



Maika & 2 others (Suing as the Personal Representatives of the Estate of Osikambe Maika Kamunyo Deceased) v Principal Land Registrar, Kajiado Central and South & 2 others (Environment and Land Appeal 9 of 2017) [2024] KEELC 4190 (KLR) (21 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4190 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL 9 OF 2017
MN GICHERU, J
MAY 21, 2024
(FORMERLY NAIROBI HCCA NO. 79 OF 2016)**

BETWEEN

**ELIAS KIMIREI OLE MAIKA 1ST APPELLANT
SIPITIEK OSIKAMBE 2ND APPELLANT
TUMANKA OSIKAMBE MAIKA 3RD APPELLANT
SUING AS THE PERSONAL REPRESENTATIVES OF THE ESTATE OF
OSIKAMBE MAIKA KAMUNYO DECEASED**

AND

**PRINCIPAL LAND REGISTRAR, KAJIADO CENTRAL AND
SOUTH 1ST RESPONDENT
LORNGOSUA GROUP RANCH 2ND RESPONDENT
ENKARONI GROUP RANCH 3RD RESPONDENT**

JUDGMENT

1. On 25/8/2016, the Land Registrar Kajiado made the following decision in relation to L.R. No. Lorngosua/38 -versus- Enkaroni Group Ranch Purko 18 dispute.
 - 6.1 Recommendations
 - i. The authority responsible for the survey of land do amend the topo cadastral map so as to correspond with the actual ground position/situation.



- ii. The land registrar and the district surveyor do fix the position and location of beacon P22 on the ground.
 - iii. The Lorngusua Group Ranch do surrender the three title deeds for cancellation since they fall outside the boundaries and encroached on several parcels falling within Enkaroni Group Ranch failure to surrender Enkaroni are advised to go to court and seek revocation of the affected titles which are.
 1. Kajiado/Lorngusua/242 Moses Lonkisa Nkuya – 38.5 ha.
 2. Kajiado/Lorngosua/242 – Moses Lord Lenchaso – 46.5 ha.
 3. Kajiado/Lorngosua/680 – Peter Kinyanjui Nyagah – 46.5 ha.
2. Aggrieved by the above decision, the appellant filed a memorandum of appeal dated 22/9/2016 which is based on the following nine (9) grounds. The land registrar erred in law and/or fact by,
- i. adjudicating a matter that had already been heard and determined in 2006 and hence was res judicata,
 - ii. ignoring and contravening the findings of the County Surveyor’s report dated 9/6/2016 in respect of the self same disputed boundary,
 - iii. not fixing the lines and positions of the disputed boundary as per the cadastral map,
 - iv. in failing to determine the position of the disputed boundary as stipulated in the Survey Act, Cap 299 Laws of Kenya,
 - v. not giving all owners and occupiers of the parcels of land adjoining the disputed boundaries notice of his intention to ascertain and fix the boundaries and an opportunity of being heard,
 - vi. determining the boundary in dispute in respect of which some parties are non-existent,
 - vii. failing to use the declarations for both Lorngosua and Enkaroni adjudication sections which define the disputed boundary by use of physical features that are still in existence,
 - viii. stating that beacon No. P22 be fixed in a different place from where it was picked and placed by the Land Registrar’s decision of 2006 as well as the Surveyor’s Report thereof,
 - ix. failing to appreciate that L.R. Kajiado/Lorngusua/38 was excised and boundaries demarcated before any other adjoining parcel.
3. The appellant seek the following orders.
1. This appeal against the decision of the Land Registrar delivered on 25/8/2016 be allowed.
 2. That the court do order a retrial of the matter by another Land Registrar or independent national body within the bounds of the order sought to be appealed against.
 3. That in the alternative to the foregoing the court do issue any other order it may deem fit to secure the ends of justice.
 4. That the costs of this appeal be awarded to the appellants.
4. The fact of the case are as follows. Sikambe Ole Maika filed a boundary dispute against Kongoni Olesikambe Maina and Moses Lord Lanchasho claiming that the defendant had encroached on his land No. Kajiado/Lorngosua/38. The defendants owned L.R. No. 241 and 242 respectively. The dispute



was heard and determined D.K. Nyantika, Land Registrar vide a report dated 28/6/2006. In the report the Land Registrar made two determinations.

Firstly, he determined that the boundary between the plaintiff's and the defendants' land was marked by a tree or bush on the ground and the beacon marked K53 on the map and visible on the ground.

Secondly, the disputants were ordered to maintain in good order and repair, the boundary so determined according to Section 23 of the Registered *Land Act*. Any party aggrieved by the Land Registrar's determination was allowed 30 days right of appeal to the High Court. No party appealed against the decision of the Land Registrar. The boundary dispute did not end and in early 2016, all the parties agreed to commission the District Surveyor Kajiado to ascertain the boundary and prepare a report. In his report dated 9/6/2016, the District Surveyor found that there was an encroachment into L.R. 38 by parcel numbers Kajiado/Enkaroni 741, 742, 496 -499 which reduced the size of L.R. 38 tremendously. It is soon after this report that the Land Registrar Kajiado made the determination referred to at paragraph (1) above and which precipitated the filing of this appeal.

5. Counsel for the parties filed written submissions on 10/2/2022, 27/6/2023 and 15/11/2023 respectively. The issues identified in the said submissions are as follows.
 - i. Whether the Land Registrar erred in adjudicating a matter that had been heard and determined before.
 - ii. Whether the said Registrar erred in ignoring and contravening the findings of the District Surveyor.
 - iii. Whether this court has jurisdiction in this matter.
 - iv. Whether it is the duty of the Land Registrar to fix boundaries.
 - v. Whether the Land Registrar erred in not fixing the lines and positions of the disputed boundary as per the cadastral map.
 - vi. Whether the Land Registrar erred by not giving all the affected land owners notice of his intention to fix the boundaries.
 - vii. Whether the Land Registrar has jurisdiction to order the cancellation of title deeds.

6. I have carefully considered the entire appeal including the record, the submissions by learned counsel for the parties, the issues raised as well as the law cited by each one of them. I make the following findings on the issues raised.

On the first issue, I find that Land Registrar erred in adjudicating over the matter which had been decided by his predecessor in office. Although the second exercise seems to have been carried out with the consent of all the parties, the fact that there exists an earlier decision by a competent registrar and which was never appealed against cannot be overlooked. That decision has the force of law and could only have been set aside on appeal. It could not be lawfully varied by the Land Registrar's colleague of the same designation. Only the High Court could have set it aside.

7. On the second issue, I find that the registrar erred in contravening the findings of the District Surveyor. In Regulation 4 of the Land (General) Regulations, 2017 it is provided as follows.

“In determining a boundary dispute lodged in accordance with paragraph (1), the Registrar shall be guided by the recommendation of the office responsible for survey of land”.



The words used are “shall be guided”. The registrar could not ignore the guidance of the District Surveyor especially where it was found that there was encroachment into L.R. 38 by Parcels 741, 742, 496 – 99 which reduced the size of L.R. 38. This was a grave mistake on the part of the Land Registrar that cannot be allowed to stand.

8. On whether this court has jurisdiction, I find that it has jurisdiction to entertain this appeal under regulation 40(6) of the 2017 regulations which provides as follows.

“Any party aggrieved by the decision of the Registrar made under paragraph (5) may within 30 days of the date of notification, appeal the decision to the court”.

The appellants have a right of appeal to this court against the decision of the Land Registrar as can be seen above.

9. it is my findings on the fourth issue that it is the duty of the Land Registrar to fix boundaries. That power is given to the Land Registrar by Section 18(2) of the Land Registration Act and Regulation 40 of the 2017 Regulations among other provisions of the Land Registration Act. The only requirement is that the Land Registrar shall be guided by the survey office.

10. I must confess that I do not quite understand the fifth issue but it is my finding that the determination made in 2006 is the lawful one. This is because it was never set aside by a higher tribunal.

11. On the sixth issue, I find that it was wrong for the Land Registrar to make his second determination without affording the affected land owners an opportunity to be heard. Regulation 40(2) and (5) provide as follows.

(2) “The registrar shall issue a notice in form LRA 24 set out in the Sixth Schedule to all persons appearing on the register that may be affected or such other persons...”

(5) The registrar shall, after giving all persons appearing for the hearing in accordance with the notification sent under paragraphs (1) and (2) an opportunity to be heard, make a determination of the dispute and inform the parties accordingly”.

12. On the final issue of whether the Land Registrar had power to order cancellation of any title deeds, I find that he had no such power. His jurisdiction was limited to determining the boundary under the guidance of the survey office as we have already seen before.

13. For the above stated reasons I find that the appeal herein has merit consequently, I order as follows.

- a. The appeal against the decision of the Land Registrar delivered on 25/8/2016 is hereby allowed.
- b. The decision by Daniel K. Nyantika delivered in June 2006 is the lawful determination of the dispute and the same to be implemented.
- c. Costs of the appeal to the appellants.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 21ST DAY OF MAY 2024.

M.N. GICHERU

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JUDGE



I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

