



Keter & another (Both Suing as the Legal Representatives and Beneficiaries of the Estate of the Late Kipketer Arap Ngeny - Deceased) v Maiywa & 22 others (Environment & Land Case 78 of 2018) [2024] KEELC 3704 (KLR) (9 May 2024) (Judgment)

Neutral citation: [2024] KEELC 3704 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 78 OF 2018**

MC OUNDO, J

MAY 9, 2024

BETWEEN

ZAKAYO KIMUTAI KETER 1ST PLAINTIFF

WILSON KIPKORIR KETER 2ND PLAINTIFF

**BOTH SUING AS THE LEGAL REPRESENTATIVES AND BENEFICIARIES OF
THE ESTATE OF THE LATE KIPKETER ARAP NGENY - DECEASED**

AND

KIPKORIR ARAP MAIYWA AND 22 OTHERS DEFENDANT

JUDGMENT

1. Vide a Plaint dated 18th October, 2018 and Amended on 22nd October, 2019, the Plaintiff herein sought for the following orders;
 - i. A declaration that the subdivision and the current boundaries on the land parcel L.R. No. Kericho/Kyongong/60, L.R No. Kericho/Kyogong/68 and L.R No. Kericho/Kyongong/762 was done fraudulently and in contravention of the law of succession and encroached the Plaintiff's land.
 - ii. That once the boundary is resurveyed by the land Registrar, the same must remain permanently without any interference from the Defendants or any other person.
 - iii. Compensation for damages and loss suffered.
 - iv. Costs of the suit and the interest thereon.
 - v. Any other or further relief as the court may deem appropriate.



2. The Plaintiff had particularized the fraud committed by the 1st – 12th Defendants as having encroached into the boundary of land parcel Kericho/Kyongong/69, and fraudulently subdivided land parcel Kericho/Kyongong/60 without letters of administration and thereafter fraudulently registering the owners of the resultant parcels of land parcel Kericho/Kyongong/1701-1712, and lastly having fraudulently subdivided land parcel Kericho/Kyongong/68 which had extended to the encroached land.
3. In regard to the 13th-18th and 21st-23rd Defendants, the Plaintiff to the rest of the fraud as having encroached onto land parcel Kericho/Kyongong/69 and have the fraudulently subdivided land parcel Kericho/Kyongong/68 without letters of administration. That the encroachment had also affected the beneficiaries of land parcel Kericho/Kyongong/762.
4. In relation to the 19th Defendant, Plaintiff particularized the fraud as negligently refusing to carrying out the survey on land parcel Kericho/Kyongong/69 and approving the subdivisions of land parcel Kericho/Kyongong/68 and 60 without proper documentation.
5. The 4th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 17th and 18th Defendants filed their Defence dated 5th November, 2019 to the Amended Plaint wherein they denied the contents therein thus putting the Plaintiff to strict proof while stating that they were all cousins since their deceased fathers; Kipketere Arap Ngeny and Kipchumba Arap Ngeny were biological brothers who had co-existed peacefully until the time of their demise.
6. That the boundaries in place had existed since the first registration of the involved parcels of land wherein the new purchasers had purchased and developed the said land in a period of over 35 years and had lived peacefully therein since then.
7. The 4th, 8th, 9th, 10th, 11th and 12th Defendants stated that the Plaintiff's had chosen to file the instant suit after the demise of both their parents yet the boundaries which had been intact all along had never been disputed. That the Plaintiffs had even witnessed the sale of land parcel No. Kericho/Kyongong/60 to the 1st to 7th Defendants and did not dispute the same.
8. The 4th, 8th, 9th, 10th, 11th and 12th Defendants also stated that their settling in different portions and the fixed boundaries was done by both their father and the Plaintiffs' father and that prior to the first registration of the parcels in dispute.
9. The 13th, 14th, 15th, 17th and 18th Defendants denied the particulars of fraud with the 14th Defendant stating that she had been waiting for the completion of Succession Cause by the Plaintiffs to enable them effect the transfer of the portion earlier sold by Kipketere Ngeny (Deceased) to Chepkwony Arap Koech (Deceased) which portion had been in her possession and her utility for over 50 years. That no suffering had been meted upon the Plaintiffs at all since the portions whose amendments had been proposed did not affect the Plaintiffs but had affected the parcels of land sold to the 14th Defendant's husband (deceased) and which the Plaintiff had no claim over at all.
10. That the instant suit was frivolous, vexatious, lacked a reasonable cause of action, an abuse of the court's time, barred by the *Limitation of Actions Act* thus the same ought to be struck out with costs.
11. The 19th and the 20th Defendants entered appearance but did not file their Statement of Defence while the rest of the Defendants did not enter appearance.
12. The matter did not proceed immediately for hearing due to several applications and none appearance of parties. On 19th February, 2021 when the instant matter had come up for hearing, parties had not complied hence the they had been granted leave to file their documents within 21 days whereby a



- mention for pre-trial had been scheduled for the 17th March, 2021. However, the matter had remained inactive since then and when the same had come up for mention on 8th December, 2021 and there being no appearance for the parties, the court had dismissed the instant suit for want of prosecution.
13. Subsequently, vide an Application dated 24th January, 2024, the Plaintiffs had applied to the court to set aside its dismissal orders and reinstate the instant suit wherein vide its ruling dated 24th November, 2023, the dismissal order of 8th December, 2021 had been set aside wherein then suit had been reinstated for hearing and determination on merit.
 14. The matter had proceeded for hearing on 25th October, 2023 whereby Zakayo Kimutai Keter, the 1st Plaintiff herein testified to the effect that he was a farmer and lived in Kyogong sub location within Bomet County. That he was the administrator to the Estate of Kipketer Arap Ngeny with regards to land parcel number Kericho/Kyongong/69 as per the Certificate of Confirmation dated 15th July, 2017, herein produced as Pf exh 1.
 15. He informed the court that he and the 2nd Plaintiff were siblings wherein the 2nd Plaintiff had allowed him to proceed with the case on his behalf and produced the letter of Authority to plead dated 18th October, 2018 as Pf exh 2.
 16. His evidence was that his father was the owner of land parcel No. Kericho/Kyogong/69 which measures 3.8 hectares but the same had not been distributed since part of the said land had been "missing". That upon finding that the land did not correspond to the title, they had opted to survey the land before distribution. That subsequently, the surveyor had gone to their land, surveyed the same and found out that what had been on the ground was a portion of land measuring 6 acres and therefore was short by 3 acres.
 17. That the surveyor had then advised him to file suit because he could not take another person's land. He testified that land parcel number Kericho/Kyongong/60 had belonged to one Kipchumba Ngeny (Deceased). That since the said Kipchumba Ngeny was deceased, they had sued his sons and in-laws being the 1st to 12th Defendants herein. That he had conducted a search that had indicated that land parcel No. Kericho/Kyong/60 had belonged to Kipchumba Ngeny. He produced the official searches for parcel of land Nos. Kericho/Kyongong/ 1701 – 1712 as Pf exh 3 (a-l).
 18. That land parcel No. Kericho/Kyongong/68 was registered in the name of Chepkwony Arap Koech. That he had conducted a search on the same and discovered that the said land had been sub-divided. He produced the green card in respect of land parcel No. Kericho/Kyongong/68 and the resultant sub divisions being Kericho/Kyongong/1102 to 111 as Pf exh 4 (1 – z).
 19. He contended that the land had been less in acreage because they did not know the boundary during their father's lifetime. That the missing acreage had been amalgamated in land parcel Numbers Kericho/Kyongong/68 and Kericho/Kyongong/ 60. He produced the surveyor's report dated 19th August, 2019 as Pf exh 5 stating that both these parcels of land being Kericho/Kyongong/60 and Kericho/Kyongong/68 were adjacent to their land as per the Registry Index Map (RIM) which he produced as Pf exh 6.
 20. He asked the court to order the Registrar and the Surveyor to visit the land, demarcate the same and place its boundaries with the inclusion of the 3 acres portion to be amalgamated into Number Kericho/Kyongong/60. He informed the court that the Defendants had refused to come to court despite being aware of the instant case.
 21. On being cross-examined, he confirmed that he had received the Confirmation of Grant on 15th July, 2017 but there had not been title issued since his father never had a title deed prior to the said



Confirmation of Grant. That the surveyor had informed them that their parcel of land had beacons before the demise of their father. That the surveyor had surveyed the suit land on 25th May, 2019 or thereabout wherein he had written the report.

22. That upon visiting the land Registrar to make a report, they had been informed that the Registrar was not allowed to go to the land to fix boundaries if the said land was more than (one) 1 acre. He confirmed that land parcel No. Kericho/Kyongong/60 measures 3.8 hectares and that they only had a Certificate of Search but had no title.

The Plaintiffs thus closed their case.

23. The State Counsel acting for the 19th and 20th Defendants had indicated that considering that the Plaintiffs had submitted a surveyor's report, he did not wish to call the Land Registrar and the Surveyor to testify, hence he closed the 19 & 20th Defendants case.

24. The Plaintiffs' Counsel also sought that the 1st -18th Defendants' and 21st -23rd Defendants case be closed. The court obliged and parties were directed to file their respective written submissions to which only the Plaintiffs and the 19th and 20th Defendants complied and which submissions I shall herein summarize as follows;

Plaintiff's submissions

25. The Plaintiffs vide their written submissions dated 15th December, 2023 summarized the factual background of the matter before framing their issues for determination as follows:
- i. Whether the Plaintiffs had sufficiently argued their case successfully as to deserve the orders in the Plaint on a balance of probabilities.
 - ii. Whether the Defendants had heard their chance and opportunity in court as required by the law.
 - iii. Whether the Plaintiffs are entitled to award/damages/mesne profits and costs of the suit.
26. On the first issue for determination, the Plaintiffs reiterated the evidence adduced in court stating that the matter was undefended save for the 19th and 20th Defendants who were represented by the Office of the Hon. Attorney General. That pursuant to the court order of 4th April, 2019 directing the Land Registrar and the District Surveyor, the 19th and 20th Defendants to the suit to visit the suit land and mark its boundaries and/or resurvey the parcels accordingly, the said orders had been executed by the said Defendants in the presence of all the Defendants and the Plaintiffs herein wherein the Land Registrar had filed his report dated 16th August, 2019 in court which had been produced by the Plaintiff as Pf exh 5.
27. That subsequently, the matter had proceeded for hearing on 25th October, 2023 and after the Plaintiff had testified and produced documents in exhibit, the matter had been marked as closed. The Plaintiffs placed their reliance on the provisions of Section 107 of the *Evidence Act* to submit that their evidence had satisfied the evidence rule. That the report by the Land Registrar which had been produced by the Plaintiff as evidence had not been challenged hence the same should be adopted as the judgement of the court, with any adjustments and/or further necessary directions, if any by the court. That subsequently, the court should direct that the 22nd and 23rd Defendants to visit the suit lands and duly effect the report/judgement of the court accordingly, in the presence of the Officer Commanding Bomet Police Station and thus mark the matter herein closed.



28. On the second issue for determination as to whether the Defendants had their chance and opportunity in court as required by the law, the Plaintiff submitted that as evident from the several Affidavits of Service filed in court and also from the response from some of the Defendants who had entered appearance, the Defendants herein had been accorded their rights to be heard which right, most of them had chosen to ignore.
29. The Plaintiffs hinged their reliance on the provisions of Section 1A and B of the Civil Procedure Act to submit that for a matter that was as old as the present one, the issue of the right to be heard ought to be balanced off with the Oxygen principle that matters ought to be heard and determined within reasonable period of time. They thus submitted that the parties herein having been accorded sufficient time and judicial resources, the instant matter ought to be disposed of to allow other equally deserving matters to be attended to.
30. Regarding the costs, it was the Plaintiffs' submissions that the same followed the event.
31. In conclusion, the Plaintiffs submitted that the Constitution of Kenya guaranteed their right to enjoy their land as per the acreage provided and be protected from invasive acts of the Defendants hence they urged the court to enforce the same as no party would be prejudiced.

19th and 20th Defendants' Submissions.

32. The 19th and 20th Defendants framed one issue for determination, to wit; whether the allegations of fraud against the 19th and 20th Defendants were merited. They placed reliance in the decided case of General Properties Limited v Saika Two Estate Developers Limited [2021] eKLR on the definition of fraud as well as the decided case of Kuria Kiarie & 2 Othews v Sammy Magera [2018] eKLR to the effect that it was now trite law that any allegation of fraud must be pleaded and strictly proved.
33. They reiterated the particularized fraud by the 19th and 20th Defendants as had been alleged by the Plaintiffs in their Amended Plaint dated 22nd October, 2023 to submit that the particulars of the fraud itemized in the pleadings had fallen short of the definition of fraud aforesaid since the Plaintiff had not portrayed any deceitful device or deceitful practice that may have violated his rights over the suit property.
34. That in particular, the 19th Defendant did not negligently refuse to direct a resurvey of the suit property as the said 19th Defendant had been present during the site visit on 30th May, 2019 and had even signed the Report dated 19th August, 2019. That further, the Plaintiff had failed to adduce evidence to prove that subdivision of L.R. No. Kericho/Kyongong/68 and L.R No. Kericho/Kyongong/60 had been conducted without proper documentations and finally that the subdivision of land was not guided by the Law of Succession Act as had been falsely alleged by the Plaintiff.
35. The 19th and 20th Defendants' reliance was placed on the provisions of Section 79 (1) of the Land Registration Act on the Land Registrar's power of rectification as well as on the decided case of Republic v Chief Land Registrar & another, Ex-parte Yosabia Kerubo Manyura [2018] eKLR to submit that under the guidance of the Surveyor's Report, the Land Registrar may amend the discrepancies arising on the parcels of land, subject to a notice issued to the neighboring parcels of land.
36. They thus submitted that the Plaintiff did not articulate fraud against the District Land Surveyor, Bomet, and the 20th Defendant herein, hence the said 20th Defendant did not have a case to answer.
37. In conclusion, the 19th and 20th Defendants denied engaging in any deceitful act geared towards depriving the Plaintiffs of their proprietary rights and further, that the pleadings had failed to articulate



any fraudulent actions. They thus urged the court to dismiss the case against the 19th and 20th Defendants in its entirety.

Determination.

38. Before determining the merits of the case, I shall refer to the case of Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR, where the Court of Appeal had observed as follows;

“Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavoring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.”

39. The proceedings of this matter are clear to the effect that the Hon. Attorney General had only entered appearance on behalf of the 19th and the 20th Defendants and did not file their Statement of Defence or pleadings but decided to file their written submissions after the closure of the case. In line with the above captioned authority, the said written submissions are therefor of no consequence in the present circumstance.

40. I have considered the Plaintiffs’ case herein and prayers sought thereto as well as the fact that although the 4th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 17th and 18th Defendants filed their Defence dated 5th November, 2019 to the Amended Plaintiff wherein they had denied the contents therein thus putting the Plaintiff to strict proof, they did not turn up in court to testify. I have also considered the fact that although the 19th and the 20th Defendants entered appearance, yet they did not file their Statement of Defence but opted to file their submissions. The rest of the Defendants did not enter appearance.

41. The Plaintiffs in their Amended Plaintiff of 22nd October, 2019, sought for orders that there be a declaration that the subdivision and the current boundaries on the land parcel L.R. No. Kericho/Kyongong/60, L.R No. Kericho/Kyogong/68 and L.R No. Kericho/Kyongong/762 by the Defendants was done fraudulently and in contravention of the Law of Succession wherein they had encroached onto the Plaintiffs’ land. They had thus sought that the boundary be resurveyed by the Land Registrar, and thereafter the same to remain permanent without any interference from the Defendants or any other person, that further, they be compensated for damages and loss suffered and for the costs of the suit with interest thereon.

42. In evidence, the 1st Plaintiff testified on his behalf and on behalf of the 2nd Plaintiff who was his sibling to the effect that as per the Certificate of Confirmation dated 15th July, 2017, herein produced as Pf exh 1, he was an Administrator to the Estate of Kipketer Arap Ngeny who was their father and who was the proprietor of land parcel No. Kericho/Kyogong/69 which measured 3.8 hectares. That they had decided to survey his father’s land before distribution wherein the surveyor had gone on the ground only to discover that the land measured 6 acres thus falling short by 3 acres. He produced the surveyor’s report dated the 19th August, 2019 as Pf exh 5.

43. That the adjacent portions of land being parcel No. Kericho/Kyongong/60 was registered to one Kipchumba Ngeny (Deceased) had been fraudulently subdivided resulting into Nos. Kericho/Kyongong/ 1701-1712 as per the official search which he produced as Pf exh 3 (a-l) whereas land parcel No. Kericho/Kyongong/68 registered in the name of Chepkwony Arap Koech had also been



fraudulently sub-divided resulting into parcels No. Kericho/Kyongong/1102 to 111 as per the Green card which he had produced as Pf exh 4 (1 – z).

44. His evidence was that these two parcels of land No. Kericho/Kyongong/68 and Kericho/Kyongong/60 had amalgamated the missing acreage measuring 3 acres of their land and therefore he sought that the court orders the Registrar and the Surveyor to visit the lands, demarcate the same and place the suit land boundaries with the inclusion of the missing 3 acres of land.

45. Having laid down the background of the matter in question and having considered the evidence adduced in the matter, it is evident that the Plaintiff's case revolves around a cause of action founded on fraud which is a tort herein.

46. Section 4 (2) of the *Limitation of Actions Act* provides as follows:

“An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:

Provided that an action for libel or slander may not be brought after the end of twelve months from such date”

47. The Plaintiffs evidence was that upon receipt of Confirmation of the Grant of Letters of Administration dated 15th July, 2017, herein produced as Pf exh 1, in respect to the estate of his father who was the proprietor of land parcel No. Kericho/Kyongong/ 69, he had secured the services of the government land surveyors who proceeded to the suit land to take measurements with the intention of sub dividing the same. That it had been then that he had discovered that the suit land measured 6 acres on the ground instead of the registered the 9 acres.

48. Section 26 of the *Limitation of Actions Act* provides as follows;

Where, in the case of an action for which a period of limitation is prescribed, either—

- (a) the action is based upon the fraud of the Defendant or his agent, or of any person through whom he claims or his agent; or
- (b) the right of action is concealed by the fraud of any such person as aforesaid; or
- (c) the action is for relief from the consequences of a mistake,

the period of limitation does not begin to run until the Plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:

49. There is no evidence adduced to challenge the fact that the Plaintiff herein had discovered the discrepancies on the suit land in the year 2017 after receiving confirmation of grant wherein he had filed suit via the original Plaint in the year 2018. He was therefore within the period described by the act and therefore the issues that come out clearly for determination are as follows.

- i. Whether there was fraud involved in the subdivision and registration of land parcel Kericho/Kyongong/68 and subdivided land parcel Kericho/Kyongong/60 by the Defendants herein.
- ii. Whether the Plaintiff had any cause of action against the Defendants herein?
- iii. Whether the Land surveyor's finding of 19th August 2019 should be upheld.
- iv. Who should pay the cost of the suit?



50. On the first issue for determination, having pleaded fraud and illegality on the part of the Defendants in the manner in which they had subdivided land parcel Kericho/Kyongong/68, No. Kericho/Kyongong/60 and L.R No. Kericho/Kyongong/762 which had ended up encroaching, or as put by the Plaintiff, amalgamating (3) three acres of land parcel Kericho/Kyongong/69 belonging to his late father, the onus was on the Plaintiff to prove those allegations. Fraud is a serious matter which must be proved to the required standard. In *R.G Patel vs Lalji Makanji* 1957 E.A 314, the Court of Appeal stated as follows:
- “Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required”.
51. I have no doubt in my mind that the Plaintiff herein distinctly pleaded the facts on which fraud was alleged against the Defendants. The next step however was for him to prove those allegations to the required standard. I will therefore interrogate this allegation of fraud as submitted by the Plaintiff.
52. It was the Plaintiff’s testimony that upon fraudulently sub dividing parcels Nos Kericho/Kyongong/68, Kericho/Kyongong/60 and Kericho/Kyongong/762, the boundaries of the said parcels of land had encroached onto land parcel Kericho/Kyongong/69 thereby hiving three acres from the same and reducing its size. He supported his evidence with the surveyor’s report dated 19th August 2019 herein produced as Pf exh 5 which I have considered herein. Indeed the report is to the effect that all the three parcels of land were well fenced although when surveyed, there had been discrepancies on the ground as compared to the registered area. That Kericho/Kyongong/60 was 1.832 hectares against the registered in the area of 1.5 hectares thereby exceeding with 0.332 hectares. That Kericho/Kyongong/68 was 8.772 hectares against the registered area of 9.0 hectares and hence was less by 0.228 hectares and lastly Kericho/Kyongong/69 measured 3.0 hectares against the registered area of 3.8 hectares thereby falling short of 0.8 hectares. There was however no evidence of fraud committed by the Defendants. Indeed this discrepancy had only come about at the time when the Plaintiff sought to subdivide the land during the succession cause.
53. Indeed the evidence as alluded to in the survey report was that prior to the survey, all the proprietors of the three parcels of land had lived peacefully within their demarcated respective parcels of land wherein there had been no boundary disputes. It is in light of the survey report that I find no traces of fraud committed by the Defendants and this line of argument shall therefore fail.
54. On the second issue as to whether the Plaintiff had established a cause of action against the Defendants herein, it is trite that a cause of action, is a set of facts sufficient to justify a right to sue to obtain money, property, or the enforcement of a right against another party. The term also refers to the legal theory upon which a Plaintiff brings suit. Having found that there was no evidence of fraud attributed as against the Defendants in what caused the discrepancies found on the suit land and indeed having found that Kericho/Kyongong/68 was also less by 0.228 hectares, then it goes without saying that the Plaintiffs had not established any cause of action as against the Defendants.
55. On the last issue for determination as to whether the surveyors finding of 19th August 2019 should be upheld, it is on record that the Plaintiff sought that there be a resurvey of the boundaries on the affected parcels of land by the Land Registrar, wherein the same must then remain permanent without any interference from the Defendants.



56. Previously boundary disputes were determined during the regime of the Registered Land Act, wherein Section 21(2) of the said Act (now repealed) had provided as follows :

“Where any uncertainty or dispute arises as to the position of any boundary, the Registrar, on the application of any interested party, shall, on such evidence as the Registrar considers relevant, determine and indicate the position of the uncertain or disputed boundary”.
(Emphasis mine)

57. From the foregoing it is clear that where there is any uncertainty as to the position of any boundary, the Registrar was enjoined to determine and indicate the position of the uncertain or disputed boundary. In this case, there had been a boundary on the ground between the three parcels of land which boundary had been respected by the original proprietors of the respective suit lands.

58. In the case of *Azzuri Limited v Pink Properties Limited* [2017] eKLR, Justice Angote, while making a decision relating to general boundaries stated;

‘ In his paper, “The Role of the Registry Index Map (RIM) in Land Management in Kenya”, Peter K. Wanyoike has stated that the Registered Index Map is a very useful document in registration and management of land in Kenya within the context of “General Boundaries” or “approximate boundaries.”

59. The paper defines “General Boundaries” as follows:

“ A boundary of which the precise line is undetermined in relation to the physical features which demarcate it ... However, it is clear on the ground where the parcel is situated and where the boundaries are, for they are clearly visible and unmistakable physical features, though they do not indicate the exact location of the line within the breadth which such physical features necessary process.”

60. In the case of *Ali Mohamed Salim vs Faisal Hassan Ali* (2014) eKLR it had been held as follows:

“The type of survey that generated the Registry Index Map is what was known as “general boundaries” which has been defined in Section 18(1) of the Land Registration Act, 2012 to mean “the approximate boundaries and the approximate situation only of the parcel.” Indeed, most of the titles under the repealed Registered Land Act were issued on the basis of the general boundaries, meaning that such parcel of land had no fixed beacons. On the other hand, land registered under the Registration of Titles Act required a cadastral survey to be prepared, which is based on a fixed boundary principle. Such a survey has an accurate linear and angular measurements to aid the registration of a title of a plot. The boundaries of land registered under the Registration of Titles Act can easily be identified by any Surveyor because of the fixed nature of its beacons.”

61. In the case of *Samuel Wangau Vs. AG & 2 others* (2009) eKLR, it was held as follows:

“However, it is common ground that such maps (R.I.M) are not authorities on boundaries. Both the District Land Registrar and the District Land Surveyor said as much.....It means therefore that when and where there is a dispute as to the position and location of a boundary as in this case, unless the same is a fixed boundary, one has to go beyond the R.I.M in solving the dispute.”



62. Indeed, for one to determine a dispute in respect to general boundaries, the physical features existing on the ground are very critical. Such features include rivers, hedges, fences, roads etc. Because general boundaries are identifiable by using the existing physical features, and by interviewing the owners of the adjacent plots, the law requires disputes relating to such boundaries to be handled by the Land Registrar, and not Surveyors or even the court.
63. In this case, only the land surveyor visited the disputed parcels of land wherein he had noted the discrepancies in the measurements although there had been well demarcated fences around the disputed parcels of land and consensus that the people living there had adopted the said boundaries.
64. The jurisdiction of this Court flows from Art 162(2) (b) of *the Constitution* as read with the provisions of section 13(2) of the Environment and *Land Act*. The latter provides as follows;
- “In exercise of its jurisdiction under Article 162(2) (b) of *the Constitution*, the Court shall have power to hear and determine disputes—
- a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b) relating to compulsory acquisition of land;
 - c) relating to land administration and management;
 - d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - e) any other dispute relating to environment and land
65. For avoidance of doubt Section 13 of the Environment and *Land Act* thus does not oust the jurisdiction of the court to determine boundaries. However when it comes to general boundaries Section 18(2) of the *Land Registration Act* provides in mandatory terms that the dispute should be submitted to the Land Registrar for it is only after the Land Registrar has determined the dispute that the matter can be escalated to this Court.
66. Putting all the matters herein aforesaid into consideration, I find that the Plaintiff has not proved his case on a balance of probability as against the Defendants and I proceed to dismiss the same with no costs. This matter shall however be referred to the Land Registrar Bomet who shall visit the suit premises within 30 days of delivery of this judgment so as to determine the boundary dispute therein.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 9TH DAY OF MAY 2024

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

