



REPUBLIC OF KENYA



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**Konchella v Keindiya & another (Environment and Land Appeal
E007 of 2022) [2024] KEELC 4890 (KLR) (19 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4890 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT AND LAND APPEAL E007 OF 2022**

EM WASHE, J

JUNE 19, 2024

BETWEEN

KIRUTA NKARIO KONCHELLA APPELLANT

AND

MENSA NAIGEYO KEINDIYA 1ST RESPONDENT

BENKI OLE NAIGEYO 2ND RESPONDENT

JUDGMENT

1. The Appellant herein being aggrieved by the Judgement of the Honourable R.M.Oanda (hereinafter referred to as “the Trial Court”) pronounced on the 25.08.2022 (hereinafter referred to as “the Trial Court Judgement”) filed a Memorandum of Appeal dated 21.09.2021 (hereinafter referred to as “the present Appeal”) on the following grounds;-
 - a. In finding and holding that LR.No. Transmara/Enanyieny/881 & 882 (hereinafter referred to as the “suit properties”) share a common boundary and thus the basis of believing the evidence of the Respondents that same had purchased the said parcels of land from the Appellant, the Learned Trial Magistrate erred in law in not taking into account and/or cognizance of the Law of Contract.
 - b. The Learned Trial Magistrate erred in fact and law in finding that the 1st Respondent had proved that same purchased the suit properties based on undated Land Sale Agreement which was contested.
 - c. The Learned Trial Magistrate erred in fact and law in finding that the Appellant ought to surrender the title deeds to the suit property for purposes of cancellation and transfer to the 1st Respondent. For clarity, the purported land sale agreement which the 1st Respondent sought to enforce had lapsed upon the expiry of 6 years thus the Counter-Claim was defeated by the provisions of Section 4 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya.



- d. In finding and holding that the Appellant do transfer the suit properties to the 1st Respondent based on a null and void contract, the Learned Trial Magistrate failed to appreciate the importance of Section 6 and 8 of the Land Control Act which required the Appellant to obtain a Land Control Board Consent within 6 months of execution of the alleged Contract failure to which the contract was null and void.
 - e. The Learned Trial Magistrate thus in finding and holding that the Appellant herein do surrender the title deeds over and in respect of the suit properties for purposes of cancellation and transfer to the 1st Respondent committed an illegality as there was no contract and/or agreement to enforce.
 - f. The Learned Trial Magistrate failed to cumulatively and/or exhaustively evaluate the entire evidence on record and hence failed to capture and decipher the salient issues and/or features of the suit before him (Trial Magistrate) and thus arrived at an erroneous and/or slanted conclusion, contrary to the evidence adduced.
 - g. The Learned Trial Magistrate erred in fact and law in finding that there was no evidence adduced by the Appellant in regard to trespass and illegal occupation by the Respondents in the suit properties while the evidence adduced during Trial proved otherwise.
 - h. The Learned Trial Magistrate misdirected himself by ignoring the evidence adduced by the Appellant on the fact that the un-dated Sale Agreement was not signed by the Appellant as same was illiterate and that the National Identification Card Number on the said Agreement did not belong to the Appellant. In a nutshell, the Learned Trial Magistrate ignored the evidence adduced by the Appellant with respect to the forged Land Sale Agreement.
 - i. The Learned Trial Magistrate misdirected himself by dismissing the Appellant's suit against the Respondent's herein while the evidence on record in favour of the Appellant were cogent and/or weighty.
 - j. The Learned Trial Magistrate erred in law in finding and holding that fraud had been proved, without addressing his judicial mind to the credibility and quality of the evidence tendered, towards proof of (sic) fraud, which evidence was riddled with contradictions and discrepancies.
 - k. The Learned Trial Magistrate failed to properly evaluate, appraise and/or analyse the entire evidence on record and thereby failed to decipher the salient features of the Appellant's case and thereby arrived at a conclusion contrary to the weight of the evidence on record.
2. Based on the above grounds, the Appellant sought for the following Orders;-
- a. The Appeal herein be allowed and the Judgement and Decree of the Trial Magistrate dated and delivered on the 25th of August 2022 be set-aside, quashed and/or varied.
 - b. The Honourable Court be pleased to substitute in lieu of the decision dated 25th August 2022 with an Order allowing the Appellant's suit and dismissing the Respondent's Counter-Claim vide Kilgoris SPM ELC No.123 of 2018.
 - c. Costs of this Appeal and costs incurred in the sub-ordinate Court with respect to the main suit and Counter-Claim be borne by the Respondent.
 - d. Such further and/or other reliefs as the Court may deem necessary, just and expedient.
3. The present Appeal was duly served on the Respondents and thereafter admitted for hearing.



4. The Appellant in the present Appeal is invoking the Court's Appellant jurisdiction against the Judgement and Decree of the Trial Court pronounced on the 25.08.2022.
5. In the case of *Selle & Another-versus- Associated Motor Boat Co.ltd & Others (1968) EA 123* the Court stated as follows as regards Appeals; -

“A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand.”

6. Consequently therefore, this Court being the first Appellate Court is required to re-look at the facts of the case before the Trial Court with a view of exhaustively scrutinising the same and come up with its own conclusion.
7. To be able to undertake such an exercise, the Court is to first and foremost appreciate the pleadings which were filed in the Trial Court.

The pleadings before the trial court

8. The Appellant (who was the Plaintiff at the Trial Court) filed a Plaint dated 12.10.2017 against the 1st and 2nd Respondents (who are the 1st and 2nd Defendants in the present Appeal) seeking for the following Orders; -
 - a. The Defendant be restrained by means of a permanent injunction by himself, agents, servants and/or anyone claiming under the Defendant from trespassing onto, cultivating, grazing, fencing off, building structures, interfering with and/or in any other manner, whatsoever, dealing with the suit property that is LR.No.Transmara/Enanyieny/881 and/or any portion thereof pending the hearing and determination of this suit.
 - b. Costs of the suit.
 - c. Such other or further relief that this Honourable Court may deem fit and just to grant.
9. The Plaint was duly served on the 1st and 2nd Respondents who filed a Statement of Defence and Counter-Claim dated 13.11.2017.
10. In the Statement of Defence, the 1st and 2nd Respondent opposed the Plaint on the following grounds; -
 - a. The Appellant was indeed the beneficial owner of the property known as Plot No. 881 within Enanyieny Group Ranch.
 - b. Based on the Appellant's beneficial ownership of the property known as Plot No. 881 within Enanyieny Group Ranch, the 1st and 2nd Respondents purchased a portion of the same measuring 10 acres pursuant to an Agreement For Sale dated March 2021.
 - c. Upon the 1st and 2nd Respondents acquiring the said 10 acres within the property known as Plot No. 881 within Enanyieny Group Ranch, a Surveyor was engaged to affix boundary markings and/or beacons to ascertain their portion within the larger property owned by the Appellant.
 - d. Thereafter, the 1st and 2nd Respondents took possession of the 10 acres portion within the property known as Plot No. 881 within Enanyieny Group Ranch and have been in occupation and use of the same since then.



- e. According to the 1st and 2nd Respondents, the Appellant was to process the remaining portion which he had not sold as Plot No. 882 within Enanyieny Group Ranch while the portion of 10 acres sold to them was retained with the original allotment known as Plot No. 881 within Enanyieny Group Ranch.
 - f. However, contrary to the terms and/or intention of the Appellant and the 1st and 2nd Respondents, the Title Deed to the portion measuring 10 acres identified as Plot No. 881 within Enanyieny Group Ranch was issued to the Appellant as LR.No.Transmara/Enanyieny/881 on the 03.08.2017.
 - g. Despite the 1st and 2nd Respondents efforts and/or request to the Appellant to amicably transfer the same to their names, the Appellant has completely refused, neglected and/or declined to so.
11. In addition to the above, the 1st and 2nd Respondents filed a Counter-Claim against the Appellant seeking for the following Orders; -
- a. A permanent injunction do issue restraining the Plaintiff herein by himself, his servants, agents or anyone acting under him or under his authority or otherwise whosoever from dealing with a parcel of land known as LR.No.Transmara/Enanyieny/881 situated in Narok County.
 - b. An Order directed to the Plaintiff herein to transfer 10 acres comprised in the land parcel no. Transmara/Enanyieny/881 and transfer an extra 2 acres to be curved out from parcel Transmara/Enanyieny/882 to the Defendant.
 - c. Costs of the suit and interest at Court rates.
12. The grounds upon which the 1st and 2nd Respondents sought the above prayers can be summarised as follows; -
- a. The 1st and 2nd Respondents are the lawful owners of the property known as LR.No.Transmara/Enanyieny/881 having purchased the same way back in the year 1991.
 - b. In addition to the above, the 1st and 2nd Respondents further pleaded that they purchased an addition 2 acres from the Appellant on the property known as LR.No.Transmara/Enanyieny/882.
 - c. According to the 1st and 2nd Respondents, the full purchase price for the 2 acres on the property known as LR.No.Transmara/Enanyieny/882 was received by the Appellant but he has again refused, failed and/or declined to hive of the same and hand over possession to them.
 - d. The 1st and 2nd Respondents stated that all efforts to compel the Appellant to transfer the property known as LR.No.Transmara/Enanyieny/881 to the 1st and 2nd Respondents as well as the extra 2 acres within LR.no.Transmara/Enanyieny/882 has been futile despite involving even the elders within the community.
13. The 1st and 2nd Respondents Statement of Defence and Counter-Claim dated 13.11.2017 was duly served on the Appellant but there was no Reply to the Defence and/or a Defence to the Counter-Claim filed therein.
14. The proceedings contained in the Record of Appeal shows that various interlocutory applications were filed and determined until 09.07.2021 when the hearing began.



Appellant's Case At The Trial Court.

15. The 1st witness in the Trial Court was the Appellant herein who was marked as PW 1.
16. The Appellant introduced himself as a resident of Shankoe whose occupation was farming.
17. The Appellant informed the Trial Court that he was a member of Enanyieny Group Ranch who was allocated the property known as Plot No. 881 within Enanyieny Group Ranch now titled as LR.No.Transmara/Enanyieny/881.
18. The Appellant then produced the Title Deed of the property known as LR.No.Transmara/Enanyieny/881 issued on the 30.06.2021 as Plaintiff's Exhibit 1.
19. Thereafter, the Appellant produced a Certified Green Card of the property known as LR.No.Transmara/Enanyieny/881 as Plaintiff's Exhibit 2.
20. Further to the above, the Appellant also produced an Official Search of the property known as LR.No.Transmara/Enanyieny/881 as Plaintiff's Exhibit 3.
21. The Appellant informed the Trial Court that he was the person in occupation of the property known as LR.No.Transmara/Enanyieny/881.
22. However, the Appellant stated that in the year 2017, the 1st and 2nd Respondents invaded the property known as LR.No.Transmara/Enanyieny/881 and began occupying the same.
23. Due to this illegal and unjustified occupation by the 1st and 2nd Respondents on the property known as LR.No.Transmara/Enanyieny/881, the Appellant made reports to the area Chief and the local District Officer with a view to amicably resolve the same.
24. Nevertheless, the 1st and 2nd Respondents refused and/or neglected to vacate the said property known as LR.No.Transmara/Enanyieny/881 on the allegations that they had bought the same.
25. The Appellant then proceeded to produce various photographs of the property known as LR.No.Transmara/Enanyieny/881 including the houses which he had build on it as Plaintiff's Exhibit 4.
26. As regards to any Agreement For Sale, the Appellant categorically denied ever selling any portion of his land to the 1st and 2nd Respondents and specifically denied ever affixing his thumb print on any Agreement For Sale.
27. In conclusion of his evidence in chief, the Appellant sought this Court to grant the prayers contained in the Plaint and costs of the suit.
28. On cross-examination, the Appellant produced his Kenyan Identification Card No. 37500832.
29. However, the Appellant's Kenyan Identification Card did not have the name Konchellah on it.
30. The Appellant confirmed that the property known as LR.No.Transmara/Enanyieny/881 was registered in his name but could not remember the actual date.
31. On being referred to the Plaintiff's Exhibit 1, the Appellant informed the Court that the Identification Card Number of the owner was not indicated therein.
32. Nevertheless, the Appellant confirmed that the Title Deed of the property known as LR.No.Transmara/Enanyieny/881 was issued in the year 2017 and he appears as the first registered owner on the register.



33. The Appellant further testified that the 1st and 2nd Respondents entered and/or trespassed into the property known as LR.No.Transmara/Enanyieny/881 in the year 2017 yet he had not sold the same to them.
34. The Appellant specifically denied ever selling the property known as LR.No.Transmara/Enanyieny/881 to the 1st and 2nd Respondents in the year 1991.
35. The Appellant's view was that in the year 1991, he had not yet acquired any proprietary rights over the said property known as LR.No.Transmara/Enanyieny/881 capable of being sold to the 1st and 2nd Respondents.
36. In essence, the 1st and 2nd Respondents entry into the property known as LR.No.Transmara/Enanyieny/881 was without his consent.
37. On being referred to the Replying Affidavit sworn on the 28.02.2017 by the 1st and 2nd Respondents, the Appellant denied the allegations that he is related to them.
38. The Appellant informed the Court that there was an existing Criminal Case in which he had been charged with Malicious Damage to the 1st and 2nd Respondents' property.
39. The Appellant confirmed that according to the Green Card of the property known as LR.No.Transmara/Enanyieny/881, there is a Caution duly registered by the 1st and 2nd Respondents.
40. The Appellant denied ever receiving any purchase price for the property known as LR.No.Transmara/Enanyieny/881 from the 1st and 2nd Respondents or a portion of 10 Acres from his land.
41. As regards the meeting before the Area Chief and the District Officer, the Appellant denied that any discussions were held and therefore the allegation that it was confirmed he sold his land to the 1st and 2nd Respondents is not true.
42. In concluding the cross-examination, the Appellant denied entering any Sale Agreement with the 1st and 2nd Respondents because he did not any land to sale before the year 2017.
43. On re-examination, the Appellant reconfirmed that the 1st and 2nd Respondents entered and/or trespassed into the property known as LR.No.Transmara/Enanyieny/881 in the year 2017.
44. At the time of the 1st and 2nd Respondents' entry, the Appellant was already in occupation of the property known as LR.No.Transmara/Enanyieny/881 and there was no Agreement For Sale which he executed with them.
45. At the end of this re-examination, the Appellant was discharged from the witness box.
46. The second Plaintiff's witness was Peter Lemayan Nkario who was marked as PW2.
47. PW 2 introduced himself as a resident of Shankoe Location and in particular Enanyieny area.
48. PW 2 informed the Court that the Appellant was his father and they reside on the property known as LR.No.Transmara/Enanyieny/881.
49. According to PW 2, he personally began using the property known as LR.No.Transmara/Enanyieny/881 in the year 2017 when his Grandfather died.
50. PW 2 stated that he planted maize on the property known as LR.No.Transmara/Enanyieny/881 and immediately after he harvested the said crop, the 1st and 2nd Respondents entered and/or trespassed in the said property.



51. The PW 2 confirmed that the local Elders were called to mediate on the dispute but the 1st and 2nd Respondents refused to vacate on the basis that they had purchased the said property.
52. The matter was then escalated to the District Officer who did not resolve the same hence the present suit in Court.
53. In concluding his evidence in chief, PW 2 affirmed that the property known as LR.No.Transmara/Enanyieny/881 had been used by his family even before 2017 and therefore the prayers in the Plaint should be granted with costs.
54. On cross-examination, PW 2 stated that his name in his Kenyan Identification Card was Peter Lemayan Nkario.
55. However, the name that appears in the witness statement which he filed in Court was Peter Lemayan Konchellah.
56. PW 2 informed the Court that he was born in the year 1992 and is familiar with the 1st and 2nd Respondents herein.
57. According to PW 2, the 1st and 2nd Respondents are residents of Isampin Sub-Location.
58. PW 2 confirmed that in the year 1991, he was not yet born.
59. PW 2 reiterated that the 1st and 2nd Respondents entered into the property known as LR.No.Transmara/Enanyieny/881 in the year 2017.
60. Due to this forceful entry and/or trespass by the 1st and 2nd Respondents, PW 2 stated that the Appellant went to the elders and ultimately the District Officer in an effort to reclaim back his land.
61. PW 2 denied the 1st and 2nd Respondents allegation that they had leased the property known as LR.No.Transmara/Enanyieny/881.
62. PW 2 in conclusion of the cross-examination confirmed that the trees on the land were planted by his grand father and the 1st and 2nd Respondents had never purchased the property known as LR.No.Transmara/Enanyieny/881.
63. On re-examination, PW 2 reiterated that he had planted various trees on the property known as LR.No.Transmara/Enanyieny/881.
64. At the end of this re-examination, PW 2 was discharged from the witness box.
65. The third Appellant's witness was Lodi Xavier who was marked as PW3.
66. PW 3 introduced himself as a resident of Shankoe and a farmer by occupation.
67. PW 3 informed the Trial Court that he was a son in law of the Appellant herein.
68. PW 3 stated that the Appellant was the rightful owner of the property known as LR.No.Transmara/Enanyieny/881 having obtained the Title Deed to the same on the 01.08.2017.
69. In the same year 2017, the Appellant's father passed away and the property began being occupied by the Appellant herein.
70. Again, in the same year 2017, the Appellant handed over possession of the property known as LR.No.Transmara/Enanyieny/881 to PW 2.



71. However, about 2 years later on, PW 3 was informed that the property known as LR.No.Transmara/Enanyieny/881 had been invaded by the 1st and 2nd Respondents herein.
72. PW 3 stated that on further inquiry, the 1st and 2nd Respondents claimed that they had purchased the property known as LR.No.Transmara/Enanyieny/881 in the year 1991.
73. PW 3 denied the allegation that the Appellant had ever sold the property known as LR.No.Transmara/Enanyieny/881 to the 1st and 2nd Respondents and further disputed the thumb-print affixed on the said Agreement For Sale.
74. PW 3 confirmed that after this disagreement, the dispute was forwarded to the local Elders and later the District Officer but there was no resolution reached thereby resulting to this suit.
75. PW 3 concluded his evidence in chief by stating that the 1st and 2nd Respondents entered and/or trespassed into the property known as LR.No.Transmara/Enanyieny/881 in the year 2017.
76. On cross-examination, PW 3 confirmed that the parties herein were his relatives.
77. PW 3 stated that the 1st Respondent had informed him that he purchased a portion of the land in 1991.
78. At that time, the Appellant had a big portion of land.
79. However, PW 3 reiterated that the 1st and 2nd Respondents entered into the property known as LR.No.Transmara/Enanyieny/881 in the year 2017.
80. Before the year 2017, it was the Appellant who was using it and thereafter handed possession to the PW 2.
81. PW 3 affirmed that PW 2 started planting trees on the property known as LR.No.Transmara/Enanyieny/881 in the year 2017.
82. PW 3 further affirmed that the Appellant and the Respondents were neighbours on the ground.
83. PW 3 confirmed that there was a meeting held before the Area Chief relating to this dispute but he did not attend and could not say what the resolution was.
84. PW 3 concluded his cross-examination by indicating that the 1st Respondent had not been in occupation prior to 2017 and also never leased the land known as LR.No.Transmara/Enanyieny/881.
85. On re-examination, PW 3 stated that PW 2 took possession of the property known as LR.No.Transmara/Enanyieny/881 in the year 2015.
86. PW 3 also confirmed that the 1st Respondent resides in Osupuko area.
87. At the end of this re-examination, the Appellant closed his case.

1st & 2nd Respondent's Case Before The Trial Court

88. The 1st Defence witness at the Trial Court was the MENSA Naigeyo Kendeya (1st Respondent in the present Appeal) who was marked as DW 1.
89. The 1st Respondent introduced himself as a resident of Isampin in Keiyan Location.
90. The 1st Respondent informed the Trial Court that he was aged 65 years and a livestock keeper by occupation.



91. The 1st Respondent admitted being familiar with the Appellant herein although they did not have any relationship between them.
92. The 1st Respondent confirmed to the Trial Court that he had recorded a witness statement dated 13.11.2017 of which he then adopted as his evidence in chief.
93. The 1st Respondent thereafter denied that he trespassed and/or unlawfully took possession of the Appellant's property known as LR.No.Transmara/Enanyieny/881.
94. According to the 1st Respondent, the Appellant offered to sell 10 acres to the 1st Respondent which offer was accepted and an Agreement For Sale executed in 1991.
95. The 1st Respondent then produced the Agreement For Sale executed in 1991 as the Defence Exhibit 1.
96. Thereafter, the 1st Respondent confirmed that the Purchase Price for the 10 acres amounted to KShs 57,000/- which was fully settled by paying a sum of KShs 37,000/- and 8 herds of cattle to the Appellant.
97. The 1st Respondent informed the Trial Court that this Agreement For Sale was also witnessed by other people.
98. The 1st Respondent affirmed that after paying the full purchase price for the 10 acres from the Appellant, he took possession of the same and has been occupying since 1997 to date.
99. However, in the year 2017, the titles of Enanyieny Group Ranch were issued and the Appellants collected two titles known as LR.No.Transmara/Enanyieny/881 & LR.No.Transmara/Enanyieny/882.
100. The 1st Respondent's testimony was that the portion of 10 acres purchased from the Appellant is what was registered as LR.No.Transmara/Enanyieny/881.
101. Consequently therefore, the registration of the Appellant as the owner of the property known as LR.No.Transmara/Enanyieny/881 was erroneous.
102. The 1st Respondent produced a Copy of the Title Deed of the property known as LR.No.Transmara/Enanyieny/881 together with a Copy of an official search as Defence Exhibit 2 (a) and (b).
103. In addition to Defence Exhibit 2 (a) and (b), the 1st Respondent also produced the Sketch Map showing the location of the two properties known as LR.No.Transmara/Enanyieny/881 & LR.No.Transmara/Enanyieny/882 as Defence Exhibit 3.
104. The 1st Respondent informed the Trial Court that in the same year 2017 when the Title Deeds were issued, the Appellant began interfering with the fence which was demarcation the properties known as LR.No.Transmara/Enanyieny/881 and LR.No.Transmara/Enanyieny/882 and cutting down various trees planted by the 1st Respondent.
105. It was on the basis of this activities by the Appellant that the 1st Respondent made a Report of Malicious Damage and the Criminal File No. 97 of 2021 was filed before the Court.
106. Similarly, the 1st Respondent informed the area Elders on the activities of the Appellant and a meeting was convened to mediate on the dispute.
107. The meeting with the Elders was held on the 16.09.2017 and the 1st Respondent produced the Minutes of the said meeting as Defence Exhibit 4.



108. On essence therefore, the 1st Respondent denied trespassing and/or forcefully entering into the property known as LR.No.Transmara/Enanyieny/881 as it was his lawful property which he occupied and had not leased the same from the Appellant.
109. In concluding his evidence in chief, the 1st Respondent sought for a permanent injunction against the Appellant and costs of the suit.
110. On cross-examination, the 1st Respondent reiterated that the Appellant executed an Agreement For Sale.
111. The 1st Respondent informed the Trial Court that the Agreement For Sale was done in Kisii Town although he was not sure if it was before an Advocate of Kenya.
112. However according to the Agreement For Sale, the same was prepared by Advocate B.O Makori in the year 1991.
113. The 1st Respondent further admitted that the Identification Card Number of the Appellant was written by hand because on the material day, he did not have it on him.
114. The 1st Respondent further confirmed that the Agreement For Sale was not dated.
115. According to the 1st Respondent, the date might just have been forgotten and he is not literate to notice such an omission.
116. On the other hand, the 1st Respondent stated that the Appellant was a younger person who could write and read.
117. Consequently therefore, the Appellant signed on the Agreement For Sale and not affixed a thumb print as alleged.
118. The 1st Respondent insisted that he paid the Appellant a sum of KShs 39,000/- and Eight Cows which was in full and final for the consideration.
119. Unfortunately, the 1st Respondent did not have any proof of payment of the purchase price to the Appellant.
120. The 1st Respondent affirmed before the Trial Court that he took possession of the 10 acres which are now titled as LR.No.Transmara/Enanyieny/881 from the Appellant and has been in occupation up to date.
121. However, the 1st Respondent did not have any proof and/or pictures to show that he had occupied the said portion of 10 acres.
122. Nevertheless, during the meeting before the Area Elders, it was confirmed that the portion of 10 acres purchased by the 1st Respondent from the Appellant had been mapped out and assigned Plot No. 881 within Enanyieny Group Ranch.
123. The 1st Respondent sought to rely on the Minutes of the Elders although they have not been signed.
124. The 1st Respondent confirmed that the meeting with the Elders was done at the Assistant Chief's office although he could not say whether he stamped the Minutes or not.
125. The 1st Respondent informed the Trial Court that the area Assistant Chief had since died.
126. In concluding the cross-examination, the 1st Respondent accused the Appellant of being a liar.



127. On being re-examined, the 1st Respondent reiterated that the Agreement For Sale was executed by the Appellant and himself in Kisii town.
128. However, the 1st Respondent could not say whether it was in an Advocate's office or not.
129. The 1st Respondent therefore confirmed that he had purchased the portion of 10 acres currently known as LR.No.Transmara/Enanyieny/881 and it was his property.
130. The 1st Respondent further concluded his testimony by stating that he had been in occupation of the 10 acres known as LR.No.Transmara/Enanyieny/881 since 1991.
131. Consequently, it was the Appellant who had trespassed and destroyed his properties hence the criminal case in Court.
132. At the end of this re-examination, the 1st Respondent was discharged from the witness box thereof.
133. The Respondents second witness in the Trial Court was Paul Komantiere Ole Keriako who was marked as DW 2.
134. DW 2 introduced himself as a resident of Isampin and a businessman by profession.
135. DW 2 informed the Trial Court that he had prepared a witness statement which he adopted the same as his evidence in chief.
136. DW 2 confirmed to the Trial Court that indeed there is a land dispute between the Appellant and the Respondents herein.
137. According to DW 2, the 1st Respondent purchased a portion of land from the Appellant through an Agreement For Sale.
138. DW 2 stated that he was one of the witnesses in the Agreement For Sale.
139. Referring to the Defence Exhibit 1, DW 2 confirmed to the Trial Court that he was the witness No. 3 who signed the said Agreement For Sale.
140. DW 2 affirmed that the Agreement For Sale was executed in the year 1991 and he had been called by the 1st Respondent to witness the same.
141. According to DW 2, the full consideration of the portion of 10 acres was KShs 58,000/- of which a sum of KShs 39,000/- was made as a down payment.
142. Thereafter, the 1st Respondent completed the balance of the purchase price by giving the Appellants herds of cows.
143. DW 2 confirmed that the Agreement For Sale was prepared and executed in Kisii Town although he could not confirm whether it was in an Advocates office or not.
144. After the purchase of the 10 acres by the 1st Respondent from the Appellant, he took possession of the same and has been living on it ever since.
145. On cross-examination, DW 2 confirmed that he is a resident of Isampin area which borders Enanyieny.
146. DW 2 affirmed that the Agreement For Sale was done in an office within Kisii Town.
147. However, DW 2 could not recollect if the Agreement For Sale was stamped or not.
148. Nevertheless, DW 2 was sure that the purchase price for the portion of 10 acres was KShs 57,000/- because he is one of the witnesses in the Agreement For Sale.



149. DW 2 also confirmed that the animals that were handed over to the Appellant by the 1st Respondent were 9 cows.
150. DW 2 however admitted that he was not there when the payments in cash and cows was done by the 1st Respondent to the Appellant.
151. DW 2 denied the allegation that the 1st Respondent had leased the land and informed the Trial Court that the portion of 10 acres had actually been purchased by the 1st Respondent.
152. On re-examination, DW 2 confirmed that he was present when the deposit of KShs 39,000/- was paid to the Appellant.
153. DW 2 informed the Trial Court that the full purchase price was KShs 57,000/-.
154. DW 2 stated that the 1st Respondent took possession of the portion measuring 10 acres although he did not see his house on it.
155. At the end of this re-examination, DW 2 was discharged from the witness stand.
156. The Respondents third witness before the Trial Court was JOHN SIBUKA who was marked as DW 3.
157. DW 3 introduced himself as a resident of MASURURA and a retired Chief.
158. DW 3 informed the Trial Court that he was familiar with the Appellant who was his brother in law.
159. Similarly, DW 3 confirmed that he was familiar with the 1st Respondent.
160. DW 3 further informed the Trial Court that he had prepared and filed a witness statement dated 01.07.2021 which he adopted as his evidence in chief.
161. According to DW 3, the Appellant sold a portion of his land to the Respondent herein.
162. The reason why the Appellant had sold a portion of his land was to settle various debts which included that of DW 3.
163. The portion that the Appellant sold to the Respondent was 2 Acres and its consideration was 12 herds of cattle.
164. DW 3 confirmed that the Respondent duly paid the full purchase price of 12 Herds of Cattle and was handed vacant possession of the 2 Acres by the Appellant.
165. DW 3 further affirmed that as early as 1996, the Respondent was already in occupation and use of the land sold to him by the Appellant.
166. DW 3 concluded his evidence in chief by stating that he retired in the year 2018.
167. On cross-examination, DW 3 reiterated that the Appellant was indebted to him.
168. Consequently therefore, DW 3 approached the Appellant with his father in law at his home.
169. After this visit, the Appellant together with DW 3 and the father in law visited the Respondent's home.
170. The main reason of visiting the Respondent with the Appellant was to get his payment.
171. DW 3 confirmed that indeed the Respondent gave the Appellant animals although no Agreement was done on that date.
172. According to DW 3, the Agreement For Sale was to be done later.



173. However, DW 3 was not sure whether the Agreement For Sale was done or not.
174. DW 3 reiterated that he only knew about the sale of 2 acres by the Appellant to the Respondent and confirmed that the full purchase price of 12 herds of cattle was paid.
175. On re-examination, DW 3 confirmed that he was saying the truth.
176. DW 3 affirmed that the Appellant has sold 2 acres to the Respondent and received the full purchase price of 12 herds of cattle.
177. Similarly, DW 3 stated that he was aware the Respondent had purchased other portions of land from the Appellant before this particular transaction.
178. At the end of this re-examination, the Respondent also closed his case.
179. The parties were then granted leave to file their final submissions wherein the Appellant filed his submissions while the 1st Respondent filed his submissions on the 22.09.2021.
180. The Court has gone through the pleadings filed herein, the testimonies of the parties, the evidence produced in the Trial Court as well as the submissions therein and hereby identify the following issues for determination.

Issue No. 1- Who is the lawful & legitimate owner of the properties known as LR.No.Transmara/Enanyieny/881 & LR.No.Transmara/Enanyieny/882?

Issue No.2- Was there any lawful acquisition of land by the 1st respondent within the appellant's properties known as LR.No.Transmara/Enanyieny/881 & LR.No.Transmara/Enanyieny/882?

Issue No. 3- Does the 1st respondent have lawful claim of the portion of 12 acres acquired from the appellant within the properties known as LR.No.Transmara/Enanyieny/881 & LR.No.Transmara/Enanyieny/882?

Issue No. 4- Is the appellant entitled to the prayers sought in the plaint dated 12.10.2017?

Issue No.5- is The 1st Respondent Entitled To The Prayers Sought For In The Counter-claim Dated 15.11.2017?

Issue No. 6- Who bears the costs of the appeal?

181. The Court having identified the issues for determination, the same will now be discussed hereinbelow.

Issue No. 1- Who is the lawful & legitimate owner of the properties known as LR.No.Transmara/Enanyieny/881 & LR.No.Transmara/Enanyieny/882?

182. The first issue for determination in this Appeal is who is the registered and lawful owner of the properties known as LR.No.Transmara/Enanyieny/881 and LR.No.Transmara/Enanyieny/882.
183. According to the Appellant's pleadings and testimony, the properties known as LR.No.Transmara/Enanyieny/881 and LR.No.Transmara/Enanyieny/882 are duly registered in his name.
184. To prove this fact, the Appellant produced a Copy of the Title Deed of the property known as LR.No.Transmara/Enanyieny/881, a Copy of an Official Search thereof and the Green Card.



185. The 1st Respondent on the other hand challenged the issuance of the Title Deed to the property known as LR.No.Transmara/Enanyieny/881 to the Appellant.
186. The 1st Respondent pleaded and testified that pursuant to an Agreement for Sale executed in the year 1991, he purchased a portion of land measuring 10 acres from the Appellant herein.
187. The 1st Respondent stated that the portion of 10 acres purchased in the year 1991 is what is contained in the Title known as LR.No.Transmara/Enanyieny/881 irregularly registered in the name of the Appellant.
188. Further to that, the 1st Respondent also pleaded and testified that he purchased another portion of 2 acres from the Appellant which he took possession and these 2 acres were to be hived from the property known as LR.No.Transmara/Enanyieny/882.
189. The 1st Respondent's claim therefore was that the entire property known as LR.No.Transmara/Enanyieny/881 should be registered in his name and a portion of 2 acres from the property known as LR.No.Transmara/Enanyieny/882 be hived off from the Appellant's property and be registered in his name.
190. It is not in doubt that the properties known as LR.No.Transmara/Enanyieny/881 and LR.No.Transmara/Enanyieny/882 have been titled in the name of the Appellant herein.
191. Section 24 of the [Land Registration Act](#), No. 3 of 2012 specifically provides that the person recorded as the proprietor of land shall vest in that person the absolute ownership of the said land with all the rights and privileges belonging or appurtenant thereto.
192. Clearly, the Appellant having been recorded as the proprietor of both the properties known as LR.No.Transmara/Enanyieny/881 and LR.No.Transmara/Enanyieny/882, this Court hereby makes a finding that both properties belong to the Appellant as provided for under the [Land Registration Act](#), No. 3 of 2012.

Issue No. 2- Was there any lawful acquisition of land by the 1st respondent within the appellant's properties known as LR.No.Transmara/Enanyieny/881 & LR.No.Transmara/Enanyieny/882?

193. The second issue for determination is who is the rightful owner of the property known as LR.No.Transmara/Enanyieny/881.
194. The Appellant in the Plaint filed before the Trial Court stated that he is the duly registered owner of the property known as LR.No.Transmara/Enanyieny/881 having obtained a valid title of the same on the 01.08.2017.
195. The property known as LR.No.Transmara/Enanyieny/881 measures approximately 2.32 Hectares which translate to approximately 6 Acres.
196. Based on the Appellant's registration as the lawful owner of the property known as LR.No.Transmara/Enanyieny/881, his prayer before the Trial Court was a permanent order of injunction against the 1st Respondent and/or any other person that claimed under him from trespassing onto, cultivating, grazing, fencing off, building structures and/or interfering with and/or in any other manner whatsoever dealing with the suit property that is LR.No.Transmara/Enanyieny/881 and/or any portion thereof.



197. On the other hand, the Respondents through his Defence filed on the 17.11.2017 denied the ownership of the Appellant over the property known as LR.No.Transmara/Enanyieny/881.
198. The 1st Respondent pleaded that before the issuance of the Title Deed to the property known as LR.No.Transmara/Enanyieny/881, the Appellant was the beneficial owner of a large parcel of land which he had been allocated during the adjudication of Enanyieny Group Ranch.
199. Based on this allocation, the Appellant offered to sale and the 1st Respondent accepted to purchase a portion of 10 acres from the large parcel of land which had been sub-divided to the Appellant.
200. The 1st Respondent then produced an Agreement For Sale made in 1991 between the Appellant and the 1st Respondent for a portion of 10 acres to confirm this position.
201. The 1st Respondent testified that it is this portion of 10 acres that the Appellant proceeded to obtain a title known as LR.No.Transmara/Enanyieny/881.
202. In essence, the 1st Respondent testified that he was the legitimate owner of the property known as LR.No.Transmara/Enanyieny/881 and the Appellant's should be ordered to transfer the 1st Respondent.
203. At the hearing before the Trial Court, the Appellant produced the A Copy of the Title Deed property known as LR.No.Transmara/Enanyieny/881 in his name, a copy of an official search and the Green Card to prove his ownership.
204. As to the allegation of a sale to the 1st Respondent, the Appellant testified that the Agreement For Sale purported to have been executed in the year 1991 was a forgery and not a genuine document.
205. The Appellant informed the Trial Court that in the year 1991, he did not have any proprietary rights on any portion of land within Enanyieny Group Ranch capable of being alienated to the 1st Respondent.
206. The Appellant further denied the signature that appears on the purported Agreement For Sale made in the year 1991 and/or the terms contained therein.
207. In essence, the Appellant denied the entire Agreement For Sale with the 1st Respondent.
208. To be able to determine this issue, it is important to analyse and/or make a determination on whether or not the Agreement For Sale purported to have been entered actually existed and/or is a forgery.
209. According to the 1st Respondent, the Agreement For Sale executed with the Appellant related to a portion of 10 acres within a larger portion measuring 50 acres allocated to Appellant by Enanyieny Group Ranch.
210. The consideration for the portion of 10 acres purchased by the 1st Respondent was 57,000/- of which was settled by payment of KShs 39,000/- in case and 8 herds of cattle which were fully paid for.
211. The purported Agreement For Sale executed in the year 1991 was produced as Defence Exhibit 1.
212. The first aspect for discussion are the parties to the Agreement for Sale executed in 1991.
213. According to the Agreement For Sale, the name of the Vendor is given as Kiruta Nkario of I.D.NO. (Particulars withheld) while the Purchaser Is Mensa Naigeyo Kendeyia who is the 1st Respondent herein.
214. This person known as Kiruta Nkario is purported to have executed the Agreement For Sale by affixing his signature of the same.



215. However, the Appellant stated before the Trial Court that his name was Kiruta Nkario Konchellah of ID. (Particulars withheld).
216. The Appellant nevertheless admitted that his ID did not have the name Konchellah on it.
217. Secondly, the Appellant informed the Trial Court that he is an illiterate person who does not know how to read and write and therefore it was not possible for him to have affixed a signature of the purported Agreement For Sale.
218. Starting with the names, the Appellant's name Kiruta Nkario which appears on the Agreement For Sale is similar to the one that appears on his I.D no. (Particulars withheld) which was shown to the Trial Court.
219. In other words, the name Kiruta Nkario which is on the Agreement For Sale is the same as that which appears in Appellant's current I.D.
220. The second aspect on the identification of the Appellant is the I.D number.
221. According to the Agreement For Sale, the Appellant's I.D. number was (Particulars withheld) in the Agreement for Sale which is different from ID. Number (Particulars withheld) produced before the Trial Court.
222. Clearly, the ID number appearing on the Agreement For Sale is not the same as that which the Appellant had during the hearing before the Trial Court.
223. Could there be an explanation as to the differences between the ID Number appearing on the Agreement for Sale executed in 1991 and the one produced by the Appellant in Court on the 09.07.2021?
224. The Court takes judicial notice that over the recent past, the Government of Kenya has replaced the Kenyan Identification Card about twice.
225. The 1st Generation Cards which existed from the time of Kenya's Independence were replaced with the 2nd Generation Identification Cards and thereafter the 2nd Generation Cards with replaced with the 3rd Generation Cards.
226. Consequently, it goes without saying that the Identification Card Numbers that both the Appellant and the 1st Respondent held in the year 1991 have since changed with the issuance of the 2nd and/or 3rd Generation Identification Card.
227. On the basis of this turn of events, the differences in the Appellant's I.D Card numbers can not on its own convenience this Court that the Vendor in the Agreement For Sale executed in 1991 and the Appellant herein are two separate and distinct persons that simple use the same name.
228. The second aspect that the Appellant raised is that at the time the Agreement For Sale was executed in the year 1991, he had no proprietary rights over any parcel of land capable of alienating the same to the 1st Respondent as intended in the said Agreement.
229. The Appellant's testimony and submissions state that the Title Deed of the property known as LR.No.Transmara/Enanyieny/881 was issued on the 01.08.2017.
230. Clearly therefore, the Appellant's ownership rights and/or capability to enter into an Agreement For Sale commenced on the 01.08.2017 and any purported transaction done before this date was annuity.



231. The 1st Respondent on the other hand pleaded and testified that the Appellant was a member of Enanyieny Group Ranch and entitled to a share of the group asset therein.
232. Based on his membership in Enanyieny Group Ranch, the Appellant was allocated and/or became a beneficial owner of a portion of land measuring 50 acres from the asset of Enanyieny Group Ranch.
233. It is this portion of 50 acres that the Appellant sold 10 acres to the 1st Respondent as entailed in the Agreement For Sale executed in 1991.
234. The 1st Respondent submitted that the Appellant had proprietary rights over the portion of 50 acres which was demarcated to him by Enanyieny Group Ranch and therefore capable of alienating the same to him.
235. To again resolve this aspect of ownership rights and capacity to alienate the same by the Appellant, it is clear from the testimonies of the parties before the Trial Court that the Appellant was a member of Enanyieny Group Ranch.
236. Similarly, it is not in contention that the Appellant was a beneficiary of the asset of Enanyieny Group Ranch as a member of the same.
237. According to the Agreement For Sale executed in the year 1991, the portion which the Appellant had been demarcated and enjoyed beneficial ownership was approximately 50 acres.
238. There is not doubt and/or dispute that the Appellant's was issued with two titles namely LR.No.Transmara/Enanyieny/881 measuring 2.32 Hectares (approximately 6 Acres) and LR.No.Transmara/Enanyieny/882 measuring 5.14 Hectares (approximately 14 acres)
239. Based on this two Title Deeds issued to the Appellant, it can be safely concluded that the Appellant was entitled to be beneficial owner of approximately 20 acres from the asset of Enanyieny Group Ranch.
240. Nevertheless, the opening of the Green Card of the properties known as LR.No.Transmara/Enanyieny/881 and LR.No.Transmara/Enanyieny/882 and the subsequent issuance of the Title Deeds was the final stage by the Government to register the Appellant as the legal and/or bona fide owner of the two properties.
241. However, this did not mean that the Appellant did not have any proprietary rights over the portion of 20 acres registered in the two Title Deeds prior to 2017.
242. The ownership rights of the Appellant began way back from the time that he registered himself as a member of Enanyieny Group Ranch entitled to registration rights based on his occupation of what was previous community land.
243. The Appellant therefore registered himself as a member of Enanyieny Group Ranch based on occupational and/or beneficial rights within the asset of the said Group Ranch.
244. It was only in recognition of these occupational and/or beneficial rights within the asset of Enanyieny Group Ranch that the Appellant was registered and/or issued with the two Title Deeds amounting to 20 acres.
245. The beneficial rights held by the Appellant were in the considered view of this Court capable of being alienated to a third party on mutual agreement.
246. The Appellant in his pleadings and/or testimony did not disclose when he became a member of Enanyieny Group Ranch.



247. Similarly, the Appellant did not deny that he was a member of Enanyieny Group Ranch in the year 1991 with beneficial rights over a portion of its assets.
248. In the absence of any denial by the Appellant that he was a member of Enanyieny Group Ranch in 1991, this Court makes a finding that the Appellant was indeed a beneficial owner of at least 20 acres of land within the asset of the Group Ranch with capacity to alienate such rights to any person based on a mutual agreement and/or sale agreement.
249. The last aspect about the legality and validity of the Agreement For Sale executed in the year 1991 is the signature affixed by the Appellant.
250. According to the Appellant, the Agreement For Sale shows that the Appellant executed the same by affixing his signature on it.
251. However, the Appellant claimed that he was illiterate and could not read and/or write.
252. The Appellant's position was that the signature which is affixed to his name was not his and is in fact a forgery.
253. The 1st Respondent denied the Appellant's allegations and insisted that the signature affixed against his name was legitimate and authentic.
254. Apart from the Appellant's testimony on this aspect, PW 2 also testified that the Appellant can not sign and only uses his thumb print when required to execute any document.
255. The 1st Respondent also called DW 2 to collaborate his evidence on this aspect of execution.
256. DW 2 confirmed to the Trial Court that he was called by the 1st Respondent to be his witness in the Agreement For Sale executed in the year 1991.
257. DW 2 indicated that he was the first witness in the said Agreement For Sale as clearly indicated therein.
258. DW 2 further affirmed that the Appellant did execute the Agreement For Sale by signing the same in the year 1991.
259. Looking at the two conflicting positions, the question then is who should prove that the signature appearing in the Agreement For Sale executed in 1991 is a forgery?
260. Section 107 of the [Evidence Act](#), Cap 80 provides as follows;-
- “(1) whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”
261. Section 109 of the [Evidence Act](#), Cap 80 further provides as follows;-
- “The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof shall lie on any particular person.”
262. Based on these provisions, the burden of proving that the signature appearing as that of the Appellant on the Agreement For Sale executed in 1991 lies with the Appellant.



263. A Claim of forgery is one which cannot be proved by mere allegations but through evidence either from possible witnesses and/or an expert witness.
264. The Appellant being the person that alleged the signature was forged had a very easy task of subjecting the Agreement For Sale for verification before a Government Document Examiner and/or a Licensed Private Document Examiner.
265. The outcome of this verification by a Document Examiner would have settled this issue once and for all.
266. Unfortunately, the Appellant failed to provide any evidence to prove that the signature appearing on the Agreement For Sale executed in 1991 was not his.
267. Both the evidence of the Appellant and PW 2 were mere denials which were not supported by any evidence either scientifically and/or collaborated by any credible witness.
268. In essence therefore, this Court hereby makes a determination that the Agreement For Sale executed by the Appellant and the 1st Respondent relating to a portion of 10 acres and provided as Defence Exhibit 1 is a legitimate and valid contract binding the parties therein.
269. The 1st Respondent in his Defence and Counter-Claim pleaded that in addition to the 10 acres contained in the Agreement For Sale executed in 1991, the Appellant further sold him another 2 acres within the property known as LR.No.Transmara/Enanyieny/882.
270. The 1st Respondent stated that the full purchase price was received by the Appellant and he took actual possession of the same.
271. The Statement of Defence and Counter-Claim filed by the 1st Respondent was served on the Appellant who did not find it necessary to file any Reply and/or Defence to the Counter-claim.
272. Be as it may, the 1st Respondent in his evidence testified that apart from the original 10 acres the Appellant sold him, there was an extra 2 acres which were purchased later on and he took possession.
273. The Appellant called one witness who was DW 3 to collaborate his evidence.
274. DW 3 who is a relative of the Appellant and a former area chief confirmed that the 1st Respondent purchased an extra 2 acres from the Appellant.
275. DW 3 further informed the Trial Court that the 2 acres sold to the 1st Respondent by the Appellant were fully paid for and possession duly handed over to the him.
276. In essence therefore, DW 3 testified before the Trial Court to the effect that the 1st Respondent was the rightful and/or legitimate owner of the extra 2 acres which were sold by the Appellant in the year 1996.
277. DW 3 also affirmed that at the time the Appellant was selling the additional 2 acres to the 1st Respondent in the year 1996, the 1st Respondent was already in occupation of another portion of land within the Appellant's property.
278. A perusal of the Trial Court proceedings and in particular the evidence of the Appellant, there is no evidence by either the Appellant himself and/or his two witnesses that touches on the extra 2 acres.
279. Similarly, during the cross-examination of the 1st Respondent and/or DW 3, the Appellant did not ask any questions and/or challenge their testimony that there is an extra 2 acres that was sold by the Appellant to the 1st Respondent in the year 1996.
280. Consequently therefore, this Court hereby makes a finding that the 1st Respondent actually purchased an extra 2 acres from the Appellant in the year 1996 and took possession of the same thereafter.



281. In other words, based on the pleadings and evidence adduced before the Trial Court, this Court is satisfied on a balance of probabilities that the 1st Respondent purchased and took possession a total of 12 acres within the Appellant's portion allocated to him by Enanyieny Group Ranch between the periods of 1991 and 1996.

Issue No. 3- Does the 1st respondent have lawful claim of the portion of 12 acres acquired from the appellant within the properties known as LR.No.Transmara/Enanyieny/881 & LR.No.Transmara/Enanyieny/882?

282. The 3rd issue for determination is whether or not the 1st Respondent has any lawful claim of 12 acres within the Appellant's properties known as LR.No.Transmara/Enanyieny/881 and LR.No.Transmara/Enanyieny/882.

283. This Court has already made two finding in Issue No.1 and Issue No. 2 to the effect that the properties known as LR.No.Transmara/Enanyieny/881 and LR.No.Transmara/Enanyieny/882 belong to the Appellant while the 1st Respondent purchased a total of 12 acres from the said properties.

284. The question that now needs to be resolved is whether the 1st Respondent has any lawful claim against the Appellant as regards the 12 acres which are within the Appellant's two properties known as LR.No.Transmara/Enanyieny/881 and LR.No.Transmara/Enanyieny/882.

285. According to the Appellant, the 1st Respondent does not have any legal and proprietary rights over either the 10 acres purchased in the year 1991 or the extra 2 acres purchased in the year 1996.

286. The Appellant therefore is seeking for this Court to declare him the sole owner of firstly the property known as LR.No.Transmara/Enanyieny/881 to the exclusion of the 1st Respondent and by extension the property known as LR.No.Transmara/Enanyieny/882 which the Appellant is seeking a excision of 2 acres from it.

287. On the other side, the 1st Respondent is seeking for an order that the Appellant be compelled to transfer the entire property known as LR.No.Transmara/Enanyieny/881 to him and thereafter a portion of 2 acres also be hived from the property known as LR.No.Transmara/Enanyieny/882 and be registered in his name.

288. It is clear in the mind of the Court based on the determination of Issue No. 2 that the 1st Respondent indeed purchased a total of 12 acres from the Appellant herein between the year 1991 and 1996.

289. The Appellant's land within Enanyieny Group Ranch was titled as LR.No.Transmara/Enanyieny/881 and LR.No.Transmara/Enanyieny/882.

290. The 1st Respondent's portion of land measuring 12 acres is therefore located within the Appellant's two properties known as LR.No.Transmara/Enanyieny/881 and LR.No.Transmara/Enanyieny/882.

291. According to the testimony of the 1st Respondent as well as his witnesses, the Appellant had granted possession of the 12 acres since way back in 1991.

292. The Appellant through his own pleadings and testimony confirmed that the 1st Respondents are in occupation of at least the property known as LR.No.Transmara/Enanyieny/881 hence his efforts to evict them and obtain a permanent injunction against them.

293. It can safely be concluded that after the 1st Respondent purchased the portion of 12 acres within the year 1991 and 1996, he also took possession of the portion he purchased from the Appellant and has been in exclusive occupation of the same.



294. This being the case, this Court makes a finding that the 1st Respondent has a valid and lawful claim over a portion of 12 acres within the two properties known as LR.No.Transmara/Enanyieny/881 and LR.No.Transmara/Enanyieny/882 currently registered in the name of the Appellant herein.

Issue No. 4- Is the appellant entitled to the prayers sought in the plaint dated 12.10.2017?

295. The fourth issue for determination is whether or not the Appellant is entitled to the prayers sought in his Plaint dated 12.10.2017.

296. Based on the determination of Issue No. 2 & 3 hereinabove, this Court hereby makes a finding that the Appellant is not entitled to the prayers sought in his Plaint dated 12.10.2017 and the 1st Respondent has a valid claim over the property known as LR.No.Transmara/Enanyieny/881.

Issue No.5- Is the 1st respondent entitled to the prayers sought for in the counter-claim dated 15.11.2017?

297. Issue No. 5 seeks to evaluate whether or not the 1st Respondent is entitled to the prayers sought for in the Counter-Claim dated 15.11.2017.

298. One of the prayers which the 1st Respondent sought for was an Order compelling the Appellant to transfer the entire property known as LR.No.Transmara/Enanyieny/881 to him.

299. The 1st Respondent testified that the original portion of 10 acres sold by the Appellant and of which he is in occupation lies in the property known as LR.No.Transmara/Enanyieny/881.

300. This Court having made a finding that indeed the 1st Respondent legally and validly purchased 10 acres from the Appellant in the year 1991 of which he is in occupation, then it is only fair and just that the Appellant be compelled to Transfer the entire property known as LR.No.Transmara/Enanyieny/881 to the name of the 1st Respondent as was the intention of the Agreement For Sale executed in the year 1991.

301. To this effect, this Court hereby finds that the 1st Respondent is entitled to the prayer seeking the Appellant to transfer the entire property known as LR.No.Transmara/Enanyieny/881 as sought for.

302. The second prayer by the 1st Respondent is that an extra 2 acres be hived off from the property known as LR.No.Transmara/Enanyieny/882 and transferred to his name in line with the second Agreement For Sale made in the year 1996.

303. The 1st Respondent's second prayer is premised on the position that the entire 10 acres which was purchased in the year 1991 is contained in the property known as LR.No.Transmara/Enanyieny/881.

304. However, based on the Appellant's exhibits produced before the Trial Court, the property known as LR.No.Transmara/Enanyieny/881 is only 2.32 Hectares which translates to approximately 6 acres.

305. In essence, the transfer of the property known as LR.No.Transmara/Enanyieny/881 will only cater for a portion of 6 acres leaving a balance of 4 acres which will not have been transferred to the 1st Respondent by the Appellant.

306. The second property known as LR.No.Transmara/Enanyieny/882 is indicated to be 5.14 Hectares which is approximately 14 acres.

307. In essence, the 1st Respondent is entitled to a portion of 4 acres which is the reminder of the original 10 acres and the extra 2 acres for the second Agreement made in 1996 giving a total of 6 acres thereof.



308. In conclusion, this Court hereby makes a finding that the 1st Respondent is actually entitled to 6 acres within the property known as LR.No.Transmara/Enanyieny/882 which the Appellant should hive off and transfer to the 1st Respondent.
309. Lastly, the 1st Respondent is also entitled to an order of a permanent injunction against the Appellant and/or any other person claiming under the Appellant's ownership from interfering, tempering, trespassing and/or in any other manner and/or way disturbing the ownership, quite possession and/or occupation of the 1st Respondent's 12 acres contained in the property known as LR.No.Transmara/Enanyieny/881 and the 6 acres portion excised from the second property known as LR.No.Transmara/Enanyieny/882.

Issue No. 6- Who bears the costs of the appeal?

310. The last issue for determination is who should bear the costs of this Appeal.
311. Costs usually follow the event and, in this Appeal, the Appellant has lost the Appeal and the final orders are in favour of the 1st Respondent.

CONCLUSION

312. In conclusion therefore, the Court hereby makes the following Orders :-
- A. The memorandum of appeal dated 21.09.2022 be & is hereby dismissed.
 - B. The appellant be & is hereby directed to transfer the title known as LR.No.Transmara/Enanyieny/881 to the 1st respondent within 30 days from the date of this judgement.
 - C. The 1st respondent is entitled to a portion of 6 acres within the property known as LR.No.Transmara/Enanyieny/882.
 - D. The appellant be and is hereby directed to cause & facilitate the excision of 6 acres from the property known as LR.No.Transmara/Enanyieny/882 which is occupied by the 1st respondent and transfer the same to the 1st respondent within 60 days from the date of this judgement.
 - E. In default of order no. b hereinabove, the deputy registrar of the environment & land court, kilgoris and/or the court administrator kilgoris law court be and is hereby directed to execute the relevant transfer documents required to give effect to the orders issued by this court.
 - F. In default of order no. d hereinabove, the sub-county land surveyor & the sub-county land registrar, transmara west, east & south are directed to visit the property known as LR.No.Transmara/Enanyieny/882 and demarcate the portion measuring 6 acres in occupation of the 1st respondent and excise the same in compliance of the orders of this court.
 - G. Thereafter, the deputy registrar, environment & land court kilgoris and/or the court administrator of kilgoris law court be and is hereby directed to execute any/or all documents required in the transfer of the 6 acres hived off from the property known as LR.No.Transmara/Enanyieny/882 to give effect to the orders of this court.'
 - H. The appellant will also meet the costs of this appeal.

DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 19TH OF JUNE 2024.

EMMANUEL.M.WASHE



JUDGE

In the presence of:

Court Assistant: Mr Ngeno

Advocate For The Appellant: Mr. Mulisa

Advocate For The Respondents: Mr. Ayienda

