2010**

RE: EL/C NO. 570/2008 – MUGUGA/GITARU/1994 & 1634

Please refer to your court order dated 9th January, 2009 on the above subject requiring the District Surveyor Kiambu to point out beacons for Muguga/Gitaru/1994 and Muguga/Gitaru/1634 and file

in court survey report afterwards. Also refer to your court order dated 12th October, 2009 requiring the District Surveyor Kiambu to do a more detailed report showing the present boundaries of L.R. No. Muguga/Gitaru/1994 to include the actual boundaries, Land Survey Boundaries and distances between the physical boundaries as is on the ground and as is in the registry map. This order also requires the Land Registrar to fix boundaries of the two pieces of land as per the provision of section 21 R.L.A.

We visited the site of the parcels on 1st July, 2009 after having informed both parties of our intended visit for the purposes of implementing the first court order.

We found out that the current boundaries have been in existence for a long time and they seem to conform with the current registry index map (RIM) but differ with the machine plots (drawings prepared directly from the aerial photographs taken for the demarcation boundaries and which were used to compile the first Edition R.I.M. map for the area after the demarcation around 1959).

We also noted that the position of the boundaries on the machine plots were changed to the current position on the R.I.M by the mutation form which was prepared during the subdivision of Muguga/Gitaru/68 into new numbers Muguga/Gitaru/1634-1636. This survey was done by a licensed surveyor J.R.R. Aganyo & Associates around 5th December, 2000. This mutation was signed by the same licensed surveyor on 19th December, 2000 after which it was submitted to District Surveyor Kiambu for processing and issuance of the new title numbers. The same mutation was registered at the land registry Kiambu on 20th February, 2001 and later forwarded to survey of Kenya, Ruaraka for R.I.M amendment. The R.I.M. was amended on 13th March, 2001. (See copy of the mutation attached).

We proceeded to use the machine plots to mark the beacons for the parcels in dispute. These were pointed out to both parties in the presence of the area chief. However, we advised them to retain the earlier status quo until the court issues further orders on the same issue.

We later visited the same site on 26th April, 2010 for the purposes of implementing the second court order, this time accompanied by the District Land Registrar Kiambu. We carried out similar exercise like the one we did on 1st July, 2009 of using the machine plots to mark the beacons for the parcels in dispute. However, we did not finish aligning the boundaries due to obstruction of tree branches and hedge. We agreed with both parties that they would clear the same after which we went back on 23rd June, 2010 to do alignment of the boundaries. We successfully completed the exercise and thus the boundary marks for both the actual ground boundaries and the machine plot boundaries are clearly marked. We later drew sketches to include the actual boundaries, physical boundaries as is on the ground and as is in the Registry Index Map.

B

The field work findings on Muguga/Gitaru/1634 filed on 28th January, and annexed to the defendant's witness statement.

THE FIELD WORK FINDINGS ON MUGUGA/GITARU/1634

The ground measurements are different compared to RIM (Registered index Map)

	GROUND	RIM
A TO B	39	43
B TO C	138	140

C TO D	130	133
D TO A	44	44

The area on the ground is 0.40 HA

The area on the RIM is 0.493 HA

The two figures (i.e. registered i.e. search certificate is 0.407 HA

The two figures (i.e. registered green card and RIM) do differ with the actual ground area ground area being the smallest.

The computed area on RIM of Muguga/Gitaru/1994 and the reflected area as per search certificate are 3.32 HA.

This is to mean the difference on Muguga/Gitaru/1634 is affected by the road reserves to its disadvantage.

NOTE: The two Muguga/Gitaru/1994 and Muguga/Gitaru/1634 do not have a common boundary.

The ground situation and the RIM situation is that the two plots are separated by a road C63.

CONCLUSION

There is no link between Muguga/Gitaru/1994 and Muguga/Gitaru/1634 therefore; if there is any error or difference in the above parcels, in regards to the ground, registered index Map and the Green Card, then the same should be occasioned on the road reserve and the railway reserve.

.....

MOSES KAMAU NG'ANG'A

LICENSED SURVEYOR

C

This is the surveyor's **report dated 16th March, 2016** and filed by **JRR AGANYO AND ASSOCIATES**, Licensed Surveyors who were engaged by the defendant. It was addressed to the defendant's advocates. It reads:

RE: HIGH COURT (ELC) NO. 570 OF 2008 – NAIROBI

RAHAB MUMBI KIMANI – VS- DAMARIS WANJIRU GACHOKA

We refer to your letter Ref No. CC/2716/ of 15th March, 2016 and reply as follows:

REPORT ON SUB-DIVISION OF MUGUGA/GITARU/68 IN DECEMBER, 2000

We carried out the above sub-division survey on 5.12.2000 into three portions for the proprietor, Damaris Wanjiru Gachoka; she showed us the boundary of her entire parcel with her neighbours, the railway reserve as well as the road of access. The survey was done in her presence under RLA (Cap 300). It was noted that the railway was cutting the parcel into two portions, one on each side.

In the office the measurements made in the field were processed and drawn in mutation Form NO.

109884 and labeled A, B and C. It was at this time that it was noted that a wrong line was drawn in parcel A and yet there was no boundary there; it was deleted by white correction fluid to rectify the error.

When the Mutation records were checked and found to be in order, they were forwarded to the District Surveyor, Kiambu, for checking, examination and approval before giving them parcel numbers 1634, 1635 and 1636 in respect of parcels labeled A, B and C above respectively; copy of Mutation Form No. 109884 used in the sub-division is enclosed.

After giving the numbers to the three parcels, the District Surveyor then forwarded the documents to the District Land Registrar, Kiambu, for issuance of the Title Deeds to the parcels.

D

REPORT ON VISIT TO PARCEL NO. 1634 ON 15TH MARCH, 2016

We visited the site about mid-day and observed discreetly going round parcel 1634 on the outside; the parcel is fenced. We could not take any measurements but noted that the road of access between the parcels was now narrower, i.e. now less than 18m. The parcel belonging to the complainant was also fenced. When we were about to complete our observation we noted two people come out of complainant's residence with threatening faces.

The main observation was that parcel 1634 did not differ significantly from our previous survey. And the road was generally as it was. So plot 1634 did not share common boundary with the complainant's parcel.

OBSERVATIONS

1. Whatever it is, parcel 1634 has no common boundary with the complainant's land; the road of access is separating the parcels.
2. The District Land Registrar, Kiambu, should resolve the problem as per RLA (Cap 300) provisions under which the surveys have been done.

Yours faithfully,

J.R. R. AGANYO

LICENCED SURVEYOR

E

Letter dated **10th January, 2017** addressed to the **Deputy Registrar, Meru. It reads as follows:**

Reference is made to your ruling of **21st March, 2016**. The District Land Registrar and the District Land Surveyor visited the suit parcels with a view of addressing and solving the boundary issues thereto.

The said officers visited the parcels on 17th November, 2016 accompanied by the following:

1. Danson Ngururi Kimani – Representing the plaintiff
2. Damaris Wanjiku Gachoka – defendant
3. Hazel Gachunga – daughter of the defendant

4. Ibrahim Mwangi – plaintiff’s advocate
5. Rose Kariuki Owesi – defendant’s advocate
6. Joseph R. R. Aganyo – defendant’s surveyor
7. George Karani Magondu – Plaintiff’s surveyor
8. Milcah Muendo – Kenya National Highway Authority Surveyor
9. Other neighbours from within the area

Before we tackle what we did on the ground that day we would like to look at the past history of the two parcels ie Muguga/Gitaru/67 and Muguga/Gitaru/68

Muguga/Gitaru/67

- 1958 – first registration in the name of Henry Kimani
- 1989 – Henry Kimani changed his name to Henry Kimani Kagonye
- 1989 – Land subdivided into Muguga/Gitaru/865 to 870
- 2005 – Muguga/Gitaru/865 to 870 combined to form 1994
- 2009 – Rahab Mumbi Kimani becomes the registered owner after succ. Case no. 249 of 2008
- 2014 – Danson Ngururi Kimani and Fredrick Kagia Kimani succeed Rahab after her demise

Muguga/Gitaru/68

- 1958 – first registration in the name of Albert Kangoro
- 1974 –land transferred to Peter Waweru Gachoka
- 1977 – Damaris registered after succession
- 2001 – land subdivided to three parcels namely Muguga/Muguga/1634 to 1635. Two parcels 1634 and 1636 are registered under Damaris while 1635 was surrendered to the government.

The government acquired some land from the two parcels during the construction of Dagoretti – Kikuyu banana hill – Kiambu road complex (C 63), Kabete – Limuru road and Nairobi southern bypass.

Land acquired from parcel Muguga/Gitaru/67 (see plan A and B)

- 0.548 (0.222 Ha) acres was acquired in through gazettee notice No. 2738 & 2739 of 8th October 1971 for Dagoretti – Kikuyu road (c63)
- 0.0790 Ha was acquired for the bypass

From above the acreage acquired is 0.301 Ha.

Land acquired from parcel No. Muguga/Gitaru/68 (see plan A and B)

- 1.0700 Ha was acquired through gazettee notice No. 4911 & 4912 of 19th October, 1990 for the construction of Dagoretti – Kikuyu – banana and Kabete – Limuru road.
- 0.0130 Ha was acquired for the construction of the bypass
- 0.030 Ha was surrendered to the government during the subdivision as an access road.

Total land acquired by government is 1.113 Ha.

FINDINGS

During the site visit both parcels were picked with the help of the other surveyors. The district land

registrar and both advocates were observers. Parcel No. Muguga/Gitaru/1634 is the one that has a dispute with parcel Muguga/Gitaru/1994. The two parcels are separated by a road of 18m wide. This road runs from point C at the bypass up to point C still at the bypass. After taking measurements the road was found to have been blocked from point A to point B.

By the owner of plot 1634. It was also found that another road of 4m wide runs from point D through parcel 1994 and joins the 18m road at point B. This 4m road does not appear in the RIM but has been in use by the public for a long time.

Following the blocking of the 18m road the public started using the 4m road to access the Dagorretti-Kikuyu-Banana road. During the subdivision of Muguga/Gitaru/68 the blocked part was made part of parcel 1634 which is a product of that subdivision. The 18m road was therefore shifted and occupied the position of the 4m road on the RIM (map). This increased the acreage of parcel No. 1634. The boundary was also shifted without the authority of the land registrar as prescribed in law (registration act of 2012). The survey was approved, amended and registered thus creating the impression that the 4m road is the 18m road on the RIM (MAP). (See 105th edition of RIM). The mutation used can be seen how this was done through erasement without the licensed surveyor countersigning the cancellation on pages 2 and 3 of the mutation. See certified copy of the mutation. What we cannot be sure is whether the changes on the mutation form were done before or after the surveyor had signed pages 3 and 4.

The disputed portion of land is at between the blocked 18m road and the 4m road. This land measures 0.0094 Ha. (see plan marked C). The area of parcel No. Muguga/Gitaru/1634 measures 0.339 ha as per the ground and after this agrees with the 46th edition the RIM after deducting the acreage acquired by the government. The registered acreage was exaggerated to 0.401 Ha.

Parcel Muguga/Gitaru 1994 has ground acreage of 3.0416 Ha instead of 3.0510ha after surrendering the acquired land by the government as well as surrendering the 4m road used by the public. The registered area of 1994 is 3.32 since the acquired area is not yet surrendered and the RIM be amended accordingly.

From the above report we can conclusively say the disputed part of land belongs to parcel No. Muguga/Gitaru/1994. Finally should the court adopt this report it should authorize the District Lands Registrar to amend the records in the registry and Director of Surveys to amend the RIM with the authority from the land registrar. Attached find drawing showing the acquired land from each parcel together with their gazette notices, copy of mutation forms, two RIMS and correspondences, drawing and maps from Kenya National Authority used during the exercise.

Thank you.

JOSEPH D. MUCHUNGU

ISSACK N. NJIRU

DISTRICT SURVEYOR,

DISTRICT LAND REGISTRAR,

KIAMBU

KIAMBU.

F

Letter dated **16th February, 2017** addressed to the Deputy Registrar, Meru. It reads as follows:

RAHAB MUMBI KIMANI VS – DAMARIS WANJIKU GACHOKA

Reference is made to your ruling of 21st March, 2016.

The District Land Registrar (Isaac Njiru) and the District Land Surveyor (Joseph Muchungu) visited the suit parcels on 17th November, 2016 with a view to addressing and solving the boundary issues thereto pursuant to the court order of 21st March, 2016.

The plaintiff's brother, the defendant, the advocates, the surveyors and witnesses were present for the exercise.

I attended as defendant's surveyor and observed the following:

1. The defendants and her witnesses were present at the site and were not allowed to be heard and to show the boundary or give what they know about the boundary between parcels 1634 and 1994.
2. The Land Registrar did not hear any party
3. The District Surveyor concentrated mainly on establishing the road reserve in respect to the two parcels; this could in my view be done after resolving the boundary dispute.
4. That the District Surveyor insisted on using the 46th edition of the RIM and not the current RIM despite the Defendant's witnesses and her advocate heated objection.
5. During the exercise no acreage was established for both parcels all that the district surveyor did was to map out the road reserve.

Parcels 1634 and 1994 were initially 68 and 67 respectively.

They were created under general boundaries provisions of the law which at the time was registered land act cap 300 section 19 to 25 and now contained in Land registration Act, 2012; under section 18 (1), the cadastral map (RIM) shall be deemed to indicate the approximate boundaries and approximate situation only of the parcel. And under section 20 and 21, proprietors are obligated to maintain features e.g. fences, hedge boundary features. Failure of maintaining the boundaries attracts stiff penalties under the law.

During the exercise of 17th November, 2016, all that the District Surveyor did was to mark out the road reserves including the 18 metre road and at no point did he point out that the defendant's boundary was touching on the plaintiff's boundary.

From the ground it could be seen that the plaintiff and the defendant have maintained their boundaries over the years and there is an 18 metre road separating them, this ought to count in the boundary dispute.

The survey carried out in respect of the parcels of land was done under the general boundaries it therefore shows the ground situation showing the fences and hedges etc this is supreme. One can change an RIM to fit the ground situation and not vice versa.

From the mutation the ground area for 1634 is 0.407 hectares if the acquired land by the government in 2006 and the road reserve are subtracted 1634 acreage would be 0.376 Hectares.

Parcel 1994 resulted from combination of 6 parcels from 865 to 870 whose total acreage was 6.70 Acres (2.71 Ha). I enclose copies of the green cards in respect of the 6 parcels that can be seen from the 46th Edition of RIM.

Parcel 1994 has since been subdivided and new parcels issued to the plaintiff's family members and according to mutation dated 13.2.2014 on page 1 gave the acreage of 1994 as 3.32 Ha.

There is a big difference in the acreage of the parcels after combination that shows an increase of 1.5 acres which should not be the case.

The recent subdivision of parcel 1994 has resulted to 16 different parcels to wit 3035 to 3050 this can be seen from the recent RIM of 2016. The total acreage of the sixteen parcels is 3.25 Ha and

this does not show deficiency. Copy of mutation for sub-division of 1994 and the 2016 RIM is produced in the defendant's list of documents.

The disputed portion of the land was surrendered to the government in 2006 therefore, should be surveyed and surrendered to the government.

Finally, the survey which was done in 2000 did not interfere with any outside boundary of the former parcel 68; it formalized the positions of the new road near the 18m road and parcel 1635 which was to be acquired by the government; Copy of mutation is enclosed for reference.

Thank you.

(J.R.R. AGANYO)

LICENSED SURVEYOR FOR THE DEFENDANT

11. PW1, Fredrick Kagia Kimani, told the court that he was the son of Rahab Mumbi Kimani, the plaintiff. He told the court he had known the defendant Damaris Wanjiku Gachoka since 1974 when she bought her land which neighboured his father's land. He went on to say that he was giving evidence on behalf of the plaintiff's family. He asked the court to place reliance on a bundle of documents marked as plaintiff's Exhibit No. 1 and on his Witness Statement dated 15th November, 2013.

12. PW1 told the court that his late father, Henry Kimani Kagonye was the registered owner of parcel No. Muguga/Gitaru/1994, the suit land. He proffered that the defendant's land was Parcel No. Muguga/Gitaru/1634 which she bought in 1974. He told the court that the two parcels of land were separated by what he said was a road called C63, which had a width of 18 metres.

13. PW1 told the court that the defendant, in the year 2001 encroached upon C63 and also upon ¼ acre of land of parcel No. Muguga/Gitaru/1994. He averred that his family reported the matter to their chief who advised them to go to Kiambu to the district surveyor and the district Land Registrar and they found out that part of their land was mistakenly marked as a road reserve. He said that a report dated 23rd July, 2010 was sent to court by the Deputy Registrar.

14. PW1 told the court that his father had subdivided parcel number 1994 into 6 plots but they were advised by the Land Registrar at Kiambu to return the titles for the six plots so that the land could revert to the original title. He told the court that this process took time but eventually the land reverted to the original title.

15. PW1 told the court that the mutation used by the defendant to encroach on C63 and on their land was number 109884. He told the court that the effect of that mutation was to increase the length of the defendant's land from 10 metres to 44 metres and to reduce their land by 34 metres.

16. PW1 produced sketches showing the position of their land vis a vis the defendant's land in 1959 and how it looks now after implementation of the impugned mutation. He went on to say that on 27th August, 2015, the defendant moved her fence to almost where it is supposed to be. He concluded his evidence - in - chief by asking the court to grant the plaintiff the orders sought in the plaint.

17. PW1 told the court he had properly substituted himself with the deceased plaintiff, who is his mother.

18. During cross-examination by the defendant's advocate, PW1 rather grudgingly admitted that part of their land had been compulsorily acquired by the government for road construction. But he changed tack and said that the defendant had encroached upon C63 in 1975 instead of in 2001 but they did not see any reason to complain as the defendant had not encroached on their land. He also admitted that his father had sub divided the land in 1989, when according to his evidence the defendant had encroached upon C 63 for 14 years. He also confirmed that they had had some survey and subdivisions done in 2015 when this matter was still in court. He proffered that the mutation concerning that subdivision and survey had been

signed by his brother and was signed by the Kiambu District Land Registrar and the Kiambu District Surveyor. PW1 also admitted that in 2006, the government acquired part of their land for road construction purposes. Asked why they did not complain about encroachment upon their land by the defendant, he said that they could not complain as they had already referred the matter to the Kiambu District Land Registrar.

19. PW1 insisted that the toilets he wanted demolished were built in 2001. He also said that in 1971 they were not compensated for a diversion used by the road construction company.

20. Upon completion of PW1's evidence on 28th January, 2016, the parties, by consent, agreed that the joint Report by the District Surveyor, Kiambu and the District Registrar, Kiambu (op cit) and the reports by the defendant's surveyor be presented to the court first before further hearing of the suit. Mr. Ibrahim, the plaintiff's advocate, intimated that the parties had agreed on a date when they could explore an out of court settlement. The court issued the following orders:

- a) Parties encouraged to discuss and see if they can get an out of court settlement before the next date fixed for hearing of this case at Meru on 21.3.2016.
- b) Summons to issue for the District Surveyor, Kiambu, to give evidence on the reports his office had submitted to court in this suit and the summons to indicate that he will give evidence on 21.3.2016 at 9.00am at Meru Law Courts.
- c) By consent, parties to share the costs to be incurred by the District Surveyor, Kiambu.
- d) Further hearing on 21st of March, 2016 at Meru.

21. On 21.3.2016, the parties expressed the need to have the locus in quo visited by the District Surveyor and the District Land Registrar Kiambu, themselves and their advocates and by their independent surveyors, if they so wished, with a view to addressing and solving the boundaries issues apposite thereto.

The court issued the following orders.

- a) By consent of the parties, the District Land Registrar and the District Surveyor to visit the suit parcels of land with a view to addressing and solving boundary issues apposite thereto.
- b) During the visit, all the parties, their advocates, their independent surveyors and their witnesses to be present.
- c) The visit be conducted any date after 15.6.2016 depending on the availability of the District Land Registrar and the District Surveyor.
- d) By consent, the plaintiff to meet costs to be incurred by the District Land Registrar and the District Surveyor during the site visit and during the presentation of their report or reports on 18.7.2016.
- e) Their independent surveyors may file their separate reports, if they so wish.
- f) The two consents proffered by the parties for adoption are adopted as orders of the court and form the primary basis for the orders issued by the court today.
- g) For avoidance of doubt, the District Land Registrar to avail documents concerning the acquisitions of the 2 parcels of Land germane to this dispute.
- h) The plaintiff to serve upon the District Land Registrar and the District Surveyor, the orders issued by this court today within 10 days of today.

i) Summons to issue for the District Land Registrar and the District Surveyor, Kiambu, to come to court and give evidence on 18.7.2016 with regard to their report or reports concerning the site visit ordered by this court.

j) Directions by consent, on 18.7.2016.

22 On 18.7.2016, Mr. Ibrahim Mwangi, the plaintiff's advocate, told the court that the date given by the District Surveyor and the Land Registrar to visit the land had fallen on Idd el Fitr. Madam Owesi, the defendant's advocate told the court that the defendant was in India for medical treatment. She informed the court that the parties had agreed to be heard on 21.11.2016. On 21.11.2016, the parties were not ready to be heard. A new hearing date was fixed for the case to be heard on 20.2.2017.

Following transfer of the presiding judge from Meru to Chuka, the case was heard on 20th March, 2017.

23. PW2, Joseph Douglas Muchungu, the District Surveyor Kiambu, testified that he had a higher diploma in Land Survey from Kenya Polytechnic and that he was employed by the government in 1987. He presented his report and his evidence was by and large in congruence with the joint report he had submitted together with the Land Registrar. Even in cross-examination he stuck to his report. A few things need to be highlighted. He said parcel No. 1634 belonging to the defendant was originally parcel No. 68 and parcel no. 1994 belonging to the plaintiff was originally parcel no. 67. He testified that an 18 metres road separated the two parcels but parcel NO. 68 had a brace allowing it to cross the 18 metres road. He testified that the 18 metres road was blocked between the disputed land and parcel No. 1634. He was of the view that the owner of parcel No. 1634 had blocked the road. He concluded that the disputed road belonged to original parcel No. 67 which is now parcel No. 1994.

24. He produced diagrams showing compulsory acquisitions concerning parcel numbers 67 and 68 and asked that the diagrams he had produced be marked as plaintiff's exhibits A, B and C. He also said that there were many anomalies concerning the suit lands as the acreages on the ground and those registered were different. He demurred to answer several questions in cross examination and threw the ball to the District Registrar, PW3. The question of why he had used Edition 46 of the RIM arose and he said that he used his discretion to use that edition although the latest edition was Edition 69. By and large he stuck to the joint report he had submitted in collaboration with the Land Registrar. He, however stressed that what the parties were fighting over was a very small portion of land measuring 0.0094 Hectares.

25. PW3, Isaac Njiru, the District Land Registrar more or less defended the report he had jointly prepared with PW2. He told the court that parcel No. 1994 was registered in the names of Danson Ngururi and Fredrick Kagia Kimani in obeisance to orders made in HCCC Nairobi Succession Case No. 249 of 2008. He also told the court that the register for parcel No. Muguga/Gitaru/1634 was closed upon subdivision on 18.1.2016 and new parcel numbers were issued as follows:

a) Parcel No.3150 – Hazel Wanjiku Gachunga effective 17.2.2016.

b) Parcel No. 3151 – Hannah Wanjiru Waweru effective 17.2.2016

c) Parcel No. 3152 – Damaris Wanjiku Gachoka effective 18.1.2016

PW3 told the court that the present proprietors of parcel Nos. 3150 and 3151 got their land from the defendant. By and large, even after cross-examination by the defence side, PW3 defended the joint report he had prepared together with PW2. He told the court that Parcel No.1994, according to the green card measured 3.3 hectares, according to him approximately 8.2004 acres.

26. DW1, Damaris Wanjiku Gachoka, the defendant told the court that she was 73 years old and was a retired nurse. She asked the court to adopt her witness statement dated 27.1.2016 as her evidence in this suit. She also asked the court to rely on her documents filed on 27.1.2017 and 28.1.2017. She further asked the court to rely on other documents filed on 17.3.2016, 18.3.2016 and 16.2.2017. She also asked the court to adopt her affidavit filed on 20.2.2017 as her evidence.

27. In cross-examination she reiterated that she bought parcel No. 1634 in 1974 and she had been in occupation since then. She stressed that from 1974 she had not added any other portion to her land although the government had compulsorily acquired part of her land. She stressed that since 1974 she never had a dispute with PW1's father, Henry Kimani Kagonye, deceased, that she had encroached upon his land. She told the court that in 2001 she had prepared a mutation to realign her land as the government had acquired part of her land for the construction of the Limuru Westlands Road. She said that the mutation was dated 23.6.2001 and its serial number was 109884. She also testified that when the District Surveyor and the District Land Registrar visited the locus in quo they had established that the 18 metres road was still there. She denied blocking it and was laconic that the boundaries concerning her land were as intact as they were in 1974 when she bought her land. She also told the court that when the Land Registrar and the District Surveyor visited the site, they never told her that she had built a toilet on the road. She denied encroaching upon any road. She reiterated that when PW1's father was alive, she and him had no boundary dispute.

28. DW1 told the court that the building materials the plaintiff claimed she had deposited on part of his land were materials which resulted after demolition of her 2 storey building because that portion of her land had been compulsorily acquired by the government for construction of the southern by-pass. She was unequivocal that when she built that building which had a shop from which the plaintiff's family used to buy provisions from, no one protested.

29. To demonstrate that she had not closed any road, during re-examination by her advocate she told the court that the police station and the district officer's office were only 200 metres away. She opined that the government officers concerned could not have countenanced closure of the road by her. She reiterated that she had properly maintained her boundaries since 1974.

30. DW1 told the court that her witness Nellie Wanja who had recorded a witness statement was threatened by PW1 and as a result she had refused to give evidence. She told the court that she had sworn an affidavit regarding that threat.

31. DW's affidavit was sworn on 19th February, 2017 and was filed on 20th February, 2017. It is in the following form.

AFFIDAVIT

I, **DAMARIS WANJIKU GACHOKA** resident at Kikuyu and of Post Office Box number 1060 Kikuyu in the Republic of Kenya state as follows:

1. That I am an adult of sound mind and the defendant herein hence competent to swear this affidavit.
2. That on 17th March, 2016, one Nellie Wanja and myself visited the offices of my advocates on record and Nellie Wanja prepared her witness statement in support of my defense willingly and freely knowing the issues the subject of this suit; having been neighbours with the plaintiff and myself since the time I bought my parcel of land.
3. That on 18th March, 2016 at around 4pm I received a call from Nellie Wanja requesting me to go to her house.
4. That I went to her house and she informed me that the plaintiff, one Fredrick Kagia had visited her and told her he had been served with her witness statement; and that he asked her not to come to testify in my defense as she is going to make him be defeated in his claim.
5. That she informed me that she was scared of Fredrick Kagia after his visit and would not be comfortable to testify after his visit.
6. That what is deponed to hereinabove is true to the best of my knowledge, information and belief,

save where the sources of the latter two (2) are otherwise disclosed.

32. The witness statement of Nellie Wanja which was in Kikuyu language but was translated into English by Josephine Wangari Kaniaru states as follows:

TRANSLATION OF WITNESS STATEMENT OF NELLIE WANJA

I Nellie Wanja resident of Kikuyu in the Republic of Kenya state as follows:

1. I am an adult of sound mind and competent to make this statement of testimony on my own behalf.
2. I am a neighbour of the plaintiff and the defendant herein and own parcel Muguga/Gitaru/73 which is right next to the defendant's parcel of land Muguga/Gitaru/1634.
3. It is over 21 years old when we moved to the said property. I am aware of the state of the road and the property in contention.
4. When we came to the land we found the family of Henry Kimani Kagonye and the plaintiff herein.
5. The defendant came and occupied her current parcel since 1974; on it stood a permanent house which she resides in to date.
6. The suit property; Muguga/Gitaru/1994 and Muguga/Gitaru/1634 do not have a common boundary and are actually separated by an 18 metre road these roads (sic) are used by the public at large.
7. The road was in the past used by the public to get to Kikuyu town before Ndenderu/Dagoretti road was constructed.
8. This 18 meters road has been in existence since time in memorial (sic) initially the public would use it to access Kikuyu before the Ndenderu Dagoretti Road; currently they use it to access Gitaru, Rungiri, Wangigi and Limuru and whenever they want to access Kikuyu too.
9. It is a tarmac road and no changes have took (sic) place ever since.
10. The two parcels are separated by the public road, and then there is no point of contact between Muguga/Gitaru/1994 and Muguga/Gitaru/1634.
11. In the year 2001 the defendant built a two storey house on her parcel of Muguga/Gitaru/1634,
12. On the said parcel of land the defendant had constructed semi-permanent houses for rental and also a two storey house for renting where at the ground floor it had commercial rentals and on the other two floors had residential houses. (photos showing the houses appears as number 5 on the defendant's bundle of documents).
13. Again in the year 2006 the government of Kenya while constructing the Southern by pass compulsorily acquired a portion of Muguga/Gitaru/1634 and Muguga/Gitaru/1994 and compensated the defendant for the same. (Copy of the gazetteeNotice confirming this appears as number 7 on the defendant's bundle of documents).
14. The parcel in contention is where the defendant had constructed her two storey house and is the same that the government compulsorily acquired and compensated her for in the year (sic). After demolishing the house some of the debris was left on the ground without being collected (photos depicting this appears as number 8 on the defendant's bundle of documents marked).

15. There has never been any boundary dispute between the deceased father to the plaintiff and the defendant that we have ever witnessed.

16. The plaintiff and the defendant have no point of contact as they have no common boundaries. They are separated by a clear road which from the maps it shows measures 18 metres wide.

DATED AT NAIROBI THIS 17TH DAY OF MARCH, 2016

TRANSLATED BY

JOSPHINE WANGARI KANIARU

33. DW2, Hazel Gachoka told the court that she was 46 years old and had lived on the suit land with her mother since 1974. She told the court that she was a Professor of Human Resource Management at Jomo Kenyatta University. She asked the court to adopt her witness statement dated 17.3.2016. Her evidence was that her mother had not encroached on the plaintiff's land. By and large her evidence was in congruence with her mother's evidence. Even during cross-examination, her evidence in her witness statement was unruffled.

34. DW3, Joseph Aganyo told the court that he was 74 years old and was a licensed surveyor. He proffered that he was working in the firm of J.R.R. Aganyo & Associates where he was a director. He told the court that he had worked at the Ministry of Lands. He further told the court that he held a Bachelor of Science degree in Surveying and also had a Master of Science in Photogrammetry degree. He also proffered that he was licensed by the Surveyors Licensing Authority.

35. DW3 told the court that he had done a report dated 16.2.2017 (op.cit) which he asked the court to adopt as his evidence. In his evidence and in cross-examination he unequivocally stood by his report. Regarding the mutation he had prepared for the defendant, he told the court that when he surveyed the defendant's land in the year 2000, the 4 metres road was not there. He also testified that although the apposite mutation had an erasure, which he termed minor, he presented the relevant documents to the District Surveyor and to the District Land Registrar and they were registered. As such they constituted the legal position regarding the plaintiff's and the defendant's land.

36. The parties filed written submissions. They highlighted their submissions on 6th November, 2017.

37. Mr. Nyiha, the plaintiff's advocate, told the court that from his side's perspective, this is a case of facts predicated upon what was on the ground and what was in the government records. He said that the plaintiff's assertion was that the defendant had grabbed part of parcel number 1994, his land, and then moved an 18 metres road into her land, hence converting what was originally an 18 metres road into her land. Mr. Nyiha submitted that the plaintiff had suffered double jeopardy. Firstly the road that was not supposed to be in the plaintiff's land has been pushed into the plaintiff's land HENCE diminishing proportionately the plaintiff's land. Secondly, he also asserted, the plaintiff's actual land had been taken by the defendant.

38. Mr. Nyiha urged the court to look at two documents: (1) The report dated 10.1.2017 filed jointly by the District Surveyor (PW2) and the District Registrar (PW3). He also said that there were coded maps ABC explaining the various changes cum-movements. He also asked the court to look at the third document which is mutation No. 16/841 (serial number 10988). He asked the court to compare it with the mutation which was in the defendant's list of documents and see that there is an illegal erasure done by the defendant's surveyor (DEX3).

39. Mr. Nyiha submitted that the plaintiff had proved his case to the required proof that the defendant had trespassed and continued to trespass on the plaintiff's land. He submitted that a mandatory prohibitory order should issue.

40. Regarding prayer g, for such orders as the court may deem fit to award, he submitted that since the

District Surveyor had demonstrated that boundaries had been changed, under Article 159 of the Constitution substantive justice would be accorded by ordering correction of the index maps to be altered to reflect the correct position. Regarding damages, he wished to leave this issue to the discretion of the court.

41. Mrs Kariuki Owesi told the court that the plaintiff's claim that the defendant had deposited building materials and started constructing a perimeter wall on his land was not proved and was untrue.

42. Mrs. Owesi took issue with the question of the apposite mutation not having been included in the original pleadings.

43. Mrs Owesi submitted that the defendant had maintained her boundaries since 1974. She opined that the closure of the road should not be visited on the defendant as she found the concerned road the way it still is when she bought and occupied her land. She further said that the 4 metre road is what she and her neighbours have been using. She submitted that how this state of affairs came to be was not within the defendant's knowledge.

44. She submitted that the plaintiff had no locus standi in bringing this case to court for the following reasons:-

a) The defendant's property has already been subdivided and for this reason, the subject is no longer in existence. She opined that the court could not issue orders in vain.

b) The plaintiff's case has no merit as he came to court with dirty hands by concealing that the original land had been subdivided. He also did not bring to the attention of the court that compulsory acquisitions involving the suit lands had taken place at different times.

45. Mrs. Owesi told the court that the plaintiff's land had been subdivided but even after amalgamation, the total area of the plaintiff's land was 3.258 hectares. In her submission, this showed that even after the evidence given by the government surveyor, the plaintiff is yet to give up what was compulsorily acquired by the government and as a result, the ground position had not changed.

46. Mrs. Owessi reiterated that the change alleged to have been occasioned by the apposite mutation was non-existent and had not changed the ground position vis-à-vis the plaintiff as had been demonstrated by DW3, the maker of that mutation.

47. Mrs. Owesi submitted that equity could not aid the indolent. She said that the plaintiff should have raised the issue of blocking of the road (C63) in the 1970's. She submitted that changing the RIM to what the plaintiff wants was tantamount to asking the court to go to the pre-1958 colonial position and she opined that this would cause chaos.

48. Mrs. Owessi opined that the 4 metres road had been brought about by encroachment of the road by both the plaintiff and the defendant. She said that this was the evidence of DW3. Having participated in the encroachment of the 18 metres road to the extent that it was now a 4 metres road, the plaintiff was estopped by the doctrine of waiver from trying to benefit from a mistake he was part of.

49. Mrs. Owessi asked the court to dismiss the suit with costs to the defendant.

50. The plaintiff proffered the following authorities:

a) The Registered Land Act Cap 300, Laws of Kenya

b) The Land Act (No. 6 of 2012)

c) The Land Registration Act (No. 3 of 2012)

d) Civil Appeal No. 287 of 2016 – The Law Society of Kenya Nairobi Branch versus Malindi Law Society.

51. The defendant proffered the following authorities:

1. The Constitution of Kenya 2010
2. Land Registration Act No. 3 of 2012
3. Land Act Number 6 of 2012
4. Survey Act, Cap. 299
5. Independent Electoral and Boundaries Commission & Another –vs- Stephen Mutinda Mule & 3 others [2014] eKLR
6. Alex Wainaina t/a John Commercial Agencies v Janson Mwangi Wanjihia [2015]eKLR
7. Serah Njeri Mwobi vs John Kimani NJOROGE [2013]eKLR
8. Antony Gachara Ayub v Francis Muhinda Thinwa [2014] eKLR
9. Nation Media Group Limited v Cradle – The Children’s Foundation Suing through Geoffrey Maganya [2016] eKLR
10. Julian Adoyo Ongunga & Another v Francis Kiberenge Bondeva (suing as the Administrator of the estate of Fanuel Evans Amudavi, deceased) [2016] eKLR
11. Republic v Commissioner of Lands & Another Exparte Hammerheads Limited [2013] eKLR

52. I have carefully considered the pleadings, the documents, expert reports, the authorities and the submissions proffered by the parties in support of their diametrically opposed propositions. At the outset, I state that the cases cited by the parties reflect a true reflection of the law and precedent in their circumstances. No one authority can be congruent to another to a veritable degree of mathematical certitude.

53. I do find that DW1’s evidence was corroborated by the evidence of DW2 and DW3. Of note is the fact that the plaintiff and the defendant did not dispute that the suit lands were separated by a road (C63). Photographs forming part of the defendant’s documents indeed clearly showed the road separating the plaintiff’s land and the defendant’s land.

54. The sworn affidavit sworn by the defendant averring that the defendant’s witness had been threatened by PW1 was not challenged by the plaintiff. Even though the witness’s evidence in her signed statement was not subjected to cross-examination, it supported the defendant’s evidence that she had not encroached upon the plaintiff’s land. The prospective witness, Nellie Wanja, was a neighbour to both the plaintiff and the defendant.

55. I need to point out that the oral submissions made by the parties’ advocates constitute a fair conspectus of what is contained in their written submissions. I, however, hasten to debunk the claim by Mrs Owessi, the defendant’s advocate, that this court has no jurisdiction to deal with the issue of unlawful trespass on the land by the defendant in these proceedings. I assert that the ELC Court has the jurisdiction to handle all matters concerning land and environment and has the jurisdiction to consider suits on a case by case basis and to decide the issue of jurisdiction whenever it arose.

56. I also wish to point out that although written submissions are no doubt useful, parties cannot substitute them with the evidence taken before the court. The court’s record is the bible of proceedings. Parties

cannot arrogate to themselves the role of narrating what the court heard or did not hear.

57. I agree with the defendant's submissions that the plaintiff had concealed the fact that the suit lands had been affected by compulsorily acquisitions at different times. PW1 was categorical and laconic that his father never received compensation with respect to the acquisition which took place in 1971. This concerned the diversion which PW1 in sworn evidence told the court that his father had gratuitously allowed the road contractor to use. His evidence is controverted by a Gazette Notice No. 3738 dated 8th October, 1971 where Henry Kimani is listed as one of the people asked to put in a written claim for compensation. The Notice of Inquiry was issued by the Commissioner of Lands. The government acquired 0.548 acres from his land.

It is noted that the defendant had not bought her land at this time as she only bought her land in 1974. This is proof that PW1 was an untruthful witness.

58. Vide another Gazette Notice of 26th May, 2006, PW1's father, Henry Kimani was to cede 0.0790 acres to the government from original parcel number 67 (then 871) and the defendant was to cede 0.130 acres from original parcel No. 68 (then 1634).

59. In his evidence PW2 told the court that the disputed portion of land measured 0.0094 hectares (0.023218 acres). This was far less than the $\frac{1}{4}$ acres of land PW1 testified he was claiming from the defendant. PW3 in his evidence testified that parcel No. 1994, according to the green card, measured 3.3 Hectares (approximately 8.2004 acres). This is about the original size of parcel NO. 1994.

60. In their report, the District Surveyor and the District Land Registrar say that parcel No. Muguga/Gitaru/1994 has ground acreage of 3.0416 Ha. They also say that the area acquired compulsorily by the government was 0.301 hectares. When the two are added we have a total of 3.3426 Ha. This is bigger than the size contained in the certificate of search dated 12th November, 2008 which says the area of Muguga/Gitaru/1994 is 3.32 Ha. The difference in favour of the plaintiff is 0.0226 Ha. This is bigger than the area of 0.0094, the District Surveyor told the court the parties were fighting over. One cannot have his cake and still retain it. It is apparent that the plaintiff still retains the land that the government had compulsorily acquired from him.

61. The amalgamation of land by the defendant seems to have had the effect of her bringing back to her land, part of the land the government had compulsorily acquired from her. However, this does not entitle the plaintiff to claim that land from her. From the evidence given by the plaintiff and her witnesses, it is pellucid that the building materials the plaintiff alleged had been deposited on his land are on the portion where the defendant had built her two storey building which was demolished because the land was affected by road construction.

62. I am persuaded, after perusing his report, by Mr. J. R. R. Aganyo, Licensed Surveyor, that the survey he had done in 2000 did not interfere with any outside boundary of the former parcel No. 68 but that it formalized the position of the new road near the 18 m road and parcel 1635 which was compulsorily acquired by the government. The upshot is that the defendant had not encroached upon the plaintiff's land.

63. Mr. Aganyo's report is buttressed by the findings of another licensed surveyor, Mr. Moses Kamau Ng'ang'a whose report (op cit) was filed on 28th January, 2016 together with the defendant's witness statement. It noted that parcel numbers Muguga/Gitaru/1994 and Muguga/Gitaru/1634 did not have a common boundary as they were separated by a road (C 63). It confirmed that the ground situation and the RIM situation was that C63 indeed separated the two parcels of land. The surveyor's conclusion was: "There is no link between Muguga/Gitaru/1994 and Muguga/Gitaru/1634; therefore, if there is any error or difference in the above parcels, in regards to the Ground, Registered Index Map and the Green Card, then the same should be occasioned on the road reserve and the railway reserve."

64. Having considered all the pleadings filed by the parties, all documents filed by the parties, expert reports and the submissions proffered by the parties to buttress their diametrically opposed assertions, I

find that, on a balance of probabilities, the plaintiff has not proved her case against the defendant.

65. This suit is dismissed.

66. Costs will follow the event and are awarded to the defendant.

67. It is so ordered.

Delivered in open court at Chuka this 26th day of February, 2018 in the presence of:

CA: Ndegwa

Miss Mathenge h/b Nyiha for the plaintiff

Mrs Kariuki Owessi for the defendant

P. M. NJOROGI,

JUDGE.