



Langat (Suing as Personal Representative of the Estate of Kiplangat Arap Rop - Deceased) & another v Birir (Sued as the Personal Representative of the Estate of Kibirir A. Maina alias Kongole Kibirir - Deceased) (Environment and Land Appeal E009 of 2023) [2025] KEELC 666 (KLR) (20 February 2025) (Judgment)

Neutral citation: [2025] KEELC 666 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT AND LAND APPEAL E009 OF 2023**

LA OMOLLO, J

FEBRUARY 20, 2025

BETWEEN

**RAPHAEL KIPKOECH LANGAT (SUING AS PERSONAL REPRESENTATIVE OF THE ESTATE OF KIPLANGAT ARAP ROP - DECEASED) ... 1ST APPELLANT
JOSHUA KIPYEGON LANGAT (SUING AS PERSONAL REPRESENTATIVE OF THE ESTATE OF KIPLANGAT ARAP ROP - DECEASED) 2ND APPELLANT**

AND

JOHN KIPKOECH BIRIR (SUED AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF KIBIRIR A. MAINA ALIAS KONGOLE KIBIRIR - DECEASED) RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Appeal dated 21st December, 2023 the Appellants challenge the decision of Hon. C. Obulutsa CM in Kericho CMELC No. E030 of 2021 delivered on 5th December, 2023.

Factual Background.

2. The Respondent filed a plaint dated 10th May, 2021 against the Appellants seeking the following orders;
1. A declaration that the 1st and 2nd Defendants are trespassers and illegally in occupation of five (5) acres piece of land comprised in suit property known as Kericho/Kapkatet/1464.
 2. An order directing the Kericho County Land Registrar and Surveyor to re-survey the two suit lands namely Kericho/Kapkatet/1464 and Kericho/Kapkatet/1465 and establish a common boundary of the said suit lands therein.



3. An eviction order be issued against the 1st and 2nd Defendants from illegal occupation of the suit land measuring approximately five (5) acres comprised under Title Number Kericho/Kapkatet/1464.
 4. General damages and mesne profits aforesaid and a permanent injunction restraining the Defendants or their servants, labourers, (sic) agents and/or any person acting through them from interfering, trespassing, cultivating, fencing, grazing and/or in any way dealing with the suit property namely Kericho/Kapkatet/1464.
 5. Costs of the suit.
 6. Interest.
 7. Any other or further reliefs the Honourable Court may deem fit to grant.
3. The Appellants filed their Statement of Defence dated 30th June, 2023 where they sought that the Respondent's suit be dismissed with costs.
 4. The Trial Magistrate delivered Judgement in the matter on 5th December, 2023 and ordered as follows;
 - a. A declaration is hereby issued that the first and second Defendants are trespassers and in illegal occupation of 2.47 acres comprised in land reference number Kericho/Kapkatet/1464.
 - b. Common boundary as established by the County Land Registrar and County Surveyor be effected immediately and the registry index map be amended accordingly.
 - c. An order of eviction is hereby issued against the Defendants from occupying 2.47 acres in land reference number Kericho/Kapkatet/1464.
 - d. The Defendants to pay the Plaintiff general damages for trespass of 500,000 shillings.
 - e. The Plaintiff to have costs of the suit and interest.
 5. The Appellants being aggrieved by the said judgement approached this Court by way of Appeal.

The Appeal.

6. The grounds of Appeal are as follows;
 - a. The Learned Trial Magistrate erred in failing to appreciate that granted that the Respondent pleaded (sic) that the alleged encroachment on the parcel of land known as LR No. Kericho/Kapkatet/1464 had happened in the year 2008 whereas this suit was filed in the year 2021 more than 12 years had already lapsed and thus the Respondent's claim was statute barred.
 - b. The Learned Trial Magistrate erred in fact and in law by failing to appreciate that since the Registry Index map had not been amended to incorporate the suit properties known as LR No. Kericho/Kapkatet/1464 and 1465 and that the boundaries thereof had not been fixed, the Court was not seized with the jurisdiction to determine questions relating to the said boundaries in the first instance as it would have within (sic) the mandate of the relevant Land Registrar as per the provisions of Section 18 of the *Land Registration Act*.
 - c. The Learned Trial Magistrate erred in adopting the Surveyor's report submitted on record without interrogating its merits especially on the rationale and/or basis for the surveyor's conclusion that the Appellants' parcel of land known as LR No. Kericho/Kapkatet/1465 ought to have been reduced by 2.47 acres whereas the Respondent's father had duly transferred



a total of 14 acres to the Appellants' deceased father's name and put him and his family in its possession.

- d. The Learned Trial Magistrate erred in law and in fact in failing to appreciate that granted it (sic) was not contested that the Respondent's father had sold and transferred part of his land now registered as LR No. Kericho/Kapkatet/1465 comprising 14 acres to the Appellants father and that the said portion was clearly demarcated on the ground and occupied by the Appellants for at least the last 40 years, in spite of the fact that the Registry Index Map had not been duly amended to incorporate it and the Respondent's father parcel known as LR No. Kericho/Kapkatet/1464; there would have no reasonable basis upon which the Appellants could have adjudged to have been trespassers on the Respondent's land especially noting that the boundaries of the suit properties had never been fixed. (sic)
 - e. The Learned Trial Magistrate erred in law and in fact in placing undue weight on the Respondent's case and disregarding the Appellant's evidence and submissions regarding the use and occupation of the suit properties.
7. The Appellants pray for orders that;
- a. For an order setting aside the impugned Judgement and Decree of the Lower Court issued in Kericho CM ELC No. E030 of 2021 and substituting it with an order dismissing the suit with costs.
 - b. That necessary directions do issue.
 - c. The Respondent be ordered to pay costs of this appeal.

Issues for Determination.

8. The Appellants filed their submissions on 7th August, 2024 while the Respondent filed his submissions on 25th July, 2024.
9. The Appellants submitted on the following issues;
 - a. Whether the Learned Trial Magistrate erred in law and in fact in failing to appreciate that the Court did not have the jurisdiction to hear and determine the claim; and
 - b. Whether the Learned Trial Magistrate erred in law and in fact in finding that the Appellants were trespassers of that parcel of land known as LR No. Kericho/Kapkatet/1464 when it was not contested that the Respondent's father had sold and transferred part of the land now registered as LR No. Kericho/Kapkatet/1465 comprising 14 acres to the Appellant's father.
10. The Appellants submit that issue No. 1 covers grounds (i) and (ii) of their Memorandum of Appeal. They rely on the judicial decision of Lemita Ole Lemein v Attorney General & 2 Others [2020] eKLR as was cited in Attorney General & 2 Others vs Okiya Omtata Okoiti & 14 Others [2020] eKLR, Petrojessica Enterprises Ltd & another v Leventis Technical Co. Ltd [1992] 5NWLR (Pt. 244)675 and submit that as per the evidence of PW2, the boundaries of the said parcel of land were yet to be fixed and therefore the Trial Court did not have jurisdiction to hear and determine the matter.
11. The Appellants rely on Section 18 of the [Land Registration Act](#) in support of their submissions.
12. The Appellants also submit that the Respondent alleged that trespass had occurred in the year 2008 but no evidence in support of the said trespass was produced. They further submit that the suit before



- the trial Court was filed in the year 2021 and yet the alleged trespass happened in the year 2008. The suit was therefore filed thirteen years after the alleged cause of action arose.
13. The Appellants rely on Section 19 of the *Land Registration Act* and submit that the County Land Registrar gave his evidence as PW2 and filed his report.
 14. The Appellants submit that they were not accorded an opportunity to be heard and to participate. They add that when the visit took place they were not informed as no notice of the intended meeting was issued.
 15. The Appellants also submit that jurisdiction cannot be conferred by consent of the parties and neither can it be assumed that parties have acquiesced by action.
 16. The Appellants rely on the judicial decision of *Jamal Salim v Yusuf Abdulahi Abdi & another Civil Appeal No. 103 of 2016 [2018] eKLR* and submit that the survey was therefore conducted illegally and was un procedural. They also submit that the dispute before the trial Court ought to have been first referred to the Land Registrar who has the power to ascertain and fix boundaries.
 17. The Appellants also rely on the judicial decision of *Victoria Wanjiru Murigi (Suing as the administrator to the Estate of Jane Njoki Murigi(Deceased) v Evans Muringu Muhia [2020] eKLR* in support of their submissions.
 18. The Appellants submit that the second issue canvasses grounds (iii), (iv) and (v) of the Memorandum of Appeal. They submit that the Respondent's father (Kibirir A. Maina (Deceased) and the Appellants father (Kiplangat Arap Rop (Deceased) are the registered owners of the suit parcels of land.
 19. The Appellants also submit that it was the 2nd Appellant's evidence before the trial Court that the Respondent's deceased father transferred 14 acres of his land to their (Appellants) father. It was also his evidence that they had never interfered with the boundaries that had been established at the time of purchase.
 20. The Appellants further submit that there was no evidence that they had ever destroyed the established boundaries as they have been in occupation of land parcel No. Kericho/Kapkatet/1465 for a period of over forty years with the initial boundaries established in the year 1980.
 21. The Appellants therefore submit that since there are existing boundaries on the ground which fact was confirmed in the surveyor's report, there was no basis upon which they could have been adjudged as trespassers.
 22. The Appellants further submit that since boundaries were yet to be established as required, the Respondent's case of trespass before the trial Court was not ripe for determination.
 23. The Appellants rely on the judicial decisions of *Clement Kipchirchir & 38 Others v Principal Secretary Ministry of Lands Housing and Urban Development & 3 Others [2015] eKLR*, *Cecilio Murango Mwenda & 6 Others v Isaac Kimathi Ikunga [2019] eKLR* and submit that the trial Court should not have awarded mesne profits because there was "lack of knowledge" of the true boundaries as the boundary dispute had not been referred to the appropriate body.
 24. The Appellants rely on the judicial decision of *Ndegwa & another v Gichuki (Environment and Land Appeal E011 of 2023) [2024] KEELC 1308 (KLR) (7 March 2024) (Judgement)* and urge the Court to allow their appeal.
 25. The Respondent submits that the Record of Appeal as filed does not contain all the documents filed before the trial Court and he urges the Court to look at the lower Court file.



26. With regard to ground one, the Respondent admits that the cause of action arose in the year 2008 and they tried to resolve the said issue by calling surveyors to verify the boundary but the Appellants failed to adhere to the re-established boundary.
27. The Respondent also submits that the Appellants did not raise the issue of limitation of time before the trial Court and they are therefore estopped from raising the said issue before this Court. The Respondent adds that before the trial Court, the Appellants admitted to the jurisdiction of the Court in their statement of Defence.
28. The Respondent relies on Section 120 of the *Evidence Act*, the judicial decision of Serah Njeri Mwobi versus John Kimani Njoroge [2013] eKLR as was cited in Coral Construction Engineers Limited & another versus National Bank of Kenya [2020] eKLR, Pickhard versus Sears 112, 179 in support of his submissions.
29. With regard to grounds 2 and 3 of the Memorandum of Appeal, the Respondent submits that before the trial Court, neither of the parties contested the acreages of land parcel No's Kericho/Kapkatet/1464 and Kericho/Kapkatet/1465 as they appear on the title deeds.
30. The Respondent submits that land parcel No. Kericho/Kapkatet/1464 measures 5.53 Ha (13.66 acres) while land parcel No. Kericho/Kapkatet/1465 measures 5.67 Ha (14 acres).
31. The Respondent also submits that the County Surveyor and County Land Registrar fixed the boundaries on the suit properties on 20th July, 2023 in the presence of the Land Registrar, Raphael Kipkoech Langat (the 1st Appellant) who represented his family, the Respondent and security personnel.
32. It is the Respondent's submissions that the Surveyor found that on the ground, the Appellant's property measures 15.8 Ha acres instead of 14.01 acres while his (Respondent's) property measures 10.533 acres less by the said 2.47 acres.
33. The Respondent also submits that as per the evidence of the Surveyor, the said properties share a temporary common boundary though the map has not been amended. The Surveyor recommended that the map be amended and the Trial Court in its judgement ordered that the common boundary as established by the County Registrar and County Surveyor be effected immediately and the Registry Index map amended accordingly.
34. The Respondent further submits that the Appellants did not produce any documentary evidence to show that their deceased father had purchased land from his (Respondent) father.
35. It is the Respondent's submissions that there was no dispute on the acreages and therefore grounds 2 and 3 of the appeal have no substance.
36. With regard to grounds 4 and 5 of the Memorandum of Appeal, the Respondent reiterates that the surveyor in his report found that there was a common boundary between land parcel No's Kericho/Kapkatet/1464 and 1465 which boundary the Respondent submits was from time to time being moved by the Appellants and as a result they were found to have encroached on his (Respondent) land by 2.47 acres.
37. The Respondent also submits that after the County Surveyor established the boundary, he fenced the land.
38. It is the Respondent's submissions that the dispute before the lower Court was on the interference of the boundary by the Appellants. He adds that the Learned trial Magistrate analyzed all the evidence



and arrived at a correct decision. The Respondent concludes his submissions by urging the Court to dismiss the appeal.

Analysis and Determination.

39. The issues that arise for determination are as follows;
- a. Whether the Learned Trial Magistrate erred in failing to find that the Respondent's suit was statutorily time barred.
 - b. Whether the Learned Trial Magistrate erred in failing to find that the boundaries between land parcel No's Kericho/Kapkatet/1464 and 1465 had not been fixed and therefore he did not have jurisdiction to hear and determine the matter.
 - c. Whether the Learned Trial Magistrate erred in adopting the surveyor's report which recommended that the Appellant's parcel of land be reduced by 2.47 acres and yet the Respondent's father had transferred to their father 14 acres which is comprised in land parcel No. Kericho/Kapkatet/1465.
 - d. Who should bear costs of the appeal.

A. Whether the Learned Trial Magistrate erred in failing to find that the Respondent's suit was statutorily time barred.

40. The role of the Appellate Court was stated by the Court of Appeal in the judicial decision of *Gitobu Imanyara & 2 others Vs Attorney General* [2016] eKLR. It was held as follows;

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.”

41. In *Abok James Odera T/A A.J Odera & Associates Vs John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR the Court held as follows;

“This being a first appeal, we are reminded of our primary role as a first Appellate Court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

42. It is the Appellants contention that the Respondent's case before the Trial Court was that they had trespassed onto his (Respondent) land in the year 2008.
43. It is also the Appellants contention that the suit before the trial Court was filed in the year 2021 which was after twelve years had lapsed and was therefore statute barred.
44. In response, the Respondent admits that the trespass occurred in the year 2008 and that they tried fixing the boundaries by calling a surveyor but the Appellants did not abide by the surveyor's findings.
45. The Respondent also submits that the Appellants did not raise the issue whether the suit was statutorily time barred before the trial Court and they are therefore estopped from raising the same on appeal.



46. A reading of the Judgement delivered by the trial Court on 5th December, 2023 reveals that the Learned Trial Magistrate did not address the issue whether the suit was statutorily time barred.
47. A perusal of the Statement of Defence filed by the Appellants before the Trial Court dated 30th June, 2023 together with their witness statements both dated 28th July, 2023 and the proceedings all reveal that the issue whether or not the Respondent's suit was statutorily time barred was never raised.
48. The Court of Appeal in the judicial decision of Republic v Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & others Ex-Parte Tom Mbaluto [2018] eKLR held as follows;

“It is in the discretion of the Court to allow a party to raise a new point on appeal, depending on the circumstances of the case. (See also George Owen Nandy v. Ruth Watiri Kibe, [CA No. 39 of 2015](#) and Openda v. Ahn [1983] KLR 165). In this case we have stated that the Appellant never raised the issue in his judicial review application, neither party addressed the issue in the High Court, the learned judge, quite properly did not address the issue and, to make the matters worse, the Appellant did not raise the issue in his memorandum of appeal in this Court. The Attorney General is entitled to complain, as he does, that he has been taken by surprise and denied a fair opportunity to respond to the new issue. As has been stated time and again, there is a philosophy and logical reason behind our Appellate system, which except in exceptional cases and upon proper adherence to the prescribed procedure, restricts the appellate Court to consideration of the issues that were canvassed before and decided by the Trial Court. If that were not the case, the Appellate Court would become a Trial Court in disguise and make decisions without the benefit of the input of the Court of first instance. (See North Staffordshire Railway Co. v. Edge [1920] AC 254).” [Emphasis Mine]

49. It is my view that the Appellants are precluded from raising the issue of whether or not the suit was statutorily time barred before this Court for the reason that it was neither raised nor determined by the trial Court.
50. This ground of appeal therefore fails.

B. Whether the Learned Trial Magistrate erred in failing to find that the boundaries between land parcel No's Kericho/Kapkatet/1464 and 1465 had not been fixed and that the court did not, therefore, have jurisdiction to hear and determine the matter.

51. The Appellants contend that the Learned Trial Magistrate erred in failing to make a finding that he did not have jurisdiction to hear and determine the Respondent's case as boundaries of the suit properties had not been fixed.
52. The Appellants submit that it is the Land Registrar and Surveyor who have the jurisdiction to fix boundaries and the trial Court therefore ought not to have heard the matter.
53. The Respondent did not submit on this issue.
54. Upon perusal of the pleadings filed before the Trial Court, the proceedings and the judgement of the Learned Trial Magistrate evident that the issue whether or not the Court had jurisdiction to hear and determine the suit because boundaries had not been fixed was not raised. However, in Amunga v Muisu (Civil Appeal E725 of 2022) [2024] KEHC 2504 (KLR) (Civ) (8 March 2024) (Judgment) the Court of Appeal cited its decision in Kenya Port Authority v Modern Holding (EA) Ltd, MSA CA Civil



Appeal No. 108 of 2016 [2017] eKLR wherein it cited with approval the High Court decision in *Adero & another v Ulinzi Sacco Society Ltd* [2002] eKLR and stated thus;

“We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage of the proceedings and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised:“....at any time, in any manner, even for the first time on appeal, or even viva voce and indeed, even by the Court itself - provided only that where the Court raises it suo motu, parties are to be accorded an opportunity to be heard.” (Emphasis mine)

55. Having established that the question of jurisdiction can be raised on Appeal, I shall interrogate the claim before the trial court and the evidence that was presented.

56. The Respondent, in his plaint sought the following prayers:

- a. A declaration that the 1st and 2nd Defendants are trespassers and illegally in occupation of five (5) acres piece of land comprised in suit property known as Kericho/Kapkatet/1464.
- b. An order directing the Kericho County Land Registrar and Surveyor to re-survey the two suit lands namely Kericho/Kapkatet/1464 and Kericho/Kapkatet/1465 and establish a common boundary of the said suit lands therein.

57. The cause of action as set out in the Plaint is at paragraph 4 and is as follows;

“On April 2008 or thereabout the Defendants encroached the Plaintiff’s land and illegally curved out approximately five (5) acres piece of land and utilized the same until date (sic).”

58. From the prayers it evident that the main issue for determination relates to whether or not the Appellants had encroached onto the Respondent’s parcel of land.

59. It is also evident that the Respondent (Plaintiff before the Trial Court) believed that the Appellants had crossed the boundary between the two parcels of land and trespassed onto his parcel of land and was therefore in occupation of five (5) acres piece of land comprised in suit property known as Kericho/Kapkatet/1464.

60. The proceedings of 2nd March, 2022 show that on the said date the Trial Magistrate ordered that;

- a. Within 60 days hereof, the Kericho County Land Registrar and Surveyor to resurvey the two parcels that is Kericho/Kapkatet/1464 and Kericho/Kapkatet/1465 and establish a common boundary of the suit lands.
- b. Depending on the outcome, the Plaintiff to be at liberty to apply for eviction and mesne profits.
- c. Costs to the Plaintiff.”

61. In the report filed by the Land Registrar and surveyor, it is stated that land parcel No. 1465 had encroached onto land parcel No. 1464 by 2.47 acres.

62. Kibet Isaac the County Surveyor Kericho testified before the trial Court as PW2. It was his evidence that the Court had ordered him and the County Land Registrar to establish the boundaries between the two parcels of land. When they conducted the said exercise they found that land parcel No. 1464 was less by 2. 47 acres while acreage of land parcel No. 1465 was more by 2.47 acres.



63. As a result of the said finding, the Kericho Land Registrar and Surveyor re-established the boundary between the two parcels of land.

64. In the judicial decision of Fredrick Nganga Thuo v Peter Mungai Njuho [2017] eKLR the Court held as follows;

“It is not in doubt that the two parcels of land are registered and each piece has its own distinct title deed with measurements.

There is also a surveyor’s report dated 12th April 2017, which shows that L. K. Ngetich, the County Surveyor, Kiambu went to the ground to re-state the boundary between Kikuyu/ Kikuyu

Block 1/819 and 820. From the above letter, it shows that the boundary for the two parcels of land had been fixed.

Section 18(2) of the [Land Registration Act](#) applies where the boundaries have not been fixed. However, in this instant case, the respective parcels of land have their boundaries clearly demarcated and fixed as per the letter of L. K. Ngetich, the County Surveyor. The Registrar would have jurisdiction where the boundaries have not been fixed. In the instant case, the boundaries have been fixed and therefore the Court has jurisdiction.”

65. In the above cited judicial decision, the Court held that where boundaries have been fixed, the provision of Section 18(2) of the [Land Registration Act](#) would not apply.

66. Section 18(2) of the [Land Registration Act](#) provides as follows;

“(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.”

67. Reading from the report filed by the Kericho Land Registrar and Surveyor, it is evident that there was encroachment and this led them to re-establishment the boundaries between the suit parcels.

68. The finding of the Kericho Land Registrar and Surveyor confirms that the boundary initially fixed had been tampered with and this led to the encroachment complained of by the Respondent. The extent of encroachment was discovered to be 2.47 acres. My view is that a re-establishment of boundaries meant that the boundary had already been established and/or fixed prior to the trial court making the order of 2nd March, 2022.

69. Further, the dispute before the trial court as can be seen from Paragraph 4 of the Plaintiff is that the Defendants (Now Appellants) had encroached upon about 5 acres of the Plaintiff’s (Now Respondent) land. The Learned trial magistrate was adjudicating a dispute pertaining to encroachment. He, therefore, had jurisdiction to hear and determine the suit.

70. This ground of appeal also fails.

C. Whether the Learned Trial Magistrate erred in adopting the surveyor’s report which recommended that the Appellant’s parcel of land be reduced by 2.47 acres and yet the



Respondent's father had transferred to their father 14 acres which is comprised in land parcel No. Kericho/Kapkatet/1465.

71. The Appellants contend that the Respondent's father (Kibirir A. Maina(Deceased) sold a portion of his land to the Appellant's father (Kiplangat Arap Ruto(Deceased) which was registered as land parcel No. Kericho/Kapkatet/1465.
72. The Appellants also contend that at the time of the purchase, there were existing boundaries on the ground which they have maintained to date and therefore there was no basis for them to be adjudged as trespassers on the Respondent's parcel of land.
73. In response, the Respondent contends that the Appellants did not contest the acreages of the suit properties before the trial Court.
74. The Respondent submits that land parcel No. Kericho/Kapkatet/1465 which belongs to the Appellants measures 5.67 Ha which is approximately 14 acres.
75. The Respondent also submits that land parcel No. Kericho/Kapkatet/1464 which belongs to his family measures 5.53 Ha which is approximately 13.66 acres.
76. The Respondent further submits that the surveyor in his report found that the Appellants land on the ground measured 15.8 acres instead of 14.01 acres while his (Respondent) measures 10.533 which was less 2.47 acres.
77. It is the Respondent's submissions that it is on this basis the County Surveyor reestablished the boundary between the said properties and recommended that the Registry Index Map be amended.
78. The Learned Trial Magistrate at page 6 to 8 of his judgement held as follows;

“The Court record shows that the Plaintiff is suing as the legal representative of the late Kibirir Maina and the Defendants have been sued as the legal representatives of the late Kiplangat Rop. It is not in dispute that the Plaintiff's late father is the registered owner of land parcel number Kericho/Kapkatet/1464 and the Defendants' late father is the registered owner of land parcel number Kericho/Kapkatet/1465 which he bought from the Plaintiff's late father. It is also admitted that the two plots have a common boundary.

According to the Plaintiff the Defendants interfered with the boundary between the two plots with the result that part of the land was taken by the Defendants. An order was issued by the Court to have the County Surveyor and the Land Registrar do a site visit and prepared a report which is presented in Court. It is expected that the said report would resolve the dispute.

PW2 Isaac Kibet, the County Surveyor presented the report dated fifth of October 2022 which has been seen. It states that the site visit was conducted on 20 July 2022 in the presence of the Land Registrar, County Surveyor, area Chief, Assistant Chief, Plaintiff, Defendant and Security Officers from the local police station. The Report confirmed that both parcels of land were created after subdivision of land reference number Kericho/Kapkatet/1071 which is borne by evidence presented that the Plaintiff's late father subdividing the said land into two portions and sold plot number 1465 the Defendants late father. (sic) Though the mother title had been divided, this had not been reflected on the registry index map of Kericho – Kapkatet sheet number 32.

In his findings, the County Surveyor stated that after ground measurements were taken, it emerged that the Defendants plot 1465 had encroached into the Plaintiff's plot 1464 by



2.47 acres. A map was drawn by the surveyor showing where the proper boundary should be marked in red. The first Defendant was present during the process and never raised any objection at that stage to challenge the findings of the County Surveyor...”

79. A perusal of the trial Court record shows that Kibet Isaack the County Surveyor filed a report on 12th October, 2022. The said report is dated 5th October, 2022 and it is signed by the County Surveyor and Hellen C Mutai the County Land Registrar.
80. As submitted by the Respondent, the findings of the said report were that the registered area of land parcel No. Kericho/Kapkatet/1465 was 14.01 but the ground area was 15.81 acres.
81. The County Surveyor also found that the registered area of land parcel No. Kericho/Kapkatet/1464 was 13.66 acres but the ground area was 10.535 acres. It is on the basis of this disparities that the County Surveyor re-established the boundaries between the said parcels of land.
82. As submitted by the Appellants, their father had purchased land parcel No. Kericho/Kapkatet/1465 measuring 14 acres.
- The County Surveyor in his report confirmed that land parcel No. Kericho/Kapkatet/1465 indeed measures 14 acres but the land the Appellants were in occupation of was 15.81 acres.
- This informed the finding of the surveyor that the Appellants had indeed trespassed into the Respondent’s land by 2.47 acres.
83. It is also important to note that from the Surveyor’s Report one of the Appellants was present and as per the findings of the Learned Trial Magistrate, it was the 1st Appellant who was present during the exercise.
84. The Surveyor’s report and his evidence, which was not controverted, informed the Learned Trial Magistrate’s decision.
85. I find that the Appellants have failed to lay a basis upon which this Court can interfere with the findings of the Learned Trial Magistrate.

D. Who should bear costs of the appeal.

86. The general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the Court, for good reason, directs otherwise.

Disposition.

87. In the result, I find that this Appeal lacks merit and it is hereby dismissed with costs to the Respondent.
88. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 20TH DAY OF FEBRUARY, 2025.

L. A. OMOLLO

JUDGE.

In the presence of: -

Miss Sang for Mr. Koech for the Appellants.

Mr. Koske for the Respondent.



Court Assistant; Mr. Joseph Makori

