



**Pasha v Kula & 3 others; Tiger Farm (Isenya) Limited & another (Interested Parties)
(Environment and Land Case 401 of 2017) [2024] KEELC 5755 (KLR) (29 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5755 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND CASE 401 OF 2017
LC KOMINGOI, J
JULY 29, 2024**

BETWEEN

LEONARD ROIPA RORIAN PASHA PLAINTIFF

AND

ELIJAH TENDA OLE KULA 1ST DEFENDANT

JOSEPH NKOSHESHE TOMBO 2ND DEFENDANT

TIMA OLE MPAASHE 3RD DEFENDANT

MRS RAHAB NYANGENA 4TH DEFENDANT

AND

TIGER FARM (ISENYA) LIMITED INTERESTED PARTY

PRINCIPLES STYLES LIMITED INTERESTED PARTY

JUDGMENT

1. By the Plaint dated 12th February 2007, which was first, filed at the High Court at Nairobi before being transferred to this court, the Plaintiff states that he is the owner of property Kajiado/Kaputiei North/13690 which was a subdivision of the original parcel Kajiado/Kaputiei North/20 whose boundaries were fixed in 1967 when the land was first demarcated. He claims that parcel Number 20 was a private ranch belonging to his father. The 1st, 2nd and 3rd Defendants are owners of parcels Kajiado/Kaputiei North/917, 721 and 705 respectively which border parcel 20. The 4th Defendant had purchased some parcel of land from the 1st defendant's parcel 917.
2. It is his case that during the demarcation of the 1st, 2nd and 3rd Defendants parcels by the Emboloi Group Ranch in 1985, their lands encroached on his land thus affecting its acreage. He states that the Kajiado Land registrar's boundary dispute determination and the consequent report dated 11th May



1990 which indicated that boundaries should be fixed on the Plaintiff's land was erroneous. He added that in 1990, his father sued the Defendants over the same boundary issue in High Court at Nairobi case No. 5368 but the suit abated upon his demise hence reason for filing this suit. He thus sought for:

- a. Rectification of land register by directing that any registration of new boundaries concerning Kajiado/Kaputiei North/13960 (or original Kajiado/Kaputiei North/20) as a result of the creation of land parcels Kajiado/Kaputiei North/917, 721 and 705 respectively from Emboloi Group Ranch be cancelled or amended to conform with the position prevailing at the demarcation of 1967.
 - b. Possession of the parts of the land Kajiado/Kaputiei North/13960 now wrongfully occupied by the Defendants.
 - c. An injunction to restrain the Defendants whether by themselves, their servants or agents or otherwise howsoever from entering or suing the said parts of Kajiado/Kaputiei North/13960 they now wrongly occupy or use or the transfer or dealing in any parts of land parcels comprising Kajiado/Kaputiei North/917,721 and 705 respectively until the determination of this suit.
 - d. Damages.
 - e. The costs of the suit.
 - f. Interest on (d) and (e) at court rates.
 - g. Any further orders as this Hon. Court may deem fit and just to order.
3. The Defendants in their statement of defence contested the claim on ground that it ought to be determined by the Land Registrar and not by the court and that the Plaintiff lacked locus standi to institute the suit which was also time barred. It should thus be dismissed with costs.
 4. The 1st Interested party who was joined as a party vide a ruling delivered on 17th January 2018 claims that it is the registered owner of parcel Kajiado/Kaputiei North/1117 a subdivision of Kajiado/Kaputiei North/917 having purchased it from the 1st Defendant on 25th November 1994 after undertaking due diligence. He conducted a search, got required consents and ensured that the subdivision followed the requisite legal steps. He was shown the property's boundaries and has maintained them since then and undertook several developments on the land. He contested the Plaintiff's claim and sought for its dismissal on grounds that the Plaintiff should not ask for rectification of boundaries established in the year 1967 and several subdivisions had been undertaken since then.
 5. The 2nd Interested Party who also joined as a party vide a ruling delivered on 17th July 2018 claims that it is the registered owner of parcel Kajiado/Kaputiei North/2334 having purchased it from one Jane Njoki Ndunge without any notice of encumbrance and having followed due procedure. This land being a subdivision of Kajiado/Kaputiei North/1914 which was subdivided from Kajiado/Kaputiei North/705 meant that any action on the former parcel 705 would have an effect on it. Adding that the suit should be dismissed because the boundaries were established in the year 1967 and several subdivisions taken place since then.
 6. The Plaintiff contested the Interested Parties' claim on grounds that at the time the 1st Interested Party purchased the property in 1994, the boundary dispute was in existence. His late father had also filed a case at High court being HCC No.5368 of 1990 between him and the 1st, 2nd and 3rd Defendants on the same boundary dispute. Similarly in 2015 at the time the 2nd Interested Party purchased the property, this suit was ongoing and the court had issued several orders on determination of the boundary dispute.



Therefore, all the Defendants were aware of the boundary dispute but still went ahead and subdivided and sold off the properties to other people. As such, the claim that the Interested Parties purchased their parcels without knowledge of any encumbrance was incorrect.

Evidence of the Plaintiff

7. PW1, Leonard Roipa Rorian Pasha the plaintiff testified that his father's land, Parcel 20, was allocated to him in 1967. When the Emboloi Group Ranch was subdivided and the defendants were allocated parcels 917, 705 and 721, his father discovered that their land encroached on Parcel 20. He reported this to the District Commissioner of Kajiado, who ordered the Land Registrar to visit the site and determine the boundary dispute. This visit occurred in 1990, and the plaintiff was present.
8. Dissatisfied with the Registrar's findings, his father moved to the High Court in Case No. 5368 of 1990. In 1997, the High Court ruled that it had jurisdiction to determine the dispute. However, his father passed away in 1999, and the suit abated in 2001.
9. The plaintiff testified that before his demise, his father had subdivided Parcel 20 among his children, allocating PW1 Parcel 6687, which touched on the disputed area. PW1 attempted to resolve the dispute amicably with the defendants, but when they failed to agree, he filed this suit. He noted that he had also subdivided Parcel 6687 but did not interfere with the disputed area as advised by the surveyor.
10. He testified that following a court order issued in 2017, the District Surveyor and Land Registrar visited the site on 8th November 2017, to fix the beacons. After fixing the beacons, the 1st Interested Party disputed the decision, claiming it would interfere with his land. The plaintiff stated that he was not familiar with the 1st Interested Party before the latter filed to be joined in the suit.
11. He stated that in 1994, when the 1st Interested Party claims to have bought the land from the 1st Defendant, there was a pending suit between his father and the defendants regarding the boundary. The plaintiff added that the 1st Defendant and the 1st Interested Party share an advocate, and it was the duty of said advocate to inform him of any issues regarding the property. He also testified that he learned of the 2nd IP from court documents and was unaware of the existence of Parcel 2334. Additionally, he noted that the 3rd Defendant was aware of the boundary dispute but still went ahead and subdivided and sold off part of the land in 2015 despite this. The plaintiff prayed for the Land Registrar's report to be executed.
12. On cross examination he stated that prior to his father's demise, the suit at the High Court had not been concluded. Adding that, his father had subdivided his land, apportioning him the parcel within the disputed area and instructing him to pursue the dispute, which led to the filing of this suit in 2007. He indicated that his father gave him the land within the disputed area because he was well aware of the ongoing dispute and had been accompanying his father to court. He added that they received cattle from the Agricultural Finance Corporation (AFC), and part of the requirements was to show the AFC the land beacons. When asked why he did not sue the group ranch, he stated it was because the land had already been subdivided, and the defendants were the registered owners. He also confirmed that he had subdivided and sold portions of his land but did not register caveats regarding the disputed area.
13. PW2 Rosemary Wamuyu Mwangi the Land Registrar Kajiado produced the report dated 7th February 2017 as exhibit which had been prepared by her predecessor who had since been transferred. On cross examination she confirmed that she neither prepared the report nor visited the disputed site and was also not aware of an earlier report prepared in 1990. She also indicated that she was not aware that the properties had been subdivided and transferred to third parties. On re-examination she confirmed that she was in court in her capacity as the Land Registrar to produce the boundary dispute report drafted by her colleague who had since been transferred.



14. This marked the close of the Plaintiffs' case.

Evidence of the Defendant

15. DW1 Elijah Tienda Ole Kula adopted his witness statement as part of his evidence in chief and produced the Land registrar's (C. W. Ngechu) report of 1990 and a surveyor's report which were marked as D. Exhibit 1 and 2 respectively.
16. On cross examination he confirmed that the Land Registrar's report he produced as evidence was disputed by the Plaintiff's father, vide HCCC 5368 of 1990 but the suit was never heard. He confirmed that he had subdivided the land and sold it off to different people because there was no order barring him from doing so.
17. DW2 Daniel Felix Onyango an assistant surveyor at Geomatics Surveyor's Services Limited confirmed that he conducted a site visit of the disputed area and generated the report dated 16th October 2020 which was produced and marked as D. Exhibit 2. He stated that the boundary between the Plaintiff and the Defendants' properties was a 9 metre road confirming that the dispute started during the land adjudication period. On cross examination he stated that the Plaintiff was not present when he visited the disputed site and it was the Defendants who showed him the boundaries. He confirmed that from the cadastral map prepared by the Director of Survey the boundaries were overlapping adding that beacon NY12 and NY13 which is a straight line and were created after the land adjudication were on the ground when he visited the site. He also confirmed that according to the sketch by I.M. Werunga the District Surveyor, the Defendants' parcels had encroached on the Plaintiff's parcel.
18. On re-examination he stated that he was not aware of the existence of the Land Registrar's report and did not rely on it when making his report.
19. The 2nd and 3rd Defendants having been given a last adjournment, their case was dismissed for want of prosecution. On the hearing day, when the matter was called out virtually all parties were present. It was then slated for hearing later in open court. However, when it was called out for hearing, the 2nd and 3rd Defendants, and 1st and 2nd Interested Parties were absent.
20. This marked the close of the Defendant's case.
21. At the close of the oral testimonies parties tendered final written submissions.

The Plaintiff's Submissions

22. Counsel for the Plaintiff highlighted the background of this dispute which began in 1985 when Emboloi Group Ranch demarcated it causing the Defendants lands to encroach on the Plaintiff's father's land. He also highlighted the history of getting the disputed area surveyed and a report filed in court which led to the filing of the report dated 7th February 2017 and the fixing of beacon NY13 on 8th November 2017. The fixing of this boundary was met with protest from the interested parties on grounds that the boundaries would alienate their properties and they were joined to the suit. Counsel submitted that the interested parties purchased their properties when the boundary dispute was ongoing and therefore their only recourse was in compensation from the sellers. On the issue that the 1990 Land registrar's report was still valid, counsel submitted that Hon. Githinji J (as he then was) in Nairobi HCCC No. 5368 of 1990 held that the Land Registrar had no jurisdiction to order rectification and that the court had jurisdiction to determine the boundary dispute. Therefore, when this suit was filed in 2007 that decision had neither been appealed nor set aside and it was thus valid. The Land registrar's report and the fixing of the beacons on the 8th November 2017 should thus be upheld together with general damages at the current market value for loss of use of his land from 1999



to date when the dispute has been ongoing as well as exemplary damages. Reference was made to [Kenya Power & Lighting Co. Ltd vs Eunice Ringera & 2 others](#) [2022] KECA 104 (KLR) on awarding damages.

The 1st Defendant's submissions

23. Counsel submitted that the Land Registrar's report dated 11th May 1990 which found that the Plaintiff's father had fraudulently planted a beacon on the ground and asked him to desist from claiming on the Defendants land was still valid. This is because the Plaintiff's father dissatisfied with that determination filed HCCC No. 5368 of 1990 challenging it but he passed away in 2001 before the matter was concluded and the suit abated. The Plaintiff instead of proceeding with that case filed the instant suit in 2007. By this time, the 1st Defendant had already subdivided his land and disposed it off to 3rd parties. Counsel also submitted that Hon. Githinji J's ruling dated 15th July 1997 was on the preliminary objection of court's jurisdiction to determine the boundary dispute and not on the decision. Therefore, the 1990 Registrar's report was still valid and binding.
24. Counsel also submitted that the Plaintiff did not have locus standi to institute this suit because he was not an administrator of his father's estate. He also submitted that there was discrepancy in the Plaintiff's alleged property because in the pleadings he made reference to parcel 13960 but the submissions made reference to parcel 6687 and he did not produce title to any of the parcels as evidence of ownership. The suit should thus be struck out citing [Maathai vs Kenya Times Media Trust Ltd](#) [1989] eKLR. The Plaintiff had therefore not proved his case on a balance of probabilities as per Section 107 to 112 of the [Evidence Act](#) and as held in [Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & another](#) [2005] 1 EA 334, [Jeniffer Nyambura Kamau vs Humphrey Mbaka Nandi](#) [2013] eKLR, [William Kabogo Gitau vs George Thuo & 2 others](#) [2010] eKLR and [Re H and others \(minors\)](#) (1996) AC 563, 586.
25. On whether the Plaintiff is entitled to the prayers sought, counsel submitted that the suit had not established grounds for grant of injunctions as outlined in [Giella vs Cassman Brown & Co. Ltd](#) (1973) EA 358 because he had not established a case with a burden of success, he had not shown how he would suffer irreparable loss and damage and the balance of convenience did not tilt on his favour. Therefore, the suit should be dismissed with costs to the 1st defendant.

1st and 2nd Interested Parties' submissions

26. Counsel submitted that when the 1st IP purchased its property Kajiado/Kaputiei North/1117 from the 1st Defendant property 917 was not in existence because it had already been subdivided into various parcels. The 1st IP also conducted due diligence and confirmed that the 1st defendant was the registered owner, there were no encumbrances registered against the title, all consents had been obtained and the land purchased for valuable consideration. Counsel added that the fact that parcels 20 and 917 were no longer in existence, the court order issued on the 27th March 2015 was erroneous. Adding that the suit between the Plaintiff's father and the Defendants having abated, no other fresh suit could be brought on the same cause of action as per order 24 Rule 7(1) of the [Civil Procedure Rules](#). Counsel concluded by submitting that whereas the Land registrar report of 1990 was still valid and binding, the criteria for rectification of the register established under Section 80 of the [Land registration Act](#) had not met.
27. Counsel for the 2nd Interested Party also submitted that a register could not be rectified without following Section 79 and 80 of the [Land registration Act](#). Adding that she was a bona fide purchaser without notice and any rectification of previous title 705 would affect her title which was hived from parcel 1914 which was subdivided from parcel 705.



Analysis and Determination

28. I have considered the pleadings, the evidence on record, the written submissions, and the authorities cited. The issues for determination are:
- i. Whether the Plaintiff lacks *locus standi* to institute this suit:
 - ii. Whether this court should order rectification of boundaries between original parcels Kajiado/Kaputiei North/20, 917, 721 and 705;
 - iii. Whether the Plaintiff is entitled to the prayers sought:
 - iv. Who should bear costs of the suit?
29. This boundary dispute has gone on for over three decade, beginning from 1990 when it first made its way to the Land Registrar and a determination issued. The court has been informed that the Emboloi Group Ranch was initially the owner of property known as Kajiado/Kaputiei North/2. In the year 1967, the late David Rorian Pasha being a member of the group ranch was allotted parcel Kajiado/Kaputiei North/20 which was carved out of parcel Kajiado/Kaputiei North/2. Later in the 1980s, parcel 2 would be subdivided further and allotted to other group ranch members among them being the 1st, 2nd and 3rd Defendants. The Plaintiff who is the son of the late David Pasha claims that during this subdivision, the 1st-3rd Defendants' parcels 917, 705 and 721 encroached onto his father's parcel 20. The late David Pasha filed a dispute and the Land registrar in 1990 determined that it was indeed Pasha who was encroaching onto the Defendants' land. Aggrieved by this decision, David Pasha approached the High Court at Nairobi through civil case No. 5368 of 1990. The pleadings in this case were not produced in this court. This court is not aware of the prayers sought then.
30. It is not in dispute that the Plaintiff's father passed on in 2001. That before he died he had sub-divided his land Kajiado/Kaputiei – North/20 among his children. The plaintiff had been allocated Kajiado/Kaputiei – North/6687 which bordered parcels No's 917, 705 and 721 that had encroached on the original title.
31. It is the Plaintiff's case that he instituted this suit to pursue his interest which touches on Kajiado/Kaputiei – North/6687. The issue of locus standi cannot arise as he is the registered owner of Kajiado/Kaputiei – North/6687.
32. PW2 Rosemary Wamuyu Mwangi produced the report which had been prepared by N.D. Nyambaso pursuant to a court order dated 27th May 2015. This report stated that they could not fix the beacons since the Defendants had objected. Upon being granted security the beacons were fixed on 8th November 2017.
33. DW 2 Daniel Felix Onyango and Assistant Surveyor at Geomatics Surveyors Services Limited confirmed that the 9 metre road which was to serve as the boundary between the Plaintiff's and the Defendants' parcels was not in position and that the dispute started during adjudication. He also admitted on cross-examination that the Report by I.M. Werunga showed that the Defendants' parcels have encroached on the Plaintiff's land.
34. In summary, the decision of C.W. Ngechu dated 11th May 1990 was set aside in HCCC 5368 of 1990 by Githinji J (as he then) in his ruling dated 15th July 1997.
35. I find that the beacons fixed by the Land Registrar on 8th November 2017 pursuant to a court order dated 17th September 2017 ought to stand.



36. The 1st Defendant admitted that he sub-divided his parcel and sold to third parties. This he confirmed he did while aware that there was a pending boundary dispute.
37. The Interested Parties who may have bought their parcels from the Defendants may not have been aware of the dispute but their recourse could be from the people who sold them the parcels.
38. I find that the Plaintiff has proved his case as against the Defendants on a balance of probabilities. He is therefore entitled to the Rectification of the Land Register to reflect the position prevailing at the demarcation in 1967.
39. Accordingly Judgement is entered for the Plaintiff as against the Defendants as follows;
 - a. That the Land Registrar do rectify the land register by directing that any registration of new boundaries concerning Kajiado/Kaputiei North/13960 (or original Kajiado/Kaputiei North/20) as a result of the creation of land parcels Kajiado/Kaputiei North/917, 721 and 705 respectively from Emboloi Group Ranch be cancelled or amended to conform with the position prevailing at the demarcation of 1967 within sixty (60) days from the date of this Judgement.
 - b. That the Plaintiff is entitled to possession of the parts of the land Kajiado/Kaputiei North/13960 now wrongfully occupied by the Defendants.
 - c. That a permanent injunction is issued restraining the Defendants from entering, utilizing the said portions.
 - d. That the plaintiff shall have costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 29TH DAY OF JULY 2024.

L. KOMINGOI

JUDGE.

In the presence of:

Mr T.Aswani for the Plaintiff.

Mr. Mukeli for the 1st Defendant.

N/A for the 2nd & 3rd Defendants.

Mr. John Masese for the 1st Interested Party.

Mr. Ngetich for the 2nd Interested Party.

