



**Ngetich & another (Suing as representatives of the Estate of Kimwetich Chepkam
Moi) v District Land Registrar Nakuru & 3 others (Environment & Land
Case E18 of 2020) [2024] KEELC 1421 (KLR) (13 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1421 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E18 OF 2020
FM NJOROGE, J
MARCH 13, 2024**

BETWEEN

**JEREMIAH NGETICH 1ST PLAINTIFF
HARUN NGETICH 2ND PLAINTIFF
SUING AS REPRESENTATIVES OF THE ESTATE OF KIMWETICH CHEPKAM
MOI**

AND

**DISTRICT LAND REGISTRAR NAKURU 1ST DEFENDANT
DISTRICT LAND SURVEYORS 2ND DEFENDANT
ATTORNEY GENERAL 3RD DEFENDANT
DANIEL M MUTEMI 4TH DEFENDANT**

JUDGMENT

Introduction

1. This is a case involving the question as to whether or not this court should order a road that appears on the official map be expunged or not. The map relied on is old and the plaintiffs’ grievance is also old. According to the plaintiffs, the original parcel No Rongai/ Rongai Block 1/1106 which the plaintiffs’ father was allocated has already been subdivided into parcel numbers Rongai/Rongai Block 1/2710, 2711 and 2713 (the suit lands). The land was allocated to him in 1985 after completion of survey work, the deceased being one of the beneficiaries (and director) of the entity known as Rift Valley Investment Limited. The deceased was also a director of the said land buying company. The plaintiffs are now administrators to his estate. They have now risen to defend what they perceive as part of their inheritance which would be lost if the defendants proceeded to physically open said road that traverses



the suit lands on the map. Just like their father before them, they state that the inclusion of the said road on the map was erroneous. It is undisputed that the said road despite being on the official map, has never been opened for public use since the allocation of the suit lands to the deceased and it has continuously been occupied by his family. The deceased and the plaintiffs have over time engaged numerous offices to have the said road obliterated from the map but in vain. The threat of the physical opening of the road - and thus reducing the size of what they have for long regarded as their land - which they stringently oppose hangs over their head every day.

Pleadings

Plaint

2. The Plaintiffs' case is that they are the Representatives of the estate of the late Kimwetich Chepkam Moi (deceased) having obtained a grant of letters of administration ad litem on 2/11/2020. They state that the 1st Defendant has illegally instructed the 2nd Defendant to resurvey the suit lands and mark the scope within which a public road on the map lies on the ground between the suit lands and the adjacent parcels known as Rongai/Rongai Block 1/1914-1930, 1859 and 1860 (hereinafter "the adjacent parcels"). The Plaintiffs' case is that the said road was erroneously placed on the map sheet and has never been used since the time of allocation of the said parcels to the deceased in the year 1984. It is the Plaintiffs' case that the 1st and 2nd Defendants are coordinating an "egregious" operation to forcefully evict, invade, trespass and create an access road through the plaintiffs' parcels of Land. By the plaint dated 12/11/2020, the plaintiffs seek the following prayers:
 - a. A declaration that the deceased is the lawful proprietor of the parcels of land known as Rongai/Rongai 1/1106 currently parcel numbers 2710, 2711 and 2713;
 - b. A declaration that the purported resurvey on the deceased land parcels Rongai/Rongai Block 1/1106 currently parcel numbers 2710, 2711 and 2713 and the resultant recommendation and actions are in violation of the Plaintiffs and the beneficiaries of the deceased rights to own property and have quiet enjoyment of the same and thereby a nullity and illegal ab initio;
 - c. A Declaration that the Survey Plan Map showing the public road (10m in width) exists between parcel numbers Rongai/Rongai Block 1/1106 now 2710, 2711 and 2713 and parcel numbers 1914-1930, 1859 and 1860 is not the genuine and valid survey plan map and the same should be rectified;
 - d. This Honourable Court be pleased to issue a temporary injunction restraining the Defendants, their agents or assigns from trespassing, surveying, resurveying, invading, evicting, encroaching, creating access roads or in any manner whatsoever dealing with the deceased's parcels of Land L.R No Rongai/ Rongai Block /1106 now 2710, 2711 and 2713, 1/1914-1930, 1859 and 1860 pending the hearing and determination of the application, suit and permanently;
 - e. General damages;
 - f. Costs of this suit.
3. Other facts of the case according to the plaintiffs are as follows: Rift Valley Investment Limited and Kimango Company are two separate and distinct land buying companies; they each bought land for purposes of settling their members and shareholders, and during the survey and subdivision, the Rift Valley Investment Limited committee did not indicate the presence of a public road that traverses the suit properties.



Defence

4. The Defendants filed their statement of defence on 8/03/2021 where they denied all allegations of fact and law contained in the plaint and prayed that the Plaintiffs' suit against them be dismissed with costs.

Evidence Of The Parties

Plaintiffs' Evidence

5. Jeremiah Kipkemoi Ngetich testified as PW1. He adopted his witness statement dated 12/11/2020 as part of his evidence-in-chief and produced documents. I have read that witness statement. It is a rendition of the matters contained in the plaint with some slight additions. He stated that vide a letter dated 10/6/1986, the deceased wrote to the Rift Valley Investment Limited through their chairman and lodged a complaint over the said road. Upon writing that letter, a meeting was held. During the meeting, which was of the Rift Valley Investment Company Limited directors and which was held on 14/6/1986, the issue of the said public road was deliberated upon, and the committee resolved to rectify the "error" on the map showing a public road passing through the deceased's parcel. As a result of the above meeting and vide a letter dated 17/6/1986 the Chief-Rongai Location wrote to the 2nd Defendant and copied the District Officer-Molo Division and District Commissioner-Nakuru requesting the 2nd Defendant to rectify the map and remove the alleged public road. On 5/8/2003, the deceased yet again wrote to the 2nd Defendant informing them that there were people complaining of the existing public road between his parcel and Kimango Limited which comprises of several parcels. In 2020, the plaintiffs were summoned by the 4th defendant over a complaint lodged with him stating that the deceased had closed the said road. On 11/5/2020, the 4th defendant sanctioned a meeting of the area residents, presided over by the area chief, held on the plaintiffs' land and without the plaintiffs' knowledge, in order to forcibly open the alleged road and the assembled crowd turned violent and injured the plaintiffs. Thereafter the 4th defendant sent another letter alleging that during another meeting at his office some residents had complained of the closure of the alleged public road and of an assault the plaintiffs had allegedly perpetrated on a local administrator during the meeting held on 11/5/2020. The plaintiffs also wrote to the 2nd defendant on 3rd July 2020 complaining about the said road and in a reaction to that letter the 2nd defendant wrote to the 4th defendant confirming that the road exists and asserting that it ought to be opened for public use. The 2nd defendant also wrote to the 4th defendant again on 7/8/2020 and copied the letter to the plaintiffs, instructing surveyors to visit the plaintiffs' land. The Rift Valley Investment Company Ltd on its part wrote on 14th and 29th August 2020 conveying their stance that the perception that the alleged road existed was in error, and their opinion that the 2nd defendant should initiate the process of the removal of the road. The plaintiffs also wrote to the 3rd defendant over the same issue. The plaintiffs aver that overtime the 2nd defendant has deliberately ignored requests to exercise his mandate to remove the said road despite persuasion from the plaintiffs and from various other quarters including government officers. The plaintiffs allege that the 1st and 2nd defendants have continually trespassed on the suit land in attempts to evict them and open the alleged road without legal authority. The plaintiffs claim to have suffered loss and damage arising out of the acts and omissions of the defendants.
6. On cross-examination by Ms Shirika, PW1 averred that plot 1106 was acquired by his father through shares in Rift Valley Investments Limited in 1971 and he was the registered as owner between 1994-1995. He stated that the road they want closed is in the map labelled as P. Exh 27 and it proceeds to join the main 25-meter road. He admitted that the road is on all the 3 maps and he has produced; that Kimango Company land is on one side and the suit lands are on the other side. He admitted that



on the other side of the impugned road there are other parcels and conceded that it would have been important that those parcel owners be made to know of these proceedings. He was shown paragraph 10 of his witness statement and he admitted, just as stated in the plaint, that there are people who have complained about the road not being in public use. He avers that there was a letter written to the Chief, surveyor, and the company. He stated that the complainants were not more than 5 people but also conceded that they should have been made a part of these proceedings. He stated that the 4th Defendant who does not originate from the locality has acquired a parcel of land but he failed to substantiate that allegation of proprietorship. He nevertheless insisted that it is not correct that the 4th defendant handled the matter simply out of his duties as other administrators had handled the complaint prior to him and settled it. He stated that there are no complaints from the Rift Valley side, but only Kimango side owners had complaints. He also averred that his father was against the opening of the disputed road. He admitted that the Director of Survey is the custodian of maps in the country and the map was officially stamped. He stated that his father's title deed for his father was issued between 1984 and 1985. He stated that they had received official letters from public officers and he had responded to the letters. He denied that the plaintiffs were trying to grab public property and use this court to stamp its approval on such grabbing.

7. On re-examination, he was also shown P. Exh 19 which he stated that this also confirms that the road does not exist on the map; that he has sued the 4th Defendant in person as there was impunity on his part.
8. PW2, Peter Mburu Ruoho, a tractor driver and a tractor mechanic, testified orally and adopted as his evidence-in-chief the contents of his witness statement dated 24/2/2023. He testified that he was born in 1940. It is his evidence that he knew the deceased Kimwetich Chepkam Moi and they lived together as neighbours; he knows the plots which border Kimango Company land. He testified that his land is separated from them by only one plot; there is a road which he sought to be created from plot No 1858 to 1159 and the same led to the highway. It was his testimony that he asked for it from the deceased Kimwetich Chepkam Moi; there was no such road before. He testified that the Kimango Company side are served by a road and that the road between Kimango Company side and the Rift Valley Enterprises side has no use. According to him, at present there is no road on the ground where one is sought to be opened.
9. On cross-examination he stated that the land was Kimwetich's so he asked for the road to make it easier to go to Rongai. He stated that members of the public use the said road. However, he does not know the number of his plot. He stated that the surveyor came to show the road and the road is in the map. He stated that he is the one who had a problem of access to Rongai and so he begged the deceased for an access road and he never went to the company over lack of a road.
10. PW3, Samuel Maritim Kosgey, testified orally and adopted his witness statement dated 24/2/2023 as his evidence-in-chief. In his evidence, he stated that he is a resident at Rongai, a farmer and chairman in respect of public utilities in the land. He testified that he knew Kimwetich Moi, a former director of Rift Valley Investment Limited of which he was shareholder too; PW3's plot is No 234 and is shown in the map labelled P. Exh 5. He testified that on the map P. Exh 5, the larger plots belonged to Rift Valley Investments and the smaller plots belonged to Kimango farm. It was his testimony that the road which is now disputed was supposed to be removed and the Kimango farm residents have an alternative route between plot No 1914-1878. He testified that there are access roads every two blocks and they have enough access roads. He also testified that the disputed road is not use on the ground.
11. On cross-examination he testified that he does not have any papers from the lands office regarding the road and that he does not know if Kimwetich objected to the road before he subdivided his land.



12. PW4, Kiplangat Musa Kirui, gave oral evidence and adopted his witness statement dated 24/02/2023 as part of his evidence-in-chief. He testified that he lives at Rift Valley Investment Farm in Rongai as a farmer and his plot, No 1092, is situated about 3 kilometers from Kimwetich's land. He testified that the disputed road between Kimwetich's land and Kimango Company land on the map is not reflected on the ground.
13. On cross-examination, he stated that the road is in the map. He confirmed that PW2's road was carved out of Kimwetich's land and is used by many people. Without elaboration, he stated that Kimango Company and Rift Valley Enterprises lands used to be one unit. On re-examination, PW4 testified that they never fixed beacons for a road and Kimango farm people had their own road. At that point, the plaintiffs closed their case.

Defendant's Evidence

14. This court had on 21/4/2022 allowed the defendants, and particularly the 2nd defendant, to put their house in order to enable them defend the case properly. On 12/6/2023 when the matter came up for Defence hearing, there was no appearance from the Defendants. Counsel for the Plaintiffs asked that the Defence case be closed and the court allowed the application.

Submissions

Plaintiffs' Submissions

15. The Plaintiffs' filed their submissions on 19/06/2023 while the defendants filed theirs on 26/06/2023. According to the plaintiffs, the following issues arise for determination: (a) Whether the deceased is the lawful proprietor of the parcels of land known as Rongai/Rongai Block 1/1106; currently parcel numbers 2710, 2711 and 2713; (b) Whether the purported resurvey on the deceased land, the resultant recommendation and actions are in violation of the Plaintiffs' and the beneficiaries to own property and have quiet enjoyment of the same and thereby a nullity and illegal ab initio; (c) Whether the Survey Plan Map showing the public road (10m in width) exists between parcel numbers Rongai/Rongai Block 1/1106 now 2710, 2711 and 2713 and parcel numbers 1914-1930, 1859 and 1860 is the genuine and valid; (d) Whether this Court should issue a permanent injunction restraining the Defendants, their agents or assigns from trespassing, surveying, resurveying. Invading, evicting, encroaching, creating access roads or in any manner whatsoever dealing with the deceased's parcels of Land; (e) Whether the plaintiffs are entitled to general damages; (f) Who is to bear costs of this suit.
16. Citing Section 26 of the [Land Registration Act](#), 2012 it is the Plaintiffs' submission that the deceased was and still is the registered owner of all that parcel of land known as Rongai/ Rongai Block 1/1106 currently parcel numbers 2710, 2711 and 2713. On the second issue, relying on Section 18 of the Registered [Land Act](#) and the case of Peter Rugu Gikanga & Another v Hellen Muringe Kabutha [2018] eKLR, the Plaintiffs' submit that they were not invited to any public participation forum to discuss the road indicated in the map despite having interests in the land and thus the survey is a nullity and illegal ab initio as it was done without the consent of the Plaintiffs'. The Plaintiffs' also submit that it is not their duty to provide an access road for the Kimango Farm Company shareholders and they cannot be blamed for the situation that the Kimango Farm Company Shareholders are in. They maintain that on the ground, there has never been a public road on their parcel of land. The Plaintiffs also urge the court to grant them a permanent injunction restraining the Defendants in dealing with the deceased's parcel of land and they place reliance on Article 40 of [the Constitution](#) of Kenya, Section 26 (1) of the [Land Registration Act](#), Section 80 of the [Land Registration Act](#) and the case of Salome Wangari Wamunyu



v Irene Jane Njambi & 2 others [2021] eKLR. The Plaintiffs' submit that they are entitled to general damages and an order of costs in their favor.

Defendants' Submissions

17. It was submitted on behalf of the defendants that the following issues arise for determination: (a) Whether the survey plan showing the existence of a road between parcel numbers Rongai/ Rongai/ Block 1/1106 now 2710, 2711 and 2713 and parcel numbers 1914-1930, 1859 and 1860 is a genuine and valid survey; (b) Whether the Plaintiffs are entitled to general damages; (c) Whether the Plaintiffs have established fraud as against the defendants; (d) Who should pay costs. On issue (a), the Defendants submit that based on the map produced the said road existed before the Plaintiffs' father purchased the property. They submit that the Plaintiffs have not established that the road was created out of their property. The Defendants' rely on Section 9 of the *Land Act* and the cases of *Dellian Langata Limited v Symon Thuo Muhia & 4 others*, Nairobi CA No 144 of 2014 [2018] eKLR, *Kenya Anti-Corruption Commission v Frann Investment Limited & 6 others* [2020] eKLR, *Niaz Mohamed Jan Mohamed v Commissioner for Lands & 4 others* [1996] eKLR and *Veronica Njeri Waweru & 4 others vs City Council of Nairobi & 2 others* [2012] eKLR and draw a distinction between public roads, which are for all public and roads of access which have connotation of private usage and are meant to connect a party to public utilities. They state that under Section 9 of the *Land Act* public roads can only be converted to private land in accordance with a laid down procedure and not through the court. On issue no. (b), the Defendants' submit that the Plaintiffs' are not entitled to general damages and they buttress their argument using Section 107 (1) of the *Evidence Act*. On issue no. (c) the Defendants submitted that the plaintiffs failed to prove fraud. They also submitted that it is impossible for the court to injunct the Defendants' from opening a public road that exists in the Registered Index Map. They rely on the cases of *Giella vs Cassman Brown Co Ltd* [1973] EA 358 and *Mrao Ltd Vs First Assurance Bank of Kenya Ltd & 2 Others* [2003] eKLR to state that an injunction can not issue as the conditions necessary for the grant of injunctions have not been satisfied. The defendants rely on Section 107 of the *Evidence Act* to state that the plaintiffs are not entitled to damages as it was not proved as to how the defendants have interfered with their private properties. They finally relied on the provisions of Section 27 of the CPA that costs follow the event and on *Machakos ELC Pet No 6 of 2013 Party of Independent Candidate of Kenya & Another v Mutula Kilonzo & 2 others* [2013] eKLR to support the claim that they are entitled to costs of the suit.

Analysis and Determination

18. After considering the pleadings, the evidence and the submissions, the following issues arise for determination:
- a. Whether the disputed road validly exists on the map and whether an order of permanent injunction should issue restraining the Defendants from any activity aimed at opening it on the ground;
 - b. Whether the defendants have acted fraudulently;
 - c. Whether the plaintiffs are entitled to general damages;
 - d. Who is to bear costs of this suit.



Whether the disputed road validly exists on the map and whether an order of permanent injunction should issue restraining the Defendants from any activity aimed at opening it on the ground;

19. It is indisputable that the suit properties belong to the deceased. It is also admitted by both sides in this case that on the survey map, there is reflected a road between the suit lands and the plots that belong to Kimango Company farm shareholders. On one hand, the Plaintiffs' in their case claim that the said road was erroneously placed on the map sheet and has never been used since the time of allocation of the said parcels to the deceased in the year 1984. The Defendants submit that based on the map produced the said road existed before the Plaintiffs' father purchased the property, and that a public road is public land that can only be converted to private property through laid down procedures. Further the Defendants submit that the Plaintiffs have not established that the road was created out of the suit lands.
20. The Plaintiffs in their submissions indicate that during the survey and subdivision, Rift Valley Investment Limited Committee did not indicate that a public road traverses the deceased's property. It was upon this premise that the deceased, during his lifetime, and now the Plaintiffs, began raising complaints through various correspondences objecting to the road's presence both on the map and on the ground.
21. According to the plaintiffs, from inception the Rift Valley Investment Limited Committee did not indicate that the impugned road exists. The Plaintiffs appear to buttress their claim by citing the resolution of a company meeting held on 14th June 1986 in which it is stated that the committee resolved to rectify the error on the map which erroneously shows a public road. It is therefore the case that the subject road has been reflected in the official maps held by the relevant survey offices for a very long time. The question that this court must first seek to answer is whether the said resolution has a legal basis.
22. It can be observed that firstly, the allegation that the committee never indicated that there is such a road in existence comes from the plaintiff's letter dated 10/6/86 (P. Exh 8); how and when such a finding was made by the committee has not been explained by the plaintiffs. Secondly, that letter seems to evince the fact that the deceased had harboured the expectation that having evidently donated some of his land to certain persons to enable them access their properties, he was entitled to have the road expunged from the map, but there is no direct nexus drawn between the donation and such expectation. His children appear to be of similar view. Regarding that donation, PW1 stated as follows:

“There are also other roads which the directors and other members donated for access to the Rongai Institute. My late father donated access road to enable the public from Kimango to access Gogar Primary School on the other side as they would have otherwise used a long route since he was a leader. Two neighbours requested that road. That is quite a different road. it was put into the map after the donation. By the time of the donation my father's land did not have title. that was around 1982-1983. When the road was given the titles followed. The road was already in the map. The chief and the directors found that the inclusion of the road was erroneous.”
23. The Rift Valley Investment Ltd Committee is neither a government entity nor is it recognized as an agent of the government of Kenya. The ordinary approach would be to presume that nothing turns on the resolution at a meeting held by Rift Valley Investment Limited directors on 14/6/1986 earlier mentioned, and that Rift Valley Investment Limited is also merely a land buying company and not a government agency, and that its resolution is of no effect. Indeed, the Company resolution has not taken effect since the road in dispute still appears on the official map to date. It is undisputed that



the road has been there since the date of the original survey that birthed the suit lands then known as Rongai/ Rongai Block 1/1106. That is evidenced by all copies of maps produced by the plaintiffs which bore the demarcation of the disputed road. It is proper to examine wholistically all the evidence supporting the plaintiff's contention that the road was erroneously included in the official map.

24. First is the oral evidence that the Company Committee never reserved any road on that side of their father's farm. This assertion is clearly unsupported by any but oral evidence.
25. Second is their objection raised by their father vide the letter dated 10/6/86. That letter reads as follows:

“Joseph Mutai Chepkam Moi

Box 6006

RONGAI.

10/06/1986

The Chairman,

Rift Valley Investment Ltd,

Box 75194,

NAIROBI.

Dear Sir,

RE: Complain (sic) of A Public Road In My Plot No. 1106

I wish to raise a complain concerning a road appearing in the map indicating a public road passing through my plot No. 1106 at the boarder (sic) of Rift Valley Investment Ltd and Kimango Farm Company which are separate entities.

During subdivision the committee did not indicate a road that goes through plot No's 1914 up to the last plot No. 1958.

The committee further had ensured that all shareholders get accessibility to the major road linking Rongai trading market and Visoi Railway station after I donated 9 meters' public road from my plot.

The surveyor should be recalled back to come and check and rectify the map.

Yours faithfully,

Kimwetich Chepkam Moi

Cc:

1. Secretary – Rift Valley Investment Ltd – Rongai
2. Chief – Rongai Location.”

26. Third is the company resolution produced in court. It would appear that the letter dated 10/6/1986 reached the company directors and the complaint therein was discussed as a substantive agenda vide Min no 4/14/06/1986. That minute reads as follows:

“Letter of complaint.

Mr. Joseph Arap Mutai Chepkam Moi raised a complain through a letter before the committee. The chairman directed the committee to rectify the error on the map which



erroneously shows a public road passing at the border between Rift Valley Investment Ltd and Kimango passing through Arap Mutai Farm No. 1106 and plot No. 1913 and also rectify the boundary where Kimango shareholders moved one meter inside his farm.”

27. It is clear that the directors of Rift Valley Investments Ltd employed a surveyor who created the map that reflected the road. It is that Board that had the mandate as to how the land would be surveyed. It is in their resolution that one finds how important the Company Committee was. It merely implemented the Board decisions. It was directed by the board resolution to rectify the “error” on the map, referring to the impugned road. It is this resolution that corroborates to an extent the plaintiff’s claim that the company committee had not reserved any road traversing through their father’s farm.
28. Fourth is long usage of the land comprising the road reflected on the map. That road has been used by the deceased’s family continuously since the demarcation of the Rift Valley Investments Ltd company land amongst shareholders. The plaintiffs used the land now said to be a road not for access but for their agronomic purposes. The Plaintiffs have sought the rectification of the map and also this court’s declaration that the public road is not genuine and valid. Ordinarily it would be stated and with authority, as the defendants have ably demonstrated in their submissions, that long use of land meant for a road could not confer on the plaintiffs any interest therein. The Court in the case of Veronica Njeri Waweru & 4 others vs City Council of Nairobi & 2 others (2012) eKLR pronounced itself as follows: -
- “The land in question is a road reserve and the public interest demands that such land should be used for the purpose it is intended and should not be appropriated for private use. The claim of the petitioners that they have operated their businesses on the land for the last ten years cannot outweigh the public interest to have the land revert to the purpose it was intended as a road reserve.”
29. The defendants’ reliance on the above passage and others particularly Kenya Anti-Corruption Commission v Frann Investment Limited & 6 others [2020] eKLR, Niaz Mohamed Jan Mohamed v Commissioner for Lands & 4 others [1996] eKLR as well as Section 9 of the *Land Act* is noted. However, this case is distinguishable from one where land was compulsorily acquired for a public purpose in exchange for compensation. This is a strange case of dissatisfaction with the kind of survey done on private land, in which the surveyor who did the initial survey is said to have included the road in question without the authorization of the company committee. On that basis alone this court requires to go beyond the strictures of statute to establish if any injustice has been proved by the plaintiffs.
30. Fifth, what the plaintiffs have done next is to blame the defendants for allegedly attempting to provide the Kimango Company side with an access road and this would not be surprising considering that the current government officers holding such maps as those the plaintiff produced may not be seized of all the history of the said road, and may be just translating what is in the map on to the ground. The defendants’ action towards that goal would ordinarily be interpreted as providing the Kimango side with an alternative access just as the plaintiff state. However, all the Kimango Company shareholders’ plots abutting the said road are still accessible through a road situate on the opposite side and as such are not starved of access. They would in fact obtain double access from either end if the subject road was opened as per the defendants’ wishes. On its part, this court notes that the impugned road that abuts the suit lands is only a small part of a long straight stretch of road that serves numerous properties excised from both the Rift Valley Enterprises land to the right and the Kimango Company land to the left. On one end, to the right hand side of the map, the said stretch traverses only through what was once Rift Valley Enterprises Ltd land, now subdivided into many plots on either side, which implies that the entire road, including the stretch objected to by the plaintiffs, was created during one survey exercise and not through separate surveys. It is also from this observation that a conclusion may be



safely arrived at that no Kimango company land was affected by the creation of that entire road and that Rift Valley Enterprises Ltd Board of Directors and Committee were wholly responsible for the subdivision that created it.

31. Official maps ought to be the correct guiding posts in the determination of this kind of dispute. No map was presented by the Director of Surveys, who is the proper custodian of map records. All the maps produced by the plaintiffs reflect the said road on their face. Perhaps the plaintiffs can be credited with having nothing to hide for having courageously presented evidence that is apparently against their case which unscrupulous parties may have concealed.
32. Evidence is that survey was done in 1984. Ordinarily the survey map takes a long time to be registered to pave the way for titles to issue. It is the 2nd defendant's duty to receive the survey map from the surveyor who subdivides the land and to approve it and forward it to the 1st defendant who uses the same to issue titles. There is a wealth of litigation in our justice system that I have come across that shows that at times, it takes even decades before a map can be prepared and submitted to or approved by the 2nd defendant and thereafter be registered in order for titles to issue. That is hardly surprising given the emotive theme that land is in this republic and the many leadership wrangles endemic in the land buying company sector. However, title to the plaintiffs' father's land, Rongai/ Rongai Block 1/1106 issued in 1985, soon after the survey which is conceded to have been conducted in 1984. This would mean that the surveyor had already registered the area map by the time the deceased wrote his letter dated 10/6/86 and the time the Rift Valley Company Ltd meeting took place on 14/6/1986. The deceased appears to have followed the subdivision matters keenly and this is also not strange since the concerned surveyor was a client to the company the deceased had held directorship in. He is deemed to have known the instructions given to the surveyor, and he raised alarm as soon as he realized that something had gone wrong. Assuming that the director's titles issued first on 23/8/1985 and the deceased's letter was written on 10/6/1986, it took him only 10 months to realize that the map was not drawn as per instructions by the company committee. This delay would be hardly surprising given that the road was not physically carved out on the ground, for he is deemed to have presumed that the land he had been allocated was intact, unaffected by the road.
33. Sixthly, the plaintiffs rely on the chief's letter to the 2nd defendant dated 17/6/1986. Though the defendants' submission is that the chief lacked any basis to write such letter as he is not charged with the mandate to establish, correct or authorize the correction of boundaries in land survey matters, it can be observed that he wrote only 3 days after the Board resolution discussed above was made and he enclosed a copy of the plaintiffs letter of 10/6/1986, and it is credible that, as he states in the said letter, he had confirmed the proper position held by the directors that the road was included in error.
34. It matters not that laymen like the plaintiffs and PW2 are of the strong opinion that the road has no use since there are other roads. The dispute herein, and that is clearly evident from the plaint, is also not as to whether or not the Kimango Company shareholders have access to their lands or not as PW3 and PW4 would have this court believe or whether those shareholders claim the disputed road from the plaintiffs. If that were the case, they would have been joined to this suit long ago. It is not even established that they have ever raised any complaint over the non-opening of the road. The question is whether the committee and the company intended that road to be created out of the deceased's land and if the surveyor acted contrary to company committee instructions during the drawing of the map, thus necessitating that he be recalled as soon as the error was noted and raised by the deceased.
35. Having hindsight regarding the conduct of land buying companies and the wealth of power enjoyed by their boards of directors, it can not be said that the input of the board of directors' resolution and the Committee's stance are of no consequence in the matter. The deceased was one of the directors of the company that commissioned the survey yet he ended up dissatisfied with the end-product of the



exercise and raised the issue promptly. Whatever map that resulted from the exercise must be taken to have been subject to the company scrutiny, further instructions and adjustments, of course subject to technical considerations expressed by the 2nd defendant. The company must therefore be deemed to have had right to apply for rectification of any errors noted thereon till it was content with the record before registration. Unfortunately, the apparent error in this case was noted after registration of the map and issuance of title deeds.

36. The most dissatisfactory aspect of this case however is that there was dearth of evidence from both sides as to the particular instructions that the committee gave and the registered acreage owned by the deceased vis-a-vis the total acreage his land as aggregated with the suggested road would occupy. In brief, this is to state that the evidence of acreage of the plaintiff's plots was not presented by either side to show whether the suit lands' measurements include or exclude the disputed road. Evidence showing that the suit lands' total acreage indicated on the land register either included or did not include that of the disputed road is lacking in this matter. Had such evidence been provided then this court may have had a basis for concluding either that the plaintiffs' case should be upheld and that the inclusion of the road on the official map was indeed in error. In the absence of such evidence, such conclusions cannot be reached.
37. Given the history of the dispute as analyzed herein above and the paucity of evidence, this court can neither proclaim that there is a valid road in the map meant to be translated to the ground nor grant the plaintiff's claim for rectification of the map.
38. As to whether the defendants should be enjoined from any activity aimed at opening the road on the ground I must state that their conduct has been quite dissatisfactory in that they failed to bring evidence to court to show the proper state of affairs regarding the said road; they have not shown in detail from the history in their files, whether they acted on the deceased's and the chief's letters by exerting their professionalism to ascertain if the plaintiff's claims regarding the company instructions to the surveyor were true prior to commencing the road opening exercise. That exercise should have involved scrutiny the history of the Rift Valley Enterprises Ltd land buying company records and also examining of the company directors and committee members as well as the surveyor or survey firm which conducted the first survey and submitted the initial edition of the map for Rongai/Rongai Block 1. That would have been a more preferable start aimed at seeking more information before conducting any public participation forum as intimated in the 4th defendant's letter (P. Exh 16).
39. It is not disputed in this suit that Joseph Chepkam Moi donated land to create a road that is used by the public, and indeed he appears to have, according to evidence, expected that his complaint about the disputed road would be addressed to completion favourably on that account. There was no documentation showing that donation produced at the trial, but the donation of his own land for public purposes, if verified, should be factored in during attempts to do equity in this dispute. An examination of that issue of donation of land for a public road should have also been inquired into by the defendants so as to inform their decision. This is a case in which the defendants should exercise their offices in the proper manner and expeditiously to write finis to the festering dispute as to whether the impugned road should have been, as per alleged company instructions to the initial surveyor, been included in the map or not. The defendants must be temporarily restrained from taking any precipitate action until a proper inquiry informs their activity that may affect the plaintiffs' land.

Whether the defendants have acted fraudulently;

40. The Plaintiffs in their plaint dated 12/11/2020 have also alleged fraud on the part of the Defendants. Fraud has been defined in Black's Law Dictionary 11th Edition as "...a knowing misrepresentation or



knowing concealment of material facts made to induce another to act to his or her detriment.” It is an established principle of law that a claim based on fraud must be specifically pleaded and strictly proved.

41. In the case of *Koinange & 13 others vs Charles Karuga Koinange* 1986 KLR the court held that:

“When fraud is alleged by the Plaintiffs the onus is on the Plaintiffs to discharge the burden of proof. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond a reasonable doubt, something more than a balance of probabilities is required.”
42. In the case of *Kinyanjui Kamau v George Kamau* [2015] eKLR the court dismissed the appeal as it was not demonstrated that the appellants had proved fraud to the required degree and stated that:

“It is trite law that any allegations of fraud must be pleaded and strictly proved. see *Ndolo vs Ndolo* [2008]1KLR (G & F) 742 wherein the court stated that “... we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove the allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely; proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases...”
43. In my view, the defendants must be deemed to have been acting in the course of their duty as they understood it. Whereas this court lacks unlimited jurisdiction to pronounce boundaries on its own, under Section 18 of the [Land Act](#) the 1st and 2nd defendants are empowered to act on matters concerning boundaries to parcels of land. That section provides as follows:

“

“18. Boundaries

 - (1) Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.
 - (2) The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.
 - (3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary:
Provided that where all the boundaries are defined under section 19(3), the determination of the position of any uncertain boundary shall be done as stipulated in the [Survey Act](#), (Cap. 299).”
 44. They are safe from any possibility of being held liable for fraud, for they may claim ignorance of the history of the company’s instructions to the surveyor.



Whether the plaintiffs are entitled to general damages;

45. I can not state with certainty that the defendants were present during the time when the first edition of the map in question was being made or registered. I can not attribute malice or ill will against the defendants. They have a map with them the history of which they may not have understood, or tried to unearth as they tried to translate it to the ground whereupon they came into conflict with the deceased and the plaintiffs. But to credit the plaintiffs and their father, they took action long ago while the defendants or rather their predecessors did not, which omission led to persistence of a state of uncertainty as to whether there were technical considerations or circumstances that demanded the creation of a road on the ground, or whether the surveyor whimsically and capriciously disobeyed the company committee's instructions and drew a road where there was meant to be none. Given their perception based on the map, however researched it was, that a public road is indeed in existence and should be opened by force if the plaintiffs demur, the Defendant's in their capacity as public officers were within their mandate to inform the Plaintiffs of this fact and to put in motion measures aimed at opening the disputed road for use by the public. There was no resurvey but a mere translation of the map that was attempted by the defendants. That notwithstanding, as the Plaintiffs have not discharged the burden that is required by them to substantiate fraud on the part of the Defendants no judgment in that regard can be entered against them.
46. The Court takes cognizance that the Plaintiffs claim general damages for frustrated use and abuse of the suit lands, threatened loss of proprietorship and properties, physical and psychological stress and general damages for loss of use of the deceased land parcels. It is trite that loss and damage must be proved. The Plaintiffs have produced outpatient treatment cards as P. Exh 14 (a) and P. Exh 14 (b) showing that indeed they were treated for some injuries. Further in the Plaintiff's list of documents, there is evidence that the matter was indeed reported in to the Police as evinced by P. Exh 15. This is insufficient to prove loss and damage. The plaintiffs have failed to present even a scintilla of relevant evidence how they incurred loss or damage and that claim must fail.
47. Also, the court notes that at paragraph 15 of the Plaint, the allegations of assault are blamed on the Assistant Chief- Kapkwen Sub-Location. The Court notes that the Assistant-Chief Kapkwen Sub-Location is not among the Defendant's herein and there is no pleading that raises the doctrine of vicarious liability with reference to him. The Court thus finds that the Plaintiffs are not entitled to any general or special damages from the present Defendants.

Who ought to pay the costs of the suit;

48. In view of my analysis hereinabove and the deficiencies evident in both side's cases, each party ought to bear their own costs of this suit.

Conclusion

49. I consider the plaintiff's grievance as one that has not been conclusively addressed by the defendants. I have observed above that under the [Land Act](#) the defendants have capacity to act to resolve disputes concerning boundaries. It has been a period of about fourteen years since Article 159(2)(c) and (d) of [the Constitution](#) of Kenya 2010 respectively reminded us that adversarial confrontation needs not be the only means of resolving disputes, that courts must in determining matters before them apply alternative dispute resolution methods to ensure substantive justice is done and that justice shall be administered without undue regard to technicalities. The plaintiffs may not have achieved their aim of presenting sufficient evidence in this suit to warrant orders that the road on the map expunged but



that may not be construed to mean that such evidence does not exist. That does not bar this court from issuing orders that will facilitate closure in the matter.

50. The upshot of the foregoing is that I find that the plaintiffs' claim in the Plaint dated 12/11/2023 has only partial merit and I make the following final orders:
- a. Prayer no (a) in the plaintiff's plaint dated 12th November 2020 is allowed;
 - b. An alternative dispute resolution mechanism shall be engaged in in the following manner: the concerned Assistant County Commissioner of the region hosting the plaintiff's lands shall within six (6) months of this judgment publicize within the vicinity of the suit land and organize, chair and conduct a public consultative forum that shall involve a team comprised of:
 - i. The County Land Registrar Nakuru;
 - ii. The County Surveyor, Nakuru;
 - iii. the Rift Valley Enterprises Ltd Directors;
 - iv. the Rift Valley Enterprises Ltd Committee;
 - v. the Local Chief;
 - vi. the Surveyor or Surveyor's firm who conducted the initial survey leading to the first edition of the map for Rongai/Rongai Block 1 (RVI & Kimango);
 - vii. the administrators of the estate of the deceased Joseph Kimwetich Chepkam Moi and
 - viii. three (3) other persons from the neighbourhood of the suit lands with proper knowledge of the history of the subdivision of the Rift Valley Investments Ltd company land;
 - c. The consultative forum team shall on the basis of the evidence resolve whether the disputed road was properly or erroneously included in the official map and whether it ought to be opened up on the ground and it shall make appropriate recommendations to the offices of the County Land Registrar and the County Land Surveyor and the latter two offices shall implement those recommendations and either rectify the map to expunge the road or to uphold it depending on the consultative forum's findings;
 - d. The forum shall consider all aspects including but not limited to the history of the survey process for the suit land and accessibility of other lands surrounding the Plaintiffs lands;
 - e. A temporary injunction is hereby issued restraining the defendants or any servant or agent acting in their behalf from interfering with the suit land until the outcome of the consultative forum has been received by the 1st, 2nd and 3rd defendants for implementation in accordance with order no (c) herein above;
 - f. The consultative forum shall regulate its own procedure but shall observe all concerned or affected parties' right to be heard thereat and the guidance that I have set out in this judgment;
 - g. Each party shall bear their own costs of this suit.

DATED, SIGNED AND DELIVERED AT NAKURU IN OPEN COURT ON THIS 13TH DAY OF MARCH, 2024.

MWANGI NJOROGE



JUDGE, ELC, MALINDI

