



Mushishi & 7 others v Karbuala; Nasieku (Interested Party) (Environment & Land Case 194 of 2017) [2024] KEELC 7222 (KLR) (31 October 2024) (Judgment)

Neutral citation: [2024] KEELC 7222 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE 194 OF 2017
CG MBOGO, J
OCTOBER 31, 2024
(FORMERLY NAKURU CIVIL SUIT NO. 200 OF 2012)**

BETWEEN

**SHADRACK OLE MUSHISHI 1ST PLAINTIFF
KISION OLOTURIAKI SURUM 2ND PLAINTIFF
SAMSON RESON SURUM 3RD PLAINTIFF
EMMANUEL LETOYA MOTARINI 4TH PLAINTIFF
TASIMAI OLE SURUM 5TH PLAINTIFF
LASITI M OLE SURUM 6TH PLAINTIFF
KENYATTA NKANDULA SURUM 7TH PLAINTIFF
MEIBOKO OLE SURUM 8TH PLAINTIFF**

AND

KOISANI OLE KARBUALA DEFENDANT

AND

DAVID K OLE NASIEKU INTERESTED PARTY

JUDGMENT

1. The plaintiffs filed a plaint dated 11th June, 2012 seeking judgment against the defendant for orders that: -
 - a. A declaration that the plaintiffs are the registered proprietors of all those parcels of land known as Cis-Mara/ Nairagie-Enkare/ 1390, Cis-Mara/ Nairagie-Enkare/ 1391, Cis-Mara/



Nairagie-Enkare/ 1392, Cis-Mara/ Nairagie-Enkare/ 1393, Cis-Mara/ Nairagie-Enkare/ 1394, Cis-Mara/ Nairagie-Enkare/ 1395, Cis-Mara/ Nairagie-Enkare/ 1396.

- b. A temporary injunction restraining the defendant either by himself, his agents, servants and/or employees from using, wasting, leasing, trespassing onto, occupying, using or in any other manner whatsoever interfering with the plaintiffs' possession, quiet and peaceful occupation of all those parcels of land known as Cis-Mara/ Nairagie-Enkare/ 1390, Cis-Mara/ Nairagie-Enkare/1391, Cis-Mara/ Nairagie-Enkare/ 1392, Cis-Mara/ Nairagie-Enkare/1393, Cis-Mara/ Nairagie-Enkare/1394, Cis-Mara/ Nairagie-Enkare/1395, Cis-Mara/ Nairagie-Enkare/1396./ SPENT.
 - c. A permanent injunction restraining the defendant, either by himself, his agents, servants and/ or employees from using, wasting, leasing, trespassing onto, occupying, using or in any other manner whatsoever interfering with the plaintiffs' possession, quiet and peaceful occupation of all those parcels of land known as Cis-Mara/ Nairagie-Enkare/ 1390, Cis-Mara/ Nairagie-Enkare/1391, Cis-Mara/ Nairagie-Enkare/ 1392, Cis-Mara/ Nairagie-Enkare/1393, Cis-Mara/ Nairagie-Enkare/1394, Cis-Mara/ Nairagie-Enkare/1395, Cis-Mara/ Nairagie-Enkare/1396.
 - d. Eviction of the defendant, his agents, servants and/or employees from all those parcels of land known as Cis-Mara/ Nairagie-Enkare/ 1390, Cis-Mara/ Nairagie-Enkare/ 1391, Cis-Mara/ Nairagie-Enkare/ 1392, Cis-Mara/ Nairagie-Enkare/ 1393, Cis-Mara/ Nairagie-Enkare/ 1394, Cis-Mara/ Nairagie-Enkare/ 1395, Cis-Mara/ Nairagie-Enkare/ 1396.
 - e. Costs of this suit and any other relief as this honourable court may deem fit and just to grant.
2. In their plaint, the plaintiffs averred that they were all members of Surum group ranch which was the registered proprietor of land known as Cis-Mara/ Nairagie-Enkare/ 266 and measuring 406.6 hectares, and that about the year 1998, a dispute arose between Surum group ranch, the defendant and Kahoho Ole Kodonyo and Keko Ole Kadonyo over the boundary of parcel of land known as Cis-Mara/ Nairagie-Enkare/ 266 and 267. Further, that it was observed that the disputing parties do not share a common boundary because the two portions of land are separated by a 30 metres access road.
 3. The plaintiffs went on to aver that the group ranch was dissolved and subdivided to members and they were each issued with a title deed for their respective portions of land. Also, that in the month of April, 2012, the plaintiffs went to take their respective portions of land and found that the defendant had crossed over the access road and encroached, trespassed, leased out and wasted part of their land, dug a trench across the parcels of land and prevented the plaintiffs from using the said parcels of land.
 4. The defendant filed a statement of defence dated 8th December, 2014. While denying the contents of the plaint, the defendant admitted that Surum group ranch had come up with a boundary dispute between parcel nos. 266 and 267 and that the district surveyor found that the boundary between parcel number 266 and 267 was as per the R.I.M. He averred that when the surveyor went to the ground to mark the boundary as per the Registry Index Maps, Surum group ranch became hostile uncooperative and chased away the said surveyor. He went on to aver that the issue of the 30 to 40 metres boundary was a fertile imagination of the group ranch arrived at with a clear purpose of adding more land to their ranch to apportion to their growing population.
 5. The defendant further averred that the group ranch in allocating and issuing titles to their members disregarded his rights of proprietorship of Cis-Mara/ Nairagie Enkare/ 267, and with a view of satisfying its members hived off from his parcel of land and caused subdivision of parcels Cis-Mara/



- Nairagie-Enkare/ 1390-1396. The defendant averred that besides being allocated chunks of land in his parcel of land, the plaintiffs are also beneficiaries of the larger Surum Group Ranch.
6. The defendant went on to aver that the 8th plaintiff grabbed parcel number 1399 which is in his parcel of land. He also averred that the allegations of the plaintiffs that the private paths on his parcel of land are spurious as foot paths, cattle tracks or other access ways cannot take the place of legitimate land boundaries as they cannot be used as land boundaries between adjoining parcels of land as the land boundary marks are as shown in the registry index maps. He averred that he does not intend to leave his parcel of land number 267, and that the plaintiffs have many other roads of access to their parcels of land number 266 without using his private land.
 7. The interested party filed his statement of claim against the plaintiffs dated 8th December, 2014. The interested party averred that the plaintiffs have cleverly withheld the fact that the particular parcels of land were issued over his existing parcel of land which is Cis-Mara/ Nairagie Enkare/ 414 which measures 6.6 hectares. The interested party averred that he was issued with the title deed for parcel no. 414 on 30th July, 1984 and that he has never subdivided, sold, disposed or even charged his land. He also averred that the plaintiffs' intention was to go through this suit without disclosing to him, only for them to emerge with injunctive reliefs affecting his land before he could get a whiff of the proceedings and that as a party, he would be affected by the reliefs sought by the plaintiffs.
 8. The interested party further averred that the 6th, 7th and 8th plaintiffs are members of the Surum Group Ranch whose original title deed was Cis-Mara/ Nairagie-Enkare/ 266 which measures 406.0 hectares and that in an act of greed, the plaintiffs annexed part of Cis-Mara/ Nairagie-Enkare/ 267 and took his whole land in the process. As such, parcel number 1395 and 1396 are partly on parcel number 267 and on the whole of his portion of land which is parcel no. 414. It is the interested party's position that the 6th, 7th and 8th plaintiffs' titles were wrongly obtained, and as a party already affected, he prays that title numbers Cis-Mara/ Nairagie-Enkare/ 1395 and 1396 be cancelled, and that he be awarded with the costs of the suit.
 9. This matter proceeded for hearing on 22nd October, 2018. Shadrack Ole Mushishi (PW1) while adopting his witness statement dated 11th June, 2012 testified that the suit land was a result of the subdivision from parcel number Cis-Mara/ Nairagie-Enkare/ 266 which was about 406 hectares, and that the dispute arose during the subdivision of the said parcel of land in 1998 when the defendant encroached on their land. Further, he stated that the land registrar went to settle the matter but he was chased away by the defendant's children as the R.I.M was to be followed. PW1 produced the surveyor's report dated 23rd September, 2018 as PEX No.1. It was his testimony that they were not shown the boundary but they were given title deeds to the land. That previously, the demarcation officer visited the land and each member was shown their respective portions, and that they later engaged a private surveyor called Philip Aluwale who did the final subdivision after which the map was then submitted to the county surveyor. It was his testimony that after obtaining their title deeds, they went to the director of lands and indeed confirmed that parcel number 266 was subdivided, and that there is a boundary between parcel number 266 and 267 which is a road. PW1 further testified that the defendant has encroached on 115 acres which he is cultivating and he has also built his home. PW1 produced exhibits nos. 1-9 respectively.
 10. On cross examination, PW1 testified that they are about 98 members of the group ranch in total, and each member has about 2 shares. In his case, he owns about 11 shares. He testified that the title deed for parcel number 266 was issued on 2nd December, 1987 and that measured 406 hectares, and that the subdivision of the same was done between the year 1998 and 2012. On being asked what transpired in the year 1975, he stated that he does not know whether there were objections which were filed and



appeals made to the minister. It was his testimony that the title deeds issued were hived off from 266 and not parcel number 267. Further that the boundaries are shown on the R.I.M and which he prays that it be followed. He further testified that the defendant has encroached on their parcel by about 115 acres, and that they called both the registrar and the surveyor to come and sort out the issue of the boundary dispute. He testified that the land registrar and the surveyor went to the ground on 14th September, 1999 but the dispute was not resolved since the defendant refused.

11. PW1 further testified that parcel number 1393 is a public utility reserved for a school, and the title deed is with the ministry (did not state which Ministry). He also said that the 4th plaintiff is not a member of the group ranch but he is a son of a member of the group ranch. PW1 further testified that he learnt that parcel number 266 borders parcel number 414 when they filed the suit, and that he was not aware of any report that parcel number 266 had encroached on parcel no. 267 and swallowed parcel no. 414. He added that he is not aware that all the parcels were swallowed before he was issued with a title deed. He agreed that there was a dispute about the boundary that was never resolved at all, but he does not have any proceedings relating to any dispute filed by their parents as they were illiterate and did not know how to read and write. It was his testimony further that he was there when the registrar went to resolve the issue of the boundary, and that the defendant has built about 15 houses over a period of 10 years.
12. Philip Thuma Luvala (PW2) testified that he has worked as a surveyor since the year 1984, and that sometime in the year 1988(sic) the Surum family hired him to carry out survey on their land which he did after he saw a copy of the title. He testified that the said land was 406 hectares, and that they embarked on the survey from Narok-Nairobi road and identified the RIM. He produced exhibits no. 9 and 10. Further, that he confirmed that all the procedures were complied with, and that after the exercise, he informed the Surum family that he was losing about 100 acres as he was stopped by other settlement on the ground. He informed the court that he stopped the work temporarily as they planned for a meeting on site, and that after the meeting, the assessment they concluded was the road was the boundary. He went on to say that he made a report on the same to the district surveyor and it was his conclusion that the road was the boundary. He produced P. Exhibits 11 and 12.
13. PW2 further testified that he forwarded his work to the district surveyor and that he later prepared the area list, mutations and list of ownership which he submitted to the district land registrar. It was his testimony that the parcel of land he surveyed was 266 and that he cannot tell whether he trespassed. He agreed that he also surveyed their neighbour parcel No. 267, and that if there is any encroachment, the same can be established by involving other surveyors and visiting the suit land again. He stated that there can be errors which can be made but must be with acceptable lists and anything beyond 5 acres needs to be explained. It was his recommendation that the 3 parcels of land be resurveyed by a group of other surveyors.
14. On cross examination, PW2 testified that he cannot say that there was an error as he did not see parcel number 414 and 267, and that the human settlement he found were on parcel number 266 which he was told they are neighbours. He went on to say that he was to move to the road but he could not reach. He informed the court that he made a report with the surveyor which contains his complaints, and that when he received the RIM both parcel nos. 267 and 414 were there. PW2 testified that the neighbours are obliged to be informed when survey works starts. He did not have a copy of the agreement of engagement in court, and neither did he have the handing over report to the Surum family. It was his testimony that he was later informed that the road was the final boundary on the RIM which he did not get from the district surveyor. He added it was that the district surveyor later informed him about parcel number 267 and 414. It was his evidence that the title deeds were issued based on his finding and work, and not with the approval of the district surveyor.



15. On 11th February, 2019, Edward Kaneri Suro (PW3) while adopting his witness statement dated 11th June 2012, testified that he called an annual general and applied for consent to subdivide the land. He said that later they called the surveyor (PW2) who subdivided the land among the 98 members. Thereafter, they took the maps to the district surveyor and the land registrar who both signed the mutations forms. It was his testimony that the area list was 385.54 hectares and the roads took 16.48 hectares totalling to 456 hectares. He added that he was issued with a certificate of compliance after the physical planner had satisfied himself that the title deeds were properly issued to the members.
16. PW3 further testified that he does not know the parcel number of the interested party but that on 14th September, 1999, they called the registrar and surveyor to resolve the boundary dispute but the defendant raised issues which led to chaos. He went on to say that the surveyor resolved that the boundary between the two parcels of land is a road. He produced exhibit 1 to 13, and P. Exhibits 14, 16, 17, 18, 19, 20 and 21 respectively.
17. On cross examination, PW3 identified the map exhibit No. 10 relating to land parcels 266 and 267 which he said are divided by a road. He testified that they have been neighbours with the defendant and the interested party for long, and that he knows both the defendant and interested party have title to their respective parcels. He testified that the group ranch obtained title in 1994, and that the dispute began after the subdivision of parcel number 266 which was after the services of the surveyor in 1998 and issuance of title deeds as both the defendant and the interested party have parcels of land within parcel number 266. He did not have the map of Surum group ranch, and according to him, it was the land registrar and the district surveyor who confirmed that to them. He further agreed that both the owners of 267 and 414 have titles to their land and they were issued prior to the issuance of their own titles.
18. He went on to say that the interested party has encroached on parcel number 1396 and 1395 and that the defendant has encroached on parcel number 1392, 1393, 1394, 1395, 1396, 1397 and 1398. PW3 testified that they had minutes of the group ranch engaging the services of a Surveyor but the same was destroyed by fire in his office. He added that the committee of the group ranch had agreed that there are some members who got more than one share, and that parcel number 1393 is reserved as a public utility. However, there are no minutes to confirm the same.
19. On re-examination, PW3 restated that the defendant has encroached on parcel number 1392,1394,1395,1391 and 1390 and the interested party on parcel number 1395 and 1396 and that the boundary dispute began in the year 1995 before the issuance of the title deeds.
20. Simon Mibuko Surum (PW4) testified that he was allocated parcel number 1396 which title was registered in his name but is in the custody of a creditor. On cross examination, he testified that parcel number 1396 has been charged to banks about five times and that he also has parcel number 1299 which is charged to a bank as well. PW4 further testified that the interested party and the defendant have encroached on his land and are cultivating the same even after he obtained a title deed. He disclosed that he has two shares in the group; the main share and that of his father. He also said that parcel number 1299 is inside the group ranch and has no issues. PW4 further stated that he does not know the owner of parcel number 414 but that there is a road between parcel number 266 and 267.
21. On 8th March, 2021 Kennedy Too (PW5), the land registrar testified that based on the report prepared by the land registrar of a dispute that was held on 14th September,1999 it was the finding of the registrar that the disputing parties do not share a common boundary as there is a 30 meter access road between the parcel number 266 and 267. He added that the Kodonyo family was in occupation of the access road and that the boundary marks pointed out by the Kodonyo family was the correct boundary. He



- said that when the land registrar wanted to put beacons, he was stopped by both parties. He produced the report as P. exhibit no. 13.
22. On cross-examination PW5 confirmed that the report was from his office, and that the report concluded that the RIM be used to mark the boundary. With the testimony and the evidence of PW5, the plaintiffs closed their case.
 23. The defendant, (DW1) testified that he is the owner of parcel no. 267, and that the surveyor went to his land and found that the plaintiffs had encroached on his land. He added that he was aware that there are people who obtained title deeds to the land and that he complained to the land registrar vide a letter dated 4th April, 2012 and that the land registrar responded in a letter dated 18th April, 2012 informing him of a meeting to settle the dispute. DW1 further testified that he later attended a meeting with the land registrar and that later the surveyor went to the suit land. It was his testimony that he has lived on his parcel of land for more than 50 years and has a title deed. He further testified that the surveyor never subdivided the land but he was shown the road. DW1 produced the exhibits no. D. Exhibits 1 (a) to (f) and D. Exhibit. No. 2.
 24. On cross examination, DW1 recalled that the surveyor visited the suit land during the time of Chief John Kerori and that the boundary dispute was between a strip of 30 to 40 metres in width. He added that there is a road that separates the two parcels of land but the surveyor never placed a beacon on the land and as he recalls, there is a report which stated that he occupies 214.8 hectares against the registered 196 hectares, and as such, he has not encroached on the suit land.
 25. On 22nd June, 2022, Salaton Ole Parsampola (DW2) while adopting his witness statement dated 8th December, 2014 testified that the parcel of land belonging to Surum group ranch is over 1000 acres, and that he is aware that there is a dispute between Surum group ranch and the defendant.
 26. On cross examination DW2 testified that the boundary between Surum group ranch and the defendant is in the map which is fixed and he became aware of the dispute when the plaintiffs and the defendant started having wrangles and that is when he was called to record a statement. He went on to say that he is aware that in the year 1999, the land registrar visited the suit land and marked the boundary which is as per exhibit P. exhibit no.13 and that he was present during the site visit. DW2 further testified that there is a straight road between the two parcels of land and that as far as he is concerned, the defendant has not encroached on the land belonging to the plaintiffs. On re-examination, DW2 stated that he would not be aware if all the people that attended the meeting.
 27. The interested party, while adopting his witness statement dated 8th December, 2014 testified that he resides on parcel number 414 since the registration of the parcels began in the year 1984, and that he has never sold any portion of his land. He also said that the members of Surum group ranch who are the owners of parcel number 266 encroached onto his land during the subdivision without his knowledge and that he only came to learn of it after the plaintiffs had acquired title deeds to his parcel of land on or about April of 2012. The interested party further testified that the 6th, 7th and 8th plaintiffs acquired parcel number 1395 and 1396 which were issued over his existing parcel of land parcel number 414 which had been in existence since the year 1984 and that his titled deed has never been cancelled. He pointed out that the title deeds issued to the 6th, 7th and 8th defendants were issued on 15th March, 2012.
 28. On cross examination, the interested party testified that he did not file a claim against the plaintiffs and that it was the defendant who informed him that he had been sued, and he suspected that his land had been affected. He went on to state that the defendant allowed him to peruse the documents and that is when he discovered that his parcel of land had been entirely encroached by parcel number 1395 and 1396. He added that parcel number 1395 is 4.084 hectares and parcel number 1396 is 4.130 hectares



while his is 6.6 hectares is on parcel number 267. The interested party further testified that his parcel of land can be identified in the RIM as well as parcel number 267 which belongs to the defendant. The interested party further testified that parcel number 266 belonged to the plaintiffs before subdivision and that there is a road which subdivides the parcels of land and that his parcel of land is not shown in the sheet number 9 but can be seen in the sheet number 8. He went on to say that it is not true that he has a small portion of boundary between parcel number 414 and 266. He stated that sheet number 9 shows the boundary that he shares with parcel number 266 and 267.

29. The interested party further testified that upon seeing the joint report by the surveyor and the land registrar, he realised that parcel numbers 1395 and 1396 have swallowed all his land. He admitted that the joint report does not resolve the dispute between all the parties and that he is aware that the report indicates that when the three parcels are added, the total is 606 hectares whereas the total measurements on the ground is 572.2 hectares leaving a difference of 36.4 hectares. He stated that the report indicates that the defendant occupies 214.8 hectares against the registered 196 hectares. He also stated that the report shows that the overlapping area is 7 hectares and he could not explain the discrepancies, but he was aware that the surveyor was sent back to confirm the extent of the overlap. The interested party further testified that his title deed was issued in Nairobi as those days in the year 1984, the lands registrar was based in Nairobi. He added that the error is large and the map does not follow the RIM and the sketch map shown to him encroaches on what is outside the RIM.
30. On re-examination, the interested party testified that the registered acreage of parcel number 266 is approximately 406 hectares and parcel number 267 is approximately 196 hectares and his parcel number 414 is 6.6 hectares. He went on to state that the second report of the district land registrar shows that parcel number 266 has encroached on parcel number 267 and 414 and that he is not to blame for the discrepancies in the acreage.
31. Michael Mpari Ole Kapale (DW4) while adopting his witness statement dated 8th December, 2014 testified that David Nasieku (the interested party) is his neighbour, and that his land is parcel number 593 while the interested party's is parcel number 414 and that they have been neighbours since childhood.
32. On cross-examination, DW4 testified that his parcel of land does not border parcel number 267 and that the interested party is his neighbour and owns parcel number 414.
33. On 26th October, 2022, Gabriel Wasike (DW5), the district surveyor Narok testified that the boundary dispute before the court relates to three parcels of land which are parcel number 414, 266 and 267 and that he had a joint report on the same. That according to the report, the district surveyor and the land registrar visited the disputed parcels of land on 23rd October, 2013 and 29th October, 2013. He disclosed that during the re subdivision of parcel number 266, it had 350.4 hectares and that they tried to compensate the deficit of the registered acreage because 350.4 hectares was less than what was the registered acreage by adding 55.6 hectares. According to DW5, this was done by the surveyor who was hired by the plaintiffs and the justification they had was that the old boundary dispute on the two parcels of land was heard and determined by the land registrar and the surveyor determines the boundary to be an existing road which is the same road the district surveyor and the Land registrar was at that time shown by the owner of parcel number 266.
34. DW5 further testified that after computation of the boundaries, parcel number 266 was claiming an area of 402.6 hectares which is approximately indicated in their title deed. He stated that it also shows the new numbers which fall in the overlapping area as Cis-Mara/ Nairagie-Enkare/ 1390/ 1391/ 1393/ 1394, 1395 and 1396 and the extent of overlapping is 52.2. hectares which includes parcel number 414. He also stated that there is a map which shows the three parcels and the existing road is on parcel



- number 267 but he has never visited the ground himself. According to the sketch annexed, line AB confirms the road which is at the end of parcel number 267, 414 and 266. DW5 further testified that the hatched area is overlapping parcels number 214 and 267, 1390, 1391, 1392, 1393, 1394, 1395 and 1396 fall under the area and as a result of subdivision of parcel number 266, the encroached area is the whole of parcel number 414 and part of 267 as per the RIM.
35. On cross examination, DW5 testified that parcel number 267 occupies 214.8 hectares against the registered area of 196.0 hectares and the difference between the two parcels is 18.8 hectares. He went on to state that the earlier report vide letter dated 29th August, 2014 does not show 18.8 hectares. DW5 agreed that according to the court's proceedings of 19th February, 2014 the report was not helpful to the court and that it is in compliance with the court's directions that the second report was done. Again, in the second report, the 18.8 hectares is not shown and the same is not of help as it does not show all the encroachment, and as such he cannot be able to tell the extent of the encroachment from the diagram.
 36. DW5 further testified that the report of 29th August, 2018 indicates that the RIM was used but the said report does not conclusively help the court to determine the extent of the encroachment of 18.8 hectares and indeed that parcel number 267 has encroached on parcel number 266. He stated that there is a deficit of 36.6 hectares which is possible because it is a preliminary index diagram (D. Exhibit. no. 7) that was made through an unrectified enlarged aerial photograph which has serious errors which cannot be corrected. He added that the error should have been rectified before the production of the map. He testified that the 36.6 hectares can be rectified by sharing the ratio of the deficit. DW5 pointed out that this is his opinion which is not a professional opinion but the history of the area can be used with D. exhibit no.7 to show the boundaries of the parcels of land in dispute. He went on to state that the report shows that parcel number 266 and 267 are separated by a road of access but the report does not show the historical background that was taken into account in determining the boundary. It was his opinion that the two reports do not assist the court in resolving the dispute and given a chance, he would go back to the ground and make a report on the same.
 37. On re-examination, DW5 testified that the directions of the court on 7th April, 2014 resulted into the joint report dated 29th August, 2014 which report indicates the extent of the encroachment and during the exercise, the RIM was used and that D. ex no.7 is the preliminary index diagram which shows the boundaries.
 38. On 13th July, 2023, Emmanuel Kipkurui Keitany (DW6) introduced himself as a government surveyor based in Narok in charge of survey and mapping with 20 years' experience. He stated that the report dated 2nd June, 2023 is as a result of the implementation of the court order dated 7th February, 2023 touching on the three parcels of land. DW6 testified that his office visited the ground together with the land registrar on 3rd May, 2023, and that the main purpose of the site visit was to establish the nature of the disputed boundary, to establish the actual ground position as pointed out to the surveyors by the respective parcels owners, comparing the ground findings with the relevant Registry Index map (RIM) specifically sheets No. 9 and 10 of Cis Mara/ Nairegia Enkare registration section.
 39. DW6 testified that in order to establish the ground acreages defined by the boundaries which had been pointed by the respective parcel owners and comparing the same to their respective registered acreages, his findings are described in 2 diagrams. He pointed out that parcel no. 266 is described by a blue boundary, parcel no. 267 is described by a green boundary, and parcel no. 414 is described by a red boundary. From the diagram, he observed that parcel no. 266 as pointed out by the respective parcel owner, the acreage is computed to be 403.6 hectares which when converted into acres is 997.296 acres (approximately), while the registered actual acreage of the parcel is 406.0 hectares which is 1003 acres approximately. According to him, some sections of the same boundary of parcel no. 266 do not confirm



- to its boundaries as described by the relevant index map, and that the actual boundaries of parcel no. 266 are separated from parcel no. 267 and 414 by a 15 metre access road indicated on Diagram 1 as R1, R2, R3 to R4. He stated that the road in question as per the ground visit in some sections were visible and they were in use while some other sections were closed.
40. DW6 further observed from the ground picking as pointed out by the owners indicated that there exists a pathway of about 6 meters in width which is adapted as a boundary dividing part of parcel nos. 266 and 267. He said that the part is indicated as R1, R6, R7, R8, R9, R10 to R11 in Diagram 2, and that it does not exist on the relevant index map but it is rather part of parcel no. 267. Further, he stated that there also exists a small path within parcel no. 267 indicated as R1, R11, R12, R13 all in diagram 2, and the same path is not indicated in the relevant registry map.
 41. With respect to parcel no. 267 as pointed out by the owners, the actual ground acreage computed was established to be 213.5 hectares which is 526.447 acres. He also said that the registered actual acreage of the same parcel is 196.0 hectares which is 484.316 acres approximately. He observed that the sections of boundaries of this parcel of land nearly conformed to the same boundaries as described by the relevant Registry Index Map which is also marked by a green lien on Diagram 1.
 42. With regard to parcel no. 414, DW6 testified that the boundaries as pointed out by the owners is marked by a red line on Diagram 2, and the actual ground acreage established was 7.52 hectares which is 18.582 acres (approximately). He added that the actual registered acreage of the same parcel is 6.6 hectares which is approximately 16.309 acres. He testified that all the sections of its boundaries nearly conformed to its position as indicated on the relevant Registry Index Map and also marked by a red line on Diagram 2.
 43. From their analysis, DW6 stated that it was further established that part of the boundaries of parcel no. 266 as pointed out by the owners on the ground did not conform to its position as described by the RIM, and that since the ground position of the boundaries of parcel no. 267 and 414 as pointed out by the owners nearly conformed to their position on the relevant Registry Index Map, there is a clear indication that the position of the boundaries of 266 as pointed out on the ground overlap part of no. 267 and consume the entire parcel no. 414. Therefore, if the position of all the boundaries were to be respected on the ground as per the relevant RIM then, parcel no. 266 is overlapping to parcel number 267 by a position shaded in pink, parcel no. 266 is overlapping parcel number 414 by a portion marked in yellow, and there was very small overlap by 267 to parcel no. 414 of approximately 0.29 hectares which is approximately 0.717 acres. Conclusively, DW6 stated that there is an overlap of approximately 50.6 hectares which is approximately 125 acres.
 44. DW6 summarized his report as follows: -
 - a. That the ground acreage of parcel number 266 is 403.6 hectares while the registered acreage is 406 hectares with a shortfall of 2.4 hectares, and still on the same line, they did plan metric measurements of areas from the relevant RIM and established that parcel number 266 plan metric measurement is 353 hectares which means, the difference in acreage between the RIM measurements and the registered acreage is a positive of 53 acres bearing in the registered acreage is more than the hectares reflected on the RIM.
 - b. The ground acreage of parcel no. 267 is 213.05 hectares while the registered acreage is 196.0 hectares. The difference in acres is positive. If one subtracts the registered acres from the ground, one gets 17.05 hectares more. The same parcel on plan metric computation is approximately 213 hectares.



- c. Parcel number 414 is 7.52 hectares on the ground while the registered acreage is 6.6 hectares. That subtracting the registered acreage from the ground, it is more by 0.92 hectares, and from the plan metric computation, it is approximately 7.52 hectares.
45. According to DW6, parcel no. 266 overlaps part of parcel number 267 and the entire 414, and that any registered acreage comes from establishment of the RIM. He testified that at times when there are disparities as a surveyor, he may not be in a position to explain, but he agreed that some portions of parcel no. 266 do not conform to the position in the relevant RIM. He also stated that in parcel no. 266, the owners pointed out that there is a 6-metre-wide path which does not exist on the RIM, and the said path is part of parcel no. 267. According to him, parcel no. 266 overlaps parcel no. 267 and 414 by 50.6 hectares.
46. On cross examination, DW6 testified that from the RIM (D. exhibit no. 9), it shows that parcel no. 266 and 267 do not share a common boundary as they are separated by the road, and that when he visited the ground, he established the position of the boundary which is through the road R1, R2, R3 and R4. It was his testimony that he had used the RIM when he visited the ground, and being accompanied by Mr. Lubale, they did not mark the boundaries on the ground as they are on the RIM. He agreed that diagram 1 is limited to parcel nos. 266 and 267, which did not include parcel no. 414 due to an oversight, and which is why they later submitted an amended report which included another diagram. He testified that Diagram 1 is the relevant RIM while Diagram 2 is the report. He agreed that the order was not to establish the position on the ground but rather the dispute on the ground, and that Diagram 2 is an approximate and it does not rhyme with the RIM (diagram 1).
47. He agreed that according to his report of 2nd June 2023, parcel no. 414 occupies larger acreage than what is registered by slightly over 2.2 hectares which is a very big disparity. He also stated that the actual registered acreage for parcel no. 267 is 196 hectares, while the one occupied on the ground is 213 hectares leaving a disparity of 17 hectares which is about 35 acres. He agreed that the disparity between the registered and what the plaintiff is in actual occupation is 53 hectares which is approximately 132 acres. He stated that the acreage as per the RIM should also reflect the acreage on the ground, and that according to the report by Aubsey Kubebe, the registered acreage agrees with what is on the ground which shows that parcel no. 266 claims 402.6 hectares while the map shows 403.6 hectares. He pointed out that there is a disparity of about one hectare, and that parcel no. 267 is claiming 214.8 hectares according to Kubebe's report while his report is 213.05 hectares, which disparity is acceptable.
48. DW6 further testified that according to Kubebe's report, the overlapping area is 52.2 hectares while his report indicated 50.6 hectares with the disparity between the 2 reports being acceptable. He added that parcel no. 414 has a registered area of 6.6 hectares according to Kubebe's report while his report shows that the ground acreage is 7.52 hectares. That according to Mr. Kubebe's report, the total acreage of the 3 parcels is 608.6 hectares while his report indicates the total acreage existing on the ground as 572.2 hectares which leaves a difference of 36.4 hectares. Whereas the total registered acreage for parcel no. 267 is 196 hectares, it is not necessarily that boundary R1 to R4 will move if he was to remove 196 hectares. (showed Mr Lubale's sketch). He stated that according to his sketch, he had established 168.7 hectares for parcel no. 267, and also indicated that for parcel no. 266, where the area claimed is 402 hectares which agrees with his diagram. He further stated that the disputed area according to Lubale is 51.8 hectares while his report shows 50.6 hectares. He disagreed with Mr. Lubale that by using the RIMs, he can be able to establish the actual boundary on the ground.
49. DW6 testified that he did not mark the boundary on the ground using the RIM, as the nature of the exercise was to establish the dispute on the ground. That having done boundary disputes before, it is true that they use RIMs to establish the actual boundary on the ground, and that if the court were



to send him to the ground to establish the actual boundary using the RIM, he will be able to do so. He disagreed with the suggestion that if he were to allocate parcel no. 267 its registered acreage on the ground, it overlaps 266 by 17.05 hectares for the reason that the position assumes that boundary R5, R6, R7, R8, R9, R10 and R11 is not registered on the RIM. He went on to state that if he removes the disputed area, the acreage of parcel no. 267 is 169.92 hectares. He also stated that for parcel no. 266, the undisputed acreage is 352.4 hectares which almost agrees with Mr Lubale's report.

50. With regard to P. Exhibit No. 13 which is a report prepared by Onyambu, district land registrar who was with Mr Ngayah who is a surveyor in 1999, DW6 testified that it indicates that when they checked the RIM, the 2 parcels of land were separated by a 30 metre road, and that according to the width, it is 15 metres and not 30 metres. He agreed with the two that if the RIM is used, the disputed boundary can be marked. He also did not have any explanation as to why parcel no. 267 has more acreage on the ground than what is registered but pointed out that if the boundaries on the RIM are to be respected on the ground, the boundary can be established. He also stated that the acreage of parcel no. 267 is 213 as per the RIM, and that 213 is the plan metric computation on the ground. He agreed that the acreage of parcel no. 267 has not been calculated properly, and that the best way of solving the dispute between the 2 parties is to make some adjustments on the ground, and that the path way shown to him along R5, R6, R7, R8, R9, R10 and R11 is very clear on the ground.
51. On re-examination, DW6 testified that he did not mark the boundaries using the RIM since the order from the court was to establish the nature of the dispute between the 3 parcels, which is how he came up with Diagram 2, and to establish if there was overlapping. According to him, Kubebe's report concludes that all said and done, the extent of the overlap is 52.2 hectares and that it includes the whole of parcel number 414. He testified that the total acreage of the 3 parcels on the ground has less acreage form the total registered by 36.4 hectares, and that Kubebe's report is similar to his report.
52. On 9th May, 2024, Tom Chepkwesi (DW7), the land registrar, Trans Mara sub-county testified that he visited the suit parcels on 3rd May, 2023 and that on the very first day that he visited, surveyors took measurements of the parcels in dispute. He testified that the surveyors and his deputy continued with the exercise, and that they came up with the report. That from the report, the key point that emerges is that if the plaintiffs' claim is addressed as prayed, it would create an overlap into parcel number 267. He also stated that the same claim would create a situation where parcel no. 414 would cease to exist. It was his testimony that there is a sketch map and the report is in agreement with the sketch map. He added that the sketch map shows the blue line on parcel no. 266 including that patch it is claiming. The blue line indicates parcel number 266 inclusive of the disputed portion parcel number 267 is defined by the green shaded line, and that there is a small portion of parcel no. 414. That according to the survey measurement, it places parcel no. 267 correctly into the area shaded green. DW7 testified that the report confirms that according to the plaintiffs' claim, the area shaded in pink would be lost by parcel nos. 267 and the entire of parcel no. 414, further, that parcel no. 266 overlaps 267 by 106.4 acres (43.08 hectares), and parcel no. 414 by 7.52 hectares (18.52 acres).
53. DW7 testified that the title deed issued in respect of the parcels of land emanated from his office, and that as at the time of issuing the titles, the disputes had been resolved.
54. On cross-examination, DW7 testified that the acreage on the title is not the same as the acreage on the land, and that he does not know if that is part of problem that has affected the three parcels of land. It was his testimony that he did not measure the acreage of parcel no. 266, but that the report indicates the acreage of parcel no. 266 minus the disputed portion which is 403.6 hectares. He said that the report does not indicate the acreage of parcel no. 267 minus the disputed portion, and that he cannot confirm if the area is 168.7 hectares. It was his testimony that he did not go through the entire portions of the disputed parcels, but that he had the RIM for the affected areas. He also did not know



if the RIM was used by the surveyors. He admitted that the report filed was the implementation of the court order in civil suit number 200 of 2012 which was prepared by his predecessor and a surveyor and it shows that parcel no. 267 occupies 214.08 hectares against the registered area of 196 hectares, and that parcel number 414 occupies 7 hectares. He also admitted that the 2 reports agree that parcel number 267 occupies a larger portion than the registered acreage. According to his report parcel no. 414 has a registered acreage of 6.60 hectares against the ground acreage of 7.52 hectares, and that it is overlapping some other land by about one (1) hectare. He did not know if it is correct that there is no overlap by 266 and 267. It was his testimony that when the acreage on the ground is different from the registered acreage, he would look into the history of the parcels, and that if there's dispute, he would not entertain new disputes.

55. With regard to the report dated 23rd September, 1999 DW7 testified that the certified report from his office concerned a boundary dispute between parcel no. 266 and 267 which concluded that the disputed boundary was marked by the adjudication committee, and that the 2 parcels do not share a boundary. He also testified that their sketch shows 2 roads which is R1 to R4, and R9 to R13.
56. On re-examination, DW7 testified that the report by Mr. Kubebe and Philip Mengi shows that the site was visited on 23rd October, 2013 and 29th October, 2013. He testified that on synthesis of facts parcel number 266 occupies 350.4 hectares but when they subdivided their land, they tried to compensate their land by 55.6 hectares. He informed the court that it said that this was done by the surveyor on allegation that the dispute had been resolved by the land registrar. According to their report of 07th June, 2023, DW7 testified that the ground acreage for parcel no. 266 is 403.6 hectares which slightly conforms to Kubebe's report. He also testified that parcel number 414 does not overlap parcel nos. 266 and 267 according to their report and when he visited the land in 2023, the occupants of parcel no. 267 were in their rightful position.
57. The defendant and the interested party filed their joint written submissions dated 4th September, 2024 where they raised four issues for determination as listed below: -
 - a. Whether the plaintiff's claim is properly before court;
 - b. Whether the plaintiff's have proven their case to the required standard.
 - c. Whether the interested party's claim is merited; and
 - d. Who should pay costs.
58. On the first issue, the defendant and the interested party submitted that the suit was filed when the registrar was in the process of fixing the boundary, and that being a boundary dispute, the suit is not properly before this court, as it lies in the purview of the land registrar as provided under Section 18 (2) of the *Land Registration Act*. To buttress on this submission, they relied on the case of Kibelio t/a Rome Guest House versus Koske [2022] KEELC 14906 (KLR).
59. On the second issue, the defendant and interested party submitted that the plaintiffs in their plaint averred that when they went to take possession of their parcels of land, they noticed the encroachment and trespass, which shows that by the time they acquired rights to the contested parcels of land, the defendant was already in occupation, and thus the question of trespass and encroachment does not arise. That since there was a boundary dispute pending before the land registrar, the plaintiffs' craftly framed the suit as one of encroachment and trespass. They submitted that the plaintiffs have failed to prove the allegations of trespass and encroachment. Reliance was placed in the cases of Karim Amirali Abbany versus Ivana R & Another [2018] eKLR and John Kiragu Kimani versus Rural Electrification Authority [2018] eKLR.



60. On the third and fourth issues, the defendant and the interested party submitted that from the testimony of the surveyor and the land registrar, the genesis of the dispute is the subdivision of parcel no. 266 prepared by PW2 which resulted in new titles for parcel no. 1395 and 1396 which took up the interested party's land. They submitted that pursuant to Section 80 of the *Land Registration Act*, the titles ought to be cancelled as prayed. They further submitted that the plaintiffs dragged the defendant to court knowing well that the boundary dispute was being solved by the Land Registrar, and they concealed this information from the court. They submitted that the suit ought to be dismissed with costs.
61. The plaintiffs did not file their written submissions. Be that as it may, I have considered the pleadings, the evidence on record and the written submissions filed by the defendant and the interested party. In my view the issues for determination are as follows: -
- i. Whether the plaintiffs are the lawful owners of the suit parcels.
 - ii. Whether the plaintiffs are entitled to the prayers sought.
 - iii. Whether there is merit in the claim by the interested party.
 - iv. Who is to bear the costs.
62. In addressing all the above issues, it is not in dispute that Narok/ Cis-Mara/ Nairagia-Enkare-Enkare/ 266 is, or was owned by Surum group ranch and it measured approximately 406. 0 hectares as per the title deed issued on 2nd December, 1987. The register for this title deed appears to have been opened on 4th January, 1984. The dispute in this case arose in the year 1998, when Surum group ranch embarked on subdivision of this parcel of land into 70 portions as per the letter of consent dated 12th May, 1998. They averred that there was a boundary dispute between their parcel of land and that of the defendant being parcel no. 267. It was the plaintiffs' case that when they went to take possession of their portions of land, they realized that the defendant had encroached and trespassed onto their parcel of land.
63. The defendant contended that the plaintiffs had come up with a boundary dispute, which the surveyor found that it was as per the Registry Index Map, and the issue of the 30 to 40 metres boundary was intended to add more land to their growing population. He contended that the plaintiffs hived off chunks of his land and awarded the same to the beneficiaries of the group ranch.
64. The interested party filed a statement of claim against the plaintiffs over his parcel of land being no. 414. He stated that the plaintiffs withheld particulars over his parcel of land which has been consumed by parcel nos. Cis-Mara/Nairagia-Enkare/ 1395 and 1396, and that were it not for the defendant, he would not have been aware of these proceedings which affected his land.
65. It is trite law, that he who alleges must prove, and in support of their case, PW1 informed the court that the demarcation officer visited their land and showed them their respective portions but that they were not shown the boundaries. He testified that they engaged a private surveyor to do the subdivision, who prepared all the documents and followed the process leading up to the issuance of their title deed. He maintained that the defendant has encroached on their land with an exceeding 115 acres. On cross examination, PW1 learnt that parcel no. 266 borders parcel no. 414 and that it has taken all of the interested party's parcel of land which title had been issued prior to their title deeds.
66. PW2 was the private surveyor said to have undertaken the subdivision exercise, and according to him, he carried out the exercise in the year 1998 upon the instructions of Surum group ranch. It was his case that he complied with all the procedures and that after the exercise, he informed the group ranch that they were losing out on about 100 acres of land as they found other settlers on the ground. He informed



- the court that he was told that the boundary is the Narok-Nairobi highway. He also admitted that he could not tell whether he trespassed and any encroachment can be established by involving other surveyors. Interestingly, he based his findings on the exercise he conducted and not with the approval of the district surveyor, and he did not obtain the RIM from the said office.
67. From the evidence of PW3, it appears that they had the maps and the area lists of the area but he appears to be clueless as to the existence of parcel no. 414. His knowledge of the matter largely dwelt on the issues commencing the subdivision exercise which was in the year 1998, and the boundary which he said was a road. I find his evidence contradictory as to when the group ranch obtained its title deeds as well as their source of the map of the area as well as the RIM.
 68. PW4 stated that he has two parcels of land which are charged to financial institutions and that the interested party and the defendant have encroached on his parcel of land after he had obtained the title deed. He also appeared not to know the existence of parcel no. 414 but he nevertheless maintained that there is a boundary between parcel no. 266 and 267 which is a road.
 69. PW5 stated that the disputing parties do not share a common boundary as there is a 30-metre access road between parcel no. 266 and 267, and that the boundary marks pointed out by the defendant's family was the correct boundary.
 70. DW1 contended that the plaintiffs encroached on his parcel of land which he has lived for more than 50 years. He testified that when the dispute arose, there was a meeting held by the land registrar and the surveyor. He maintained that there is a boundary between his parcel of land and parcel no. 266, and that as far as he recalls he occupies 214.8 hectares against the registered 196 hectares.
 71. According to DW2, he was present when the registrar visited the suit land and the boundary between parcel nos. 266 and 267 is clearly marked as per exhibit. 13.
 72. The interested party's claim was not controverted by the plaintiffs. While he filed his statement of claim dated 8th December, 2014, his averments as contained therein have not been refuted. I do note that the plaintiffs did not file a defence or a response to his statement of claim. DW4's testimony was to confirm that the interested party is well known to him as they are neighbours since childhood.
 73. The evidence of DW5, DW6 and DW7 was mainly geared towards shedding light as to their relevant expertise on matter survey, subdivision and title to land and more particularly their findings based on the reports filed with regard to the subject parcels of land in this case. DW5 agreed that the report dated 29th August, 2018 is not exhaustive to help the court determine the extent of the encroachment. What was also clear was that parcel nos. 266 and 267 are separated by a road which is ideally the boundary.
 74. DW6 produced the amended report dated 2nd June, 2023 which was made pursuant to this court's directions issued on 7th February, 2023. In summary and as observed from this report is that parcel no. 266 has overlapped parcel no. 267 by 50.6 acres and consumed the whole of parcel no. 414. The Registry Index Map was also not challenged by the plaintiffs, and they did not also attack or counter the extent of their invasion on parcel no. 414. The evidence of DW7 summed up the case, by indicating that if the court were to go by the claims made by the plaintiffs, the parcel of land would cease to exist whereas it has not been challenged.
 75. From my analysis, I find that the plaintiffs have not proved their case on a balance of probabilities and in fact, they have unlawfully encroached on the defendant and interested party parcels of land without



any justification. I find the interested party's claim as against the plaintiff with merit. Section 80 of The Land Registration Act, provides: -

- “(1) Subject to Subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
- (2) the register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”

76. In exercise of the above provision of the law, this court hereby orders a cancellation of the title nos. Cis-Mara/ Nairagie-Enkare/ 1395 and Cis-Mara/ Nairagie-Enkare/1396 registered in the names of Lasiti M. Ole Surum and Meiboko Ole Kasana Surum respectively. The plaint dated 11th June, 2012 is hereby dismissed with costs to the defendant and the interested party. Orders accordingly.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 31ST DAY OF OCTOBER, 2024.

HON. MBOGO C.G.

JUDGE

31/10/2024.

In the presence of: -

Mr. Meyoki Pere - C. A

