



**Nkanatha (Suing as the Legal Representative of the Estate of Zipporah Kanaitore M'nchebere) v Marete – Deceased (Environment and Land Appeal E022 of 2024) [2024] KEELC 13372 (KLR) (20 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13372 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E022 OF 2024  
CK NZILI, J  
NOVEMBER 20, 2024**

**BETWEEN**

**MORRIS MUTUMA NKANATHA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF ZIPPORAH KANAITORE M'NCHEBERE) .... APPELLANT**

**AND**

**ROY MARETE – DECEASED ..... RESPONDENT**

*(An appeal from the judgment of Hon T.M Mwangi – SPM  
in Meru ELC No. E020 of 2020 delivered on 29.2.2024)*

**JUDGMENT**

1. The appellant, who was the plaintiff at the lower court, had sued the respondent through an amended plaint dated 25.11.2021 as the legal representative of Zipporal Kinaitore Nchebere, the supposed recorded owner of Parcel No. 5157 Ruirir/Rwarera Adjudication Section, measuring 7.50 acres which the deceased her children and grandchildren had possessed until she died in 2010 and left the beneficiaries occupying the same up to the filing of the suit. The appellant blamed the respondent as the recorded owner of Parcel No. 730 Ruirir Rwarera Adjudication Section for purporting to push the boundaries and encroaching onto the land with effect from 2010, without his authority or permission.
2. The appellant averred that the respondent secretly filed Objection No. 339, with the land adjudication officer and had 6.50 acres, irregularly and fraudulently excused out of Parcel No. 5157 which was added to Parcel No. 730 making it 11 acres and subsequently 16.30 acres, thereby reducing the appellant's land to one acre stealing 6.5 acres moving the locality of the land from Ruirir Rwarera to Mbwa in Tigania and intentionally failing or declining to join him in the objection proceeding.



3. The appellant sought a permanent injunction and restoration of the 6.50 acres of land, irregularly taken out of his land and rectification of the land map, so as to replace the suit land on its original location in Mugae area within the Ruiru/Rwarera Adjudication Section.
4. The respondent opposed the claim through an amended defense dated 10.12.2021.
5. It was averred that Ruiru Rwarera Adjudication Section was a creature of the [Land Adjudication Act](#) (Cap 284) and not Cap 283 the [Land Consolidation Act](#), where a recording officer records rights to the occupant/owner of the land in a published adjudication section as outlined in the Act. In this case, the respondent averred that he was the recorded & lawful owner of Parcel No. 730 measuring approximately 15 acres in Ruiru/Rwarera adjudication section but was a stranger to the assertion that Parcel No. 5157, allegedly situated within the adjudication section, was contiguous with his land Parcel No. 730 possessed by the deceased initially and currently occupied by her grandchildren. The respondent denied the alleged fraud, illegality, irregularity, or malice in acquiring the land, for he was not a land adjudication officer.
6. Further, the respondent averred that a District Land Adjudication and Settlement Officer gave him authority to file and lodge Objection No.339 Ruiru Rwarera/730, over parcel after paying the requisite fee, which objection was rightfully and legally lodged against Julius Mbutura Kirima as the one claiming ownership and; therefore, none could be brought against the appellant or any other person when none was in possession and or claiming part of Parcel No. Ruiru/Rwarera/730, belonging to him.
7. Unlike Julius Kirimania, the respondent averred that the appellant had not been entered into the demarcation register as the owner of Parcel No. 730, and therefore, the appellant could not have been a party in the respondent's legal and procedural objection.
8. The respondent averred that land objection proceedings were extremely publicized legal actions and were also conducted openly for one to believe the assertion by the appellant that it was conducted secretly in availed accusation of impropriety on the part of the DLASO.
9. Again, the respondent averred that on 25.4.2018, a site visit was undertaken pursuant to an objection by Roy Gatari Marete, and if at all the appellant and her estate were in occupation as alleged, they would have raised the alarm and staked their claim.
10. The respondent averred that in the absence of plate tectonics, non-contiguous land masses could not magically merge or separate and that during objection No. 339, there was a site visit where boundaries of Parcel No. Ruiru Rwarera/730 were clearly identified and marked out while at same time ensuring that there was no annexation of the neighbor's parcel of land.
11. The respondent averred that ordinarily, neighbors do participate during the fixing of boundaries to guard against encroachment, and it, therefore, follows that a parcel cannot expand or shrink. In this case, the respondent averred that it was the DLASO who ascertained his parcel of land and could not have included or interfered with the appellant's parcel of land, which was not adjacent to his parcel for Mbwa 1 to Ruiru/Rwarera where the parcel is located is far and neither could he have grabbed nor increased his acreage from the appellants land situated in another adjudication section in a totally different district or sub-county.
12. Accordingly, the respondent averred that together with his family and siblings he was in possession of Parcel No. Ruiru/Rwarera/730, which they utilize and derive their livelihood from.
13. In particular, in paragraph 5(e), the respondent pleaded that the appellant had failed to subject himself to and exhaust the internal dispute mechanism under Cap 284 before filing the suit. Further, the respondent averred that before the suit was filed, he had never been summoned to Ruiru Police Station,



regarding OB No. 24/16/4/2019, over his land measuring 15 acres or regarding Parcel No. Ruiru/Rwarera/5157, over interference with its boundaries.

14. In reply to the amended defense dated 22.12.2024, the appellant termed it as raising no arguable issues and as argumentative, contrary to Order 2 Rule 3 of the Civil Procedure Rules.
15. At the trial, Morris Mutuma Nkanata testified as PW 1. He abandoned witness statements dated 26.10.2020 and relied on the one dated 25.11.2021 as his evidence in chief. He stated that he had bought the suit as a legal representative of the estate of his grandmother, who died in 2010 and used to occupy Parcel No. 5157, measuring 15 acres, together with the respondent, whose occupied land was 7.50 acres, with clear and distinct boundaries after it was allocated to them by the late Jackson Angaine.
16. PW 1 told the court that he lived with the deceased on the land from 1990 up to 1997, when the deceased gave her a portion of the land to farm together with his mother, and that there was no dispute at all with the respondent, regarding the boundary of their respective portions of land.
17. PW 1 told the court that after his grandmother passed on in 2010, the respondent came with hooligans and razed down the house belonging to the deceased, which he later rebuilt only for the respondent to once again come and demolish in 2020, followed by chasing away his farm workers out of the whole 15 acres of land.
18. Additionally, PW 1 told the court that he made a follow-up with DLASO Meru North only to establish the fraudulent alteration of the acreage from 7.50 acres to 1 acre, followed by its relocation from Ruiru Rwarerra to Mbwaa area, Tigania, and the addition of 6.50 acres to the respondents' land parcel through an Objection No. 339. PW 1 said that despite the alterations to the land adjudication record, he was still possessing, utilizing and occupying the land.
19. Subsequently, PW 1 relied on a letter dated 21.9.2020 confirming ownership of one acre of land by the late Zipporah Kinaitore M'Nchebere issued by DW1, the sub-county land adjudication and settlement officer, limited grant ad litem dated 11.9.2020, consent to sue dated 9.10.2020, demand letter dated 10.9.2020, and DLASO's letter dated 6.5.2019 as P. Exh No. 1-6 respectively.
20. In cross-examination, PW 1 said that Parcel No. 5157 measured 7.5 acres, but had no evidence that the parties were given the land by the late Jackson Angaine, measuring 15 acres. As to the immediate relatives of his grandmother, PW 1 said that he had not brought any or a clan elder to be a witness to the case. As to developments on the land, PW 1 admitted that he had no evidence to sustain his assertion that there were developments or structures on the land belonging to the deceased. Regarding a report or complaint to DLASO, PW 1 admitted that his witness statement had no date or time when he became aware of the fraud.
21. PW 1 said that he had not sued the DLASO in the suit. Asked why he did not notice or become aware of the site visits in 2018, he alleged that he was living on the land. PW 1 admitted that he had not produced map sheets to sustain his claim. He denied bringing the suit as gabble given that he was uncertain of whether Parcels No. 730 & 5157 were on the same adjudication section, or relying on any fraudulent conduct report following investigations showing complicity on the part of DLASO for the alleged alterations.
22. PW 1 said that he was confident that his grandmother was allocated the land in 1970 by the late Jackson Angaine. As to the transfer of the land from Ruiru/Rwarera to the Mbwaa 1 Adjudication Section, PW 1 said the parties were not notified of the transfers. However, he insisted that the respondent and himself were occupying land in Ruiru Rwarera and not Mbwaa, each occupying 7.5 acres of land. Though P. Exh No. (5) shows parcel No. 5157 as 1 acre; PW 1 said that on the ground, it was 7.5 acres



- located in Ruiru/Rwarera bordering the respondent parcel of land and not in the Mbwaa area. PW 1 told the court that he was surprised that his lawyers on record omitted to join the DLASO in the suit.
23. Moses Mwirigi Mugambi and George testified as PW 2 and 3. They relied on witness statements dated 25.11.2021 as their evidence in chief. PW 2, a neighbor to the suit land, owning Parcel No. 857 stated that he learned from the late Zipporah M'Nchebere that she acquired the land as an allocation from the late Jackson Angaine jointly with the late Jackson Angaine. He said that the children and grandchildren of the late Zipporah used to till the land.
  24. In addition, PW 2 said that the appellant and the respondent were each utilizing their respective portions of their land, which the court could ascertain through a scene visit report. On his part, PW 3 told the court that he was a neighbor of the parties herein and, therefore, he used to see children of the late Zipporah M'Nchebere occupying or utilizing her land until she fell ill. He said that a scene visit by the court would establish who was on the land.
  25. Julius Levu testified as DW 1. He confirmed authoring the letters dated 19.5.2021, 21.9.2020, and 6.5.2019 produced as P. Exh No's. (1) and (5). He also confirmed that there were objection proceedings and a decision handled during a second crush program over Objection No. 339 regarding Parcel No. 730 as per DMF 1 No. (2).
  26. Roy Marete testified as DW 2. He relied on a witness statement dated 5.4.2021 as his evidence in chief. He told the court that he was a stranger to Parcel No. 5157, allegedly belonging to the appellant. DW 2 added that Parcel No. 730 was recorded under his name as per the DLASO in trust for himself and other siblings, including Julius Gitonga M'Mwogo, who permanently occupy the land of his sister Jeniffer and Joyce, who till the land for food crop. He denied that his appellant's parcel of land was a neighbor to his land. DW 2 said that he planted an ancient pen kaal fence in 1987, his mother was buried on the land when she passed on in 2005, and that the appellant's land measuring one acre was distinct and falling in a separate adjudication area, as opposed to neighboring his land according to DW 1, hence he could not have committed the allegations of fraud, illegality or irregularities set in the amended plaint.
  27. Similarly, DW 2 stated that during the hearing of Objection No. 339, the DLASO's team conducted a site visit, and boundaries were ascertained; hence, the appellant was misleading the court. DW 2 relied on letters dated 21.9.2020, 19.5.2022, and 23.12.2020 as D. Exh No. 2, 3 & 4. He equally produced the OB and abstract, photographs, affidavit of names, certificate of electronic evidence, and letter dated 9.12.2022 as D. Exh No's. 5-9, respectively.
  28. In cross-examination, DW 2 told the court that he had no confirmation letter over ownership of his land showing him the same as 16.5 acres vis- -vis the findings in the objection, DLASO, and survey reports as 11 acres and or 15.30 acres, as per D. Exh No. (3).
  29. DW 2 stated that his mother was already in occupation of the land when the late Angaine gave his father 15.3 acres of land. As to the boundaries, DW 2 said that when a site visit took place, it was established that there was a euphobia live fence showing the boundary. He insisted that the letter dated 19.5.2021 was clear that he was the owner of the land, which he had been utilizing for a long time unlike the appellant.
  30. Julius Gitonga testified as DW 3. He relied on a witness statement dated 5.4.2021 as his evidence in chief. DW 3 told the court that he has lived on the land for 20 years, utilizing three acres, while DW 2 utilizes 4 acres, Jennifer and Joyce tiling 1.5 and 1 acre each, the rest being used as grazing land. DW 3 denied that the late Zipporah M'Nchebere was utilizing the land in 1985.



31. Mary Nthiga Ithuta testified as DW 4. She said that she has been in the Ruiru/Rwarera area since September 1986 as a close neighbor of DW 2, whose land was Parcel No. 1170. She confirmed the occupation of the land by the respondent as well as his siblings.
32. With the court's permission, the witness statement of Jeniffer, who had passed on, was admitted as evidence under Section 33 of the *Evidence Act*. With the close of the defense case, the appellant applied for a scene visit to be undertaken by the county land surveyor to ascertain the beneficiaries of Parcels No 5157 and 730, their acreage, encroachment to each other, and the report to be filed with the court. The trial court issued an order to that effect dated 15.9.2022.
33. A report dated 26.6.2023 was filed before the court authored by PW. Kimani and Mr. Levu DW 1. Through an application dated 5.9.2023, the appellant sought to re-open the case in order to interrogate the report by cross-examining the makers before the parties could file final submissions.
34. By an order dated 12.9.2023 the trial court re-opened the case for the production of the report and cross-examination of the county surveyor and DLASO Imenti North. It appears that only DW1 was recalled. The county surveyor was not availed, yet he was a co-author of the report.
35. There is no record to show whether the report dated 16.6.2023 was produced and marked as an exhibit.
36. The attachments to the report had no certification or verification by their makers.
37. Following the close of the defense case, parties filed written submissions dated 12.10.2023 and 15.12.2023, respectively. The trial court rendered its judgment on 29.2.2024, dismissing the appellant's suit. He has appealed against the judgment before this court by a memorandum of appeal dated 26.3.2024.
38. The appellant faults the trial court for:
  - i. Ignoring Order 1 Rule (9) of the Civil Procedure Rules by failing to deal with the matter in controversy to the extent of the appellant's right and interest on the suit land.
  - ii. Deviating from the evidence on record and basing his judgment on remote, extraneous, irrelevant, consideration and assumption.
  - iii. Purporting to allocate the respondent land which he did not own.
  - iv. Unprocedurally dismissing the suit on an alleged mistake of the appellant's counsel and or technicalities.
  - v. Delivering a judgment totally against the weight of the evidence.
39. This appeal was canvassed by way of written submissions. The appellant relied on written submissions dated 28.10.2024.
40. It was submitted that the suit was dismissed with no order as to costs simply because the land adjudication officer had not been joined to the suit contrary to Order 1 Rule 10 yet the trial court had broad discretion with or without an application by either party to order for addition of a party whose presence may be necessary for the court to effectually and completely adjudicate upon and settle all questions in the suit.
41. In this case, the appellant submitted that instead of dismissing the suit for the end of substantive justice to be met the trial court under Sections 1A & 1B of the *Civil Procedure Act* should not have acted on technicalities, but ought to have exercised its discretion to add the omitted party.



42. As to grounds numbers 2, 3 & 6 of the memorandum of appeal, the appellant submitted that the evidence of DW 1 materially contradicted the survey report as to the acreage of Parcel No's. Ruiriri/Rwarera/5157 and 730, which, in law, he had no powers to either change or vary. To that extent, the appellant posed the question on how the respondent's land acreage shot or increased from 11 acres on the disputed ground as per the report dated 26.6.2023, as compared to the earlier evidence of DW 1.
43. The appellant submitted that on pages numbers 48 – 52 of the record of appeal, it appeared that the trial court was in a dilemma as to 4.4 acres the size of Parcel No. Ruiriri/Rwarera/730 regarding the changes to the size as per objection proceedings, demarcation and sketch map compared to the evidence of DW 1. Given the said dilemma, the appellant wondered whether the lesser evil should have been to ignore Order 1 Rule 9 Civil Procedure Rules and allow the appellant to continue owning the excess 4.4 acres, or to effectively render the appellant destitute and landless but rather to allow the respondent to continue owning his lawful 11.0 acres and transfer the 4.4 acres unaccounted for acres to the appellant as failure to sue the DLASO did not in any way render the suit fatal.
44. On ground number 4 the appellant submitted that no party in a suit ought to be punished on account of a mistake of his counsel. Reliance was placed on *Rupa Savings & Credit Corporation Society vs Violet Shidogo* (2022) eKLR and *Bank of Africa (KL) Ltd vs Put Sarajevo General Engineering Co. Ltd & others* (2018) eKLR.
45. As an appellate court, the appellant urged this court to re-evaluate and analyze afresh the evidence on record and reach its conclusion on fact and the law, especially on Order 21 Rule (4) of the Civil Procedure Rules, which the trial court failed to adhere to. As to the transfer of the 1 acre to Mbwa area, the appellant submitted that no evidence was availed by DW 1 or the respondent to sustain the allegations.
46. The respondent relied on written submissions dated 3.11.2024. As an appellate court, the respondent urged the court to consider both the law, facts, and the evidence on record for just and equitable determination guided by *Abok James Odera t/a J Odera & Associates vs JP Machira t/a Machira & Co Advocate* (2013) eKLR.
47. As to whether the record of appeal is complete, the respondent submitted that the record of appeal does not include a letter dated 19.5.2021, OB book number abstract respondent photos, certificate of production of electronic evidence dated 30.6.2021, page 2 of the surveyor's report dated 26.6.2023 and all the mention notices and affidavits of services, all which were germane documentary evidence for the respondent in the trial court. Reliance was placed on *Set Point East Africa Ltd & another vs Zhongmei Engineering Group Ltd* (Civil Appeal E004 of 2023 (2024) KEHC 8447 KLR (July 4th, 2024) (Judgment) on the proposition that a party to an appeal cannot re-date or leave out documents in its compilation of the record of appeal, pegging it on the curious assertion that the documents belonged to the other party.
48. Further, the respondent submitted that he could not quote or make reference to a document not part of the record of appeal, without running the risk of introducing new material into the appeal.
49. Equally, the respondent submitted that the court would not have all the material necessary for effectual adjudication of the appeal, which was offensive to Article 25(2) of *the Constitution*, imperiling the right to a fair trial and substantial justice. The court was urged to find the record of appeal not only incomplete but also incompetent.
50. On the ground number 1 appeal, the respondent submitted it was competent, devoid of merit, and untenable since, as rightly held by the trial court prayer number 2 of the amended plaint dated



- 25.11.2021, could not be enforced without joining the land adjudication officer since he was the one, unlike the respondent who is a layman with the mandate to amend regularize and or restore boundaries.
51. The respondent submitted that the suit was not solely dismissed for non-joinder, but also because the two parcels of land did not share a common boundary, adjudication section or sub-county. The respondent submitted that the second reason for dismissal turned on the lack of contiguity of the land of the respective parties, such that neither party could donate additional estate to the other property for the non-adjacent ground, which immutable fact, the appellant had not challenged that his and the respondent's parcels were situated within different sub-counties and were not neighbors.
  52. The respondent submitted that parties are bound by their pleadings, and in this case, the appellant had sought a prayer that was unenforceable. Therefore, the respondent submitted that since it was not the business of the court to direct parties or their counsel on who to join in a suit, the appellant should not blame the trial court; otherwise, a court would be seen to be invested in cases.
  53. In any event, the respondent submitted that from the appellant's pleadings and evidence, it was clear that he did not need to join any party to the proceedings. Reliance was placed on *Juma vs Luyegu* (Civil Appeal E0152 of 2024) (2024) KEHC 13026 (KLR) (October 25th, 2024) (Ruling).
  54. On grounds 2, 3, 4, 5 & 6 of the appeal the respondent submitted that the grounds were strenuous, strained, and without a basis, since the appellant produced no documentary evidence to prove occupation of land Parcel No. 5157, its boundaries or contiguous with the respondent's land Parcel No. 730, farming activities or houses, unlike the respondent, who brought maps, letters, and photos to buttress his occupation and ownership of the land without nexus with the appellant's land.
  55. As to the allegation that Parcel No. 5157 measured 15 acres and was given to the appellant's grandmother and the respondent's mother to be shared equally; the respondent submitted that no evidence was tendered to support the assertion vis a vis the report dated 26.6.2023, out of the site visit which the respondent did not oppose.
  56. As to the alleged discrepancies in acreage, the appellant submitted that DW 1 clarified that land adjudication assistants were not surveyors and only relied on the boundaries shown to them by a landowner in the presence of landowner neighbors. In this instance, the respondent submitted that following professional advice from the county surveyors and the county land adjudication officer's report dated 26.6.2023, his property was approximated at 15.24 acres. Reliance was placed on *John Mwangi Kiiru vs Salome Njeri Mwangi* (2019) eKLR, on the proposition that when faced with discrepancies in evidence, the court should examine the discordant evidence, within the complete context of evidence availed. In this case, the respondent submitted that the trial court examined all the evidence within the context of the entire corpus of evidence and found that the land experts settled the issue of size. Yet, it was submitted that the appellant wanted to pick and choose out of context, notably when he had failed to discharge the more germane burden of his property being adjacent to the respondent's property.
  57. As to the demarcation record not bearing the respondent's name, it was submitted that under Sections 12 & 26 of the *Land Adjudication Act*, he lodged objection proceedings No. 339 since he and his family members were the ones affected by the adjudication register with respect to Parcel No. 730 in the name of Julius Mbutura Kirimania, yet they had been in long occupation of the land as confirmed by the area senior chief letter dated 9.12.2021.
  58. Therefore, the respondent submitted that, as explained by DW 1, the demarcation record had not been updated to reflect his name instead of that of Julius Mbutura Kirimania, since the adjudication section had not been closed by the time the suit was filed.



59. As to the failure to visit the appellant's land in Mbwaa, the respondent submitted that it was the appellant and not DW 1 who brought up the issue of relocation of his land in his witness statement and, therefore, the onus was on him to show how his land was fraudulently moved from Ruiriri Rwarera to Mbwaa. Reliance was placed on Patricia Ennece Chuma and another vs KCB Ltd (2007) eKLR that the appellant had come to court with unclean hands to discount the county surveyors report dated 26.6.2023, yet he had an option of engaging a private surveyor as directed by the trial court, which option he did not exploit.
60. The respondent submitted that the trial court fully complied with Order 21 Rule 4 of the Civil Procedure Rules and hence cannot be faulted. In Sections 1A and 1B of the *Civil Procedure Act*. The respondent relied on Marangu Rucha and Walter Konga vs. Bernadette Muthina Nzioki & others (2015) KECA 582 KLR (Civil) July 3rd, 2015) (Ruling) on the proposition on the overriding objective should not be used as a panacea on all ills to excuse every omission by parties in the prosecution of their cases.
61. In this appeal, it was submitted that the suit belonged to the appellant and not the advocate or the trial court, who was duty-bound to give instructions to his advocate on whom to sue and should, therefore, not hide behind his advocate to find favor before this court to the detriment of the respondent.
62. The respondent submitted that from the trial court's record, it was clear the appellant's grievance revolved around boundaries between his land and Parcel No. 730 and 5157, which were kilometers apart, and therefore, the boundaries in a live adjudication section are determined by the DLASO; hence the suit was premature.
63. The respondent submitted that under Section 17 of the *Land Adjudication Act*, the jurisdiction was on the demarcation officer and the survey officer to do so, as held in Joseph Evans Karubiu vs Peter Mugambi (2022) eKLR. The respondent urged the court to dismiss the appeal with costs under Section 27 of the *Civil Procedure Act*; otherwise, the appellant should not hide behind an apparent mistake of counsel. Reliance was placed on Patrick Kiilu Munyua vs Thika Nursing Home (2017) KEELC (427) KLR (July 17<sup>th</sup>, 2017) (Ruling).
64. The role of an appellate court of the first instance is to reappraise or rehearse the record of the trial court with an open mind and perspective to reach independent findings and conclusions as to facts and the law, while mindful that the trial court had the benefit of seeing and hearing the witnesses testify. See Abok James Odera & Associates vs John Patrick Machira (supra), Selle & another vs Associated Motor Boat Co. Ltd (1968) E.A 123.
65. Having carefully gone through the pleadings, the evidence tendered, grounds of appeal, and written submissions, the issues calling for my determination are the following:
  - i. If the trial court had jurisdiction to hear and determine the suit.
  - ii. If the appellant had a valid consent to sue the respondent.
  - iii. If the appellant pleaded and proved allocation, registration of the initial land as 7.50 acres in the name of the late Zipporah Kinaitore, its initial locality and occupation, was fraudulent, illegal and irregular, reduction, change of its size and boundaries, relocation, displacement, illegality in filing an objection and recording the actual land in the name of the respondent.
  - iv. If the appellant pleaded and proved the nexus, proximity, contiguity, overlapping, displacement, and replacement of his land Parcel No. 5157 with parcel No. 730.
  - v. If the suit was fatal for non-joinder of the land adjudication officer.



- vi. If the appeal has merits.
- vii. What is the order as to costs?
66. It is trite law that parties are bound by their pleadings and issues for court determination arise out of the pleadings. Further, it is trite law that a party may not raise new issues on appeal without leave of court on issues not canvassed before the trial court.
67. In this appeal, the appellant approached the trial court pursuant to a limited grant dated 11.9.2020 issued in Meru Chief Magistrates Misc Succession Case No. 85 of 2020 to file a suit to recover land parcel No. 5157 Ruiru Rwarera and a consent to sue issued under Section 30 of the [Land Adjudication Act](#) dated 9.10.2020, authorizing him to apply for an injunction against any encroachment within Parcel No. 730.
68. Pursuant to these documents, the appellant filed a plaint dated 26.10.2021, which he later amended on 25.11.2021, averring that Parcel No. 5157 Ruiru Rwarera Adjudication Section was 7.50 acres, lawfully supposed to be recorded in the names of the deceased Zipporah Kinaitore, whereas Parcel No. 730, a separate and distinct parcel of land, was possessed by the deceased up to 2010 when she died and her children continued on its occupation and developments.
69. The appellant averred that the respondent filed a secret Objection No. 3399 and caused the excision of the deceased land, which was also fraudulently or irregularly recorded as parcel No. Ruiru Rwarera/730 measuring 16.30 acres, after reducing Parcel No. Ruiru Rwarera/5157 from 7.50 acres to 1 acre and transferring its locality from the initial location in Ruiru/Rwarera to Mbwaa in Tigania. The appellant sought a permanent injunction, restoration of the initial acreage, rectification of the land map, and the return of the land to its original place in Mugae within the Ruiru/Rwarera Adjudication Section.
70. The respondent opposed the claim by an amended defense dated 10.12.2021. He denied any involvement in the gathering, consolidating, recording of rights, location of parcels of land, mapping of some issuance of parcel numbers, determination of neighborhood of the parcels, contiguity of the two parcels, involvement in any fraud, illegality or irregularity as averred and or being liable to the alleged claim by the appellant.
71. In particular, the respondent averred that his objection was procedurally filed openly and publicly heard and determined after a site visit and was duly implemented with no attend counter objection or appeals by anyone least of all the appellant. Specifically, the respondent averred that the appellant's parcel of land was not adjacent to his land, but was located in the Mbwaa I area far away from his parcel of land; hence, it was not possible for him to have grabbed or increased the acreage to his land from Parcel No. 5157 to his parcel which fell in a totally different district or sub-county. He equally raised the issue of non-exhaustion doctrine and, by extension, whether the suit was properly before the trial court. See paragraph 5 (e) of the amended defence. Before this trial court, the respondent, through submission, posed the question of whether the court had any role to play in fixing boundaries for land falling under the adjudication process since it is the role of demand and survey under section 17. In reply to the amended defense dated 22.12.2021, the appellant termed the contents of the amended defense as or argumentative contrary to Order 2 Rule 3 of the Civil Procedure Rules. The appellant ignored the jurisdictional issue and the non-exhaustion doctrine.
72. In *Bhaijje & another vs Nondi & another* (civil appeal 139 of 2019) (2022) KECA 119 (KLR) (February 18th, 2022) Judgment, the court observed that in cases where there is an ongoing land adjudication Section 30 of cap 284 clearly affects the power and the jurisdiction of courts to hear and determine such disputes the rationale being that there is an elaborate process under the [Land Adjudication Act](#) on how to determine which persons are and the extent to which they are entitled



- to interests in the land under adjudication. The court was clear, therefore, that parties needed first to employ the dispute mechanisms set therein before a resort is made to the court, since the land adjudication process was also shielded from unnecessary and unjustified abuses.
73. The court said that Section 30 of Cap 284 requires that an adjudication officer appointed under Section 4 thereof issue consent to institute civil proceedings. Further, the court observed that under Section 4 thereof, a minister is supposed through a gazette to appoint a public officer to be the adjudication officer for the adjudication area, and the adjudication officer may in writing appoint such demarcation officers, survey officers, and recording officers as may be necessary for demarcating, surveying and recording interest within the adjudication areas subordinate to him. The court said that filing a suit before consent to sue was issued rendered it and the entire proceedings a nullity.
74. In *Tobias Achola Osidi & Others vs. Cyprianus Ogola & others* (2013) eKLR, the court observed that the court had only a supervisory, enforcement and interpretative role to ensure that the ascertainment of interests and rights under Caps 283 & 284 adhered to the law. In *Stephen Kungutia & others vs Severina Nchulubi Nyeri Civil Appeal No. 221 of 2010*, the court observed that a claim for enforcement of the right to land had been competently brought before the court.
75. In *Amarnath (suing on behalf of the estate of the late Amarnath Gupta) vs Kazungu & others* (Civil Appeal E023 2021 (2023) KECA 128 (KLR) (October 27th 2023) (Judgment), a suit had been brought at the Environment and Land Court seeking to set aside the appeal committee decision cancellation of any action taken in compliance to the said decision and an order for the land registrar to issue a title deed to the appellant. The 1<sup>st</sup> respondent had raised a preliminary objection that the court lacked jurisdiction to sit on appeal against the minister's decision. The ELC court upheld the preliminary objection.
76. On appeal, the court cited *Julia Kaburia vs Kabeera & others* (2017) eKLR that the [Land Adjudication Act](#) provides an exclusive and exhaustive procedure for ascertaining and recording land rights in an adjudication section and, therefore, under Section 30 (1) thereof the jurisdiction of the court is ousted, once the process of land adjudication has started until the adjudication register has been made final. The court said that the consent envisaged by Section 30 to institute or continue civil proceedings was not the consent to file a suit challenging the decision of the land adjudication officer himself on the merits of his decision. Instead, the consent is given to a person to file a suit or continue with a suit against persons who have a competing claim on the land under adjudication.
77. In the *Reuben Mwongela M'Itekwia vs Paul Kigea Nabea & others* (2019) eKLR, the court held that parties must show that they have exhausted all available remedies before resorting to court. In *Kanampiu M'Rimberia vs Julius Kathare & others* (2019) eKLR the court held that rectification of the register pursuant to the A/R objection proceedings was grounded in law under section 26 of the Act; hence, the court had no jurisdiction to determine the dispute at hand. See also *Peter Muroki Kamundi vs Joshua Mbaabu & others* (2021) eKLR.
78. What I gather the appellant's claim before the trial court to have been was on an illegal alteration and or changes to his land from what had initially been allocated, demarcated, recorded, and adjudicated at the adjudication stage, from 7.50 acres to 1 acre, its relocation to another adjudication section and replacement of the same on the ground in favor of the respondent.
79. It is a trite law that the demarcation of land involves the preparation of two vital documents that form an adjudication register. Section 13 (1) (2)&(3) of the [Land Adjudication Act](#) provides the procedure for the making of claims and pointing out boundaries by persons who believe that they have an interest in land within an adjudication section. A claim is typically made to a recording officer by pointing out one's boundaries to the demarcation officer in the manner required and within the period fixed by the



- notice published under Section 5 of the Act. A person with interest is required to attend in person or through a duly authorized agent.
80. Where more than one person lays a claim to a specific parcel of land, an adjudication committee under Section 19 (2) & (3) of the Act, is required to handle the disputes, if the recording officer is unable to resolve the conflict. Anyone dissatisfied with the decision of the adjudication committee can take the dispute to the arbitration board under Section 21 (3) of the Act within 14 days after the decision is made.
  81. After an adjudication register is completed, Section 25 of the Act, provides that an adjudication officer certifies the adjudication record and demarcation map, sends the duplicate adjudication record to the Director of the land adjudication and also displays the original adjudication register for inspection at a convenient place within the adjudication section for any objection to be lodged within 60 days from the date of the notice.
  82. There is a further chance under Section 26 of the Act for anyone dissatisfied with the entries to the adjudication register to file an A/R objection against any incorrectness or incompleteness in writing. A further step is given under section 29 of the Act to appeal against a land adjudication and settlement officer's decision to the minister.
  83. In *Mohamed Ahmed Khalid (chairman) & others vs Director of Land Adjudication & others (2013) eKLR*, the court said that there are elaborate procedures for anyone aggrieved by the decision of the land adjudication and settlement officers, the land adjudication committee, the land arbitration board and the minister's appeal committee and that before the director signs the certificate of finality the adjudication register must be published, followed by hearing and determination of objection in respect to the adjudication register.
  84. In *Speaker of National Assembly vs Karume (1992) KLR 21*, the court held that where there is a straightforward procedure for redress by Constitution or statute, it must be strictly be followed.
  85. In this appeal, evidence was tendered by DW1 that the adjudication process had not been completed. The ascertainment and determination of rights and interests in landsell within the land officers and quasi-judicial bodies set up under the Act, with full powers and authority to handle all disputes that may arise. There is no evidence that the appellant commenced, participated in, and or exhausted the said internal dispute resolution mechanisms with regard to his parcel of land, by challenging the recording of the respondent as the owner before the recording officer, to the adjudication committee, arbitration board, and the A/R objection proceedings and the minister before moving to the trial court.
  86. Jurisdiction is everything, and without it, a court of law downs its tools. The consent to sue given to the appellant was for an injunction within Parcel No. 730. It was not related to Parcel No. 5157 Ruiru/Rwarera Adjudication Section.
  87. In *Peter Kimandiu vs Land Adjudication Officer Tigania West District & 4 others (2016) eKLR*, the court observed that under Cap 284, a land adjudication officer superintends the process of the land adjudication by appointing demarcation and recording officers adjudication committee and arbitration board committee and supervises the whole process, under Sections 4, 6, 9, 10 & 11 of the Act until it goes on appeal to the minister.
  88. The issues raised in the lower court pleadings, and especially the claim by the appellant, were not over the supervisory jurisdiction of the court to ensure the adjudicatory bodies adhered to the law on land adjudication. To determine the issues raised while the adjudication process had not been declared complete would amount to exercising a jurisdiction that the trial court did not possess.



89. Similarly, the consent obtained to sue was specific to an injunction against any encroachment within Parcel No. 730. It did not mention parcel No. 5157 Ruiru/Rwarera Adjudication Section. Through the amended plaint dated 25.11.2021, the appellant expanded the claim to include fraud, illegal and malicious demarcation, illegal transfer of the locality of his parcel of land and replacement of the same on the ground by Parcel No. 5157 or 730 Ruiru/Rwarera Adjudication Section.
90. The appellant went to the extent of including a relief of restoration of 6.50 acres of land allegedly grabbed and added to the respondent's parcel of land through Objection No. 339 and rectification of the land map so as to place the suit land on its original location in Mugae Ruiru/Rwarera Adjudication Section. All these were new issues that were not included in the initial consent to sue. Perhaps the said amendments may have been triggered by the respondent's statement of defense dated 21.12.2020. That notwithstanding, the said discoveries parties and in particular the trial court should have determined or satisfied itself as to whether it had jurisdiction over the determined matter that was touching on land still under adjudication process.
91. The amended plaint was beyond the initial issue of encroachment, as per the consent granted earlier on. The appellant was referring to objection proceedings No. 339, resulting in Parcel No. 730 determined on 2.5.2018, as per the proceedings produced and referred to by the land adjudication officer, DW1 where any aggrieved party had been given a right of appeal.
92. Jurisdiction is everything, and without it, a court has to down its tools. As held in Bhaijee (supra) and Amarnath (supra), without consent to sue, a court, has no jurisdiction to entertain a suit touching on land under adjudication. The mandate of the court is limited to supervision and ascertaining compliance with the adjudication process as held in Tobias Ochola.
93. The second relief in the amended plaint called for rectification of the adjudication register. The mandate to do so under Sections 26 and 27 of the Land Adjudication Act does not fall under the court. It was, therefore, not open for the appellant to move to court to re-open the adjudication register, through a court order instead of subjecting himself to the adjudicatory bodies under Cap 284.
94. In *Kanampiu M'Rimberia vs Julius Kathanje and others* 92019) eKLR, the court observed that under Section 21 of the Act, the adjudication register is taken to the final only subject to a minister appeal and therefore, a court had no jurisdiction to determine the dispute at hand.
95. It is my finding, therefore, that the amended plaint was filed without a valid consent covering the issues pleaded.
96. As to whether the appellant pleaded and proved allocation, demarcation of the initial land measuring 7.50 acres to Zipporah Kinaitore, its locality, occupation, fraudulent subdivision, reduction, change of size, and its relocation to some other place and replacement on the ground as per Parcel No. 5157 in favor of the respondent, it is trite law that parties are bound by their pleadings, and he who alleges must prove.
97. To start with, the appellant failed to produce any initial letters allocating the late Zipporah Kinaitore 7.50 acres at the locality of Mugae area within the Ruiru/Rwarera Adjudication Section. Further, the appellant failed to produce copies of the gathering book and the demarcation record at the inception of the adjudication process in the area.
98. Concerning occupation and possession of the initial land, before and during the adjudication process and towards the end of the lifetime of the late Zipporah Kinaitore in 2010, the appellant failed to produce any demarcation and adjudication records or photographic evidence that the entire 7.50 acres



- were before 2010 under the exclusive use of the initial demarcated or recorded owner, whose size boundaries locality and registration was at Mugae area of Ruiru/Rwarera Adjudication Section.
99. Moreover, the appellant averred that the encroachment occurred in 2010, soon after the initial owner passed on, and that Parcel No. 730 was separate and distinct from Parcel No. 5157 and, therefore, out of it and through an illegally filed Objection No. 339, its initial size was reduced and added to Parcel No. 5157, leaving it as one acre. Evidence to sustain those allegations through paper trails from the demarcation records, demarcation maps and registers was not availed before the trial court.
  100. Evidence tracing parcel no. 730 from the time it was established in the adjudication and demarcation maps or record at the inception of the adjudication process to the time of the filing of the suit was not availed.
  101. It is noteworthy that the initial consent to sue was on encroachment of Parcel No. 730 and not on the alleged overlapping, replacement, relocation, amalgamation, and or removal of the parcel as initially measuring 6.50 acres or 7.50 acres, from the adjudication register and adjudication maps. The appellant failed to call for and produce the initial and updated demarcation maps and registers to prove his claim.
  102. Further, the appellant failed to produce any paper trail showing that he was actively on the suit land following up every step of the adjudication process and exhausted the internal dispute mechanisms to safeguard his interests over the suit land. In the absence of investigative reports after such complaints that there was irregular and fraudulent tampering with the adjudication records to the extent of relocating the suit parcel from its initial locality in the Mugae area to Mbwaa I in Tigania, my finding is that the appellant failed to discharge the burden of proof under Section 107, 112 of the *Evidence Act*. See *Mutsonga vs Nyati* (184) KLR 425, *Nkaricha vs Magiri & 6 others* (ELC E004 of 2021 (2024) KEELC (KLR) (29 May 2024) (Judgment)
  103. Relocation of land during land adjudication is allowed in specific instances during the adjudication process. Though the appellant pleaded that the suit land was reduced, replaced and relocated to another locality, evidence by way of adjudication records, was not availed to back those averments or allegations. The easiest thing for the appellant was to produce tangible evidence by way of an adjudication record showing that his land Parcel No. 730 on paper fell under the Mbwaa area and not the Mugae area. It was not enough to allege without proof. See *Bernard Musyimi Mweni vs Musee Mbweni Ngoo & others* (2018) eKLR.
  104. As to whether the land adjudication officer should have been joined, the issues pleaded against the respondent touched both on the statutory duties of the land adjudication officers, the adjudicatory bodies under the *Land Adjudication Act*, and how the respondent was a beneficiary of the process and its outcome.
  105. In *Catherine Muthoni Kirunga & another vs Land Adjudication & Settlement Officer Tigania East Central and others* (2017) eKLR, the court held that the statement had not been amended to include the ground of composition and the committee nor was, leave sought to include that issue by way of a further verifying affidavit and therefore could not be introduced at appellate stage by way of written submissions. The second issue was on the right to a fair hearing. The court observed that the right to be heard before one diverts ownership of property is one of the cardinal principles of natural justice that inheres in every human being.
  106. The appellant on ground number 1 averred that his rights and interests on the suit land were infringed when the trial court deviated from the matters in controversy. From the trial court record, it is the appellant who brought the suit and was allowed all the necessary rights and freedoms during the



hearing of the suit to the extent of being allowed to reopen the case, engage private surveyors, and bring all the evidence available to sustain his suit.

107. Issues for determination arise out of the pleadings. The custodians of the land adjudication records are the land adjudication, demarcation, and survey officers. In *Gladys Nduku Nthuki vs Letshego (K) Ltd; Mueni Charles Maingi (IP)* (2022) eKLR, the court cited *Zephir Holdings Ltd vs Mimosa Plantations Ltd & others* (2014) eKLR and *King'ori vs Chege & others* (2002) 2 KLR 243 that a proper party was one impleaded in a suit whose presence is necessary or relevant for the determination of the fundamental matter in dispute to enable the court to effectually and completely adjudicate over the matter.
108. The appellant blamed the respondent for tampering with adjudication records, reduction of the initial land size to favor the respondent's replacement of the locality and record for his land with the names of the respondent, and the relocation of his land from Mugae area to Mbwaa 1, in favor of the respondent as the beneficiary of the exercise.
109. In his defense, the respondent pleaded that he had not committed the alleged acts and was not answerable for the statutory duties to ascertain, record, demarcate, and register land, falling under the *Land Adjudication Act*. The respondent denied the alleged fraud, illegality, and malices specifically in paragraphs 3(a), 4 (a), 5 (b) – (e), 6, 7, 8 & 9 of the amended defense dated 10.12.2021.
110. The respondent pleaded that the Ruiru Rwarera Adjudication section was governed by Cap 284 and not Cap 283, he was a stranger to Parcel No. 730 Ruiru Rwarera Adjudication, he was not a land adjudication officer; he lawfully filed an objection over Parcel No. 730 against whoever had claimed his land; the objection was heard and determined in 2018, with a scene visit where boundaries were delineated Parcel No. 5157 was not adjacent to the appellant's alleged land but situated in Mbwaa I area; the appellant never joined the objection proceedings or filed a separate one against the recorded owner or preferred a minister's appeal before escalating the claim to the court.
111. The appellant pleaded that the objection proceedings were secretly filed, heard, and determined with a view of the respondent unfairly, irregularly, fraudulently, and unlawfully acquiring the suit land. The appellant's suit was therefore questioning both the process of land adjudication and the determination of interests on land. The procedure of ascertainment of interests on land falling under adjudication is governed by Caps 284 and 283. See *Ann Kathanga Daniel and others vs. DLASO Igembe & another* (2019) eKLR.
112. The court cannot, through craft, bypass the spirit and letter of that law. See *Silverio Akubu & others vs Charle Baariu Salesio & others* (2019) eKLR. The alleged re-allocation, retaking, and re-adjudication of the appellant's land without his knowledge, consent, or approval could not be determined to finality, without the involvement as a party of the land adjudication officer, whom the appellant had sought a substantive relief against to restore his land on both on the ground and on the adjudication register to its original status. See *Simon Natal Ntoitha vs Subcounty Land Adjudication and Settlement Officer Igembe North & 20 others* (2022) eKLR.
113. Evidence tendered by the appellant was pointing blame on the land adjudication officers for tampering with and giving his parcel of land to the respondent. In *Mwangi James Njehia vs Janetta Wanjiku Mwangi & another* (Civil Appeal 177 of 2019 (2021) KECA 768 (KLB) ELC March 19<sup>th</sup> 2021 (Ruling), one of the complaints was that the trial court had ordered the land registrar to cancel the title yet he was not a party to the suit. The court found the non-joinder of the land registrar inconsequential, since there was no evidence, even remotely tendered, to suggest that the land registrar was complicit in the fraudulent transfer of the respondent's land to the appellants.



114. In *Mangi Mutisya Nzioka vs Mbuki Kisavi (Civil Appeal 97 of 2004)* (2014) KECA 838 (KLR) (February 4th, 2014) (Judgment), the court affirmed the general principle that a court of equity converts a party who has obtained property by fraud into a trustee for the party who is injured by that fraud.
115. In this appeal, the evidence tendered by the appellant was based on fraudulent, illegal, and irregular dealings over the suit land that affected its locality, size, acreage, and ownership status. Non-joinder of the alleged key architect in the process was not a procedural irregularity. A cause of action is defined as a set of acts that trigger the plaintiff to complain. See *D.T Dobie & Company (Kenya) Limited vs Muchina* (1982) KLR.
116. The alleged blame on the part of the respondent started in 2010 with the demise of the initial land owner, followed by forceful removal and destruction of structures belonging to the appellant's relatives and eventually the tampering with the adjudication records, reduction of size, replacement of his name and relocation of the land parcel to a remote place.
117. The cause of action, as pleaded touched on the role of the land adjudication officers right from inception to the filing of the suit. It was not the duty of the trial court to direct the appellant on who to join and how to prove his claim against the alleged perpetrators of the complaint. A trial court should not descend to the arena of the trial.
118. Parties are free to fashion their claims in the best way possible as long as they adhere to the rules of pleadings, evidence, statutes, and *the Constitution*. The dismissal of the suit was not solely on non-joinder but equally on failure to prove the claim to the required standards, especially on fraud, illegality, and collusion whose balance of proof is above the expected standard as held in *Virjay Morjaria vs Nansingh Darbar* (2000) eKLR and *Arthi Developers vs West End Butchery & others* (2015) eKLR.
119. Regarding the manner in which the trial court handled the trial, having failed to establish whether the court had jurisdiction or not, it is not a surprise that there was back and forth in the manner that the trial court re-opened the trial by an order dated 12.9.2023 and DW 1 recalled to testify and rely on a report dated 26.6.2023 which was never produced as an exhibit.
120. The further evidence by DW 1, left more questions than answers. DW 1 was the one who had issued P. Exh No. (3) and (5) to the appellant. P. Exh No. (5) had indicated that parcel No. 5157 belonged to Zipporah Kinaitore M'Nchebere.
121. It is the same DW 1 who had also issued D. Exh No. (2) and as per D. Exh No. (3) he allowed Gaturu Marete M'Ikiao to file an objection over Parcel No. 730. Equally, DW 1 was unable to clarify the relationship between the disputed parcels of land and the history of their demarcation right from inception through authentic demarcation records and maps.
122. It is not enough before a court of law, for a party to rely on a filed report. The report relied upon by DW 1 in his further evidence was neither marked nor produced as an exhibit. In *Ken Nyaga Mwigie vs Austin Kiguta & others* (2015) eKLR, the court said that the mere marking of a document for identification does not dispense with the formal proof thereof. The court said that a filed document has to pass the three stages before it is proved or disproved to become part of a judicial record.
123. In view of the glaring contradictions of the report, as read together with earlier evidence from DW 1 my finding is that the report was unreliable, contradictory, and of no probative value. For instance, in D. Exh No. (2), DW 1 had indicated that Parcel No. 5157 was in the Ruiru/Rwarera Adjudication Section. In his evidence before the trial court, DW 1 changed his tune and told the trial court that Parcel No. 5157 was in the Mbwaa I Adjudication Section.



124. Equally as regards the size of Parcel No. 730, DW 1 was unable to ascertain its correct acreage vis a vis what had been stated in the objection proceedings No. 339. Moreover, the report had no attachments of certified copies of updated adjudication records and maps.
125. Furthermore, DW 1 was clear in his testimony that the arbitration cases were ongoing, leaving no doubt in the mind of the court that the suit was prematurely before the trial court.
126. I find the proceedings of the trial court amounted to a nullity as held in Bhajee (supra) and Kangu & 246 others vs Attorney General & 3 others suing on behalf of 210 members of Ntarangwi Settlement Scheme Self – Help Group (I.P) (ELC 141 of 1992) (2023) KEELC 1618 KLR (8<sup>th</sup> March 2023) (Ruling). The proceedings and judgment are, as a result of this, set aside with no orders as to costs. Parties are directed to subject themselves through the internal dispute mechanism set out under the [Land Adjudication Act](#). There will be no order as to costs.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 20<sup>TH</sup> NOVEMBER, 2024**

In presence of

C.A Kananu

Thuranira for the respondent

**HON. C K NZILI**

**JUDGE**

