



**Basi v Yasi & 5 others (Environment & Land Case 36 of 2021)
[2023] KEELC 34 (KLR) (16 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 34 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT & LAND CASE 36 OF 2021
EM WASHE, J
JANUARY 16, 2023**

BETWEEN

JOSEPH LETEIPA OLE BASI PLAINTIFF

AND

KOSIKA MOROMBI OLE YASI 1ST DEFENDANT

KIPIMO OLE YASI 2ND DEFENDANT

MOLA OLE YASI 3RD DEFENDANT

OLE KETONO OLE YASI 4TH DEFENDANT

BENARD YASI 5TH DEFENDANT

WILSON YASI 6TH DEFENDANT

JUDGMENT

1. These proceeding has been commenced by way of a Plaint dated 18th November 2020 and filed on the 23rd November 2020 (hereinafter referred to as “the present suit”) against the 6th Defendants seeking the following Orders; -
 - i. Declaration that the Plaintiff is the registered owner and/or lawful owner of LR No Transmara/olochani/124.
 - ii. An Order of eviction directed against the Defendants, their agents and/or servants from LR No Transmara/ololchani/124.
 - iii. Permanent injunction restraining the Defendants either by themselves, agents, servants and/ anyone claiming under the Defendants from entering upon, re-entering, trespassing onto, cultivating, building structures, felling down trees and interfering with and/or in any other



manner dealing with the suit land, that is, LR No Transmara/ololchani/124 and/or any portion thereof.

- iv. General damages for trespass.
 - v. Interest on (iv) hereto at Court rates.
 - vi. Costs of this suit be borne by the Defendant.
 - vii. Such further and/or other relief as the Honourable Court may deem fit and expedient so to grant.
2. The Present suit also contained a List of Witnesses dated 18th November 2020 together with the substantive witness statements and a Bundle of Documents dated 18th November 2020 enclosing the necessary documentary evidence to be adduced in Court at the hearing.
 3. The Present suit was served on the Defendant who then entered appearance on the 26th of January 2021.
 4. On the same 26th January 2021, the Defence Counsel filed a Statement of Defence, a List of Witnesses, substantive Witness Statements of the 1st and 3rd Defendants and a List of Documents including copies of the documents to be adduced at the trial.
 5. The Defendants on the 14th of April 2022 filed a Supplementary List of Document attaching the copy of the Title Deed in respect of LR No Transmara/ololchani/96.
 6. Before the hearing of this suit would commence, the Court directed that a Ground Report be prepared by the Sub-County Land Registrar, Transmara West, East and South in conjunction with the Sub-County Land Surveyor Transmara, West, East and South for purposes of identifying what would be the possible encroachment if any by either of the parties in this suit in view Title Deeds each one of them holds.
 7. Indeed, the Ground Report was prepared and filed on the 8th of June 2022 by both the Sub-County Land Registrar, Transmara West, East and South and the Sub-County Land Surveyor, Transmara West, East and South and various sketch maps attached thereto.
 8. Prior to the commencement of the hearing on the 28.06.2022, both parties agreed that they would only rely on the evidence tendered by the Sub-County Land Registrar, Transmara West, East and South and the Sub-County Land Surveyor Transmara West, East and South who would be Expert witnesses 1 and 2.
 9. The 1st Expert witness to take the Witness box was one Job Mitto Obado who is the Deputy Sub-County Land Registrar within Transmara West, East and South.
 10. The 1st Expert witness confirmed receiving Orders issued by this Court to visit and establish temporary boundaries and sizes of two properties known as LR No Transmara/olochani/96 And LR No Transmara/Ololchani/124.
 11. The 1st Expert witness further testified that this process of establishing the temporary boundaries and sizes of the two properties known as LR No Transmara/ololchani/96 And LR No Transmara/olochani/124 was done together with the Sub-County Land Surveyor Transmara West, East and South.
 12. The 1st Expert witness began his testimony by indicating that two ground visits were done on the 10th of May 2022 and 16th May 2022.



13. During these two ground visits, the Expert witness organised and held public barazas in the presence of all the parties in this suit.
14. Both the Plaintiff and Defendants in the presence of their Counsel were given an opportunity to point out their boundaries in accordance to the understanding of their ownership documents.
15. According to the Expert witness, it is indeed true that the property known as LR No Transmara/ololchani/124 registered in the name of the Plaintiff borders the property known as LR No Transmara/Ololchani/96 registered in the name of the 1st Defendant.
16. On the ground, the boundary between the two properties known as LR No Transmara/ololchani/124 And LR No Transmara/ololchani/96 has been demarcated by a line of Sisal plants as well as a number of trees.
17. Unfortunately, these sisal plants and trees which are to demarcate the boundary have not run to the end of the two properties.
18. The 1st Expert witness informed the Court that there is an area of about 30.03 Hectares which has been occupied by the Defendant by building of temporary houses but the Plaintiff is claiming the same to be within the property known as LR No Transmara/Olochani/124.
19. Within this disputed portion of 30.03 Hectares, there is also a church which has been built with the consent of the Plaintiff.
20. The 1st Expert witness proceeded to inform the Court that 1st Defendant's property known as LR Transmara/ololchani/96 physically occupies a ground area of 64.52 Hectares whereas the provided acreage on the Title Deed was 42.47 Hectares.
21. On the other side, the property known as LR No Transmara/olochani/124 owned by the Plaintiff physically occupies a ground area of 34.01 Hectares whereas the registered area on the Title Deed is 61.42 Hectares.
22. In concluding his evidence in Chief, the 1st Expert witness further testified that if the two properties known as LR No Transmara/OLolchani/124 and LR No TransmarA/Ololchani/96 would be identified and demarcated in line with the Registered Index Map of the two properties, then they would overlap on other parcels which are not in this dispute.
23. The Expert witness thereafter produced the Ground Report dated 8th June 2022 in compliance with the Court Orders issued on the 24th March 2022.
24. On Cross-examination by the Plaintiff's Counsel, the 1st Expert witness reiterated that the two properties known as LR No Transmara/Ololchani/124 And LR No Transmara/Ololchani/96 do border each other.
25. The 1st Expert witness further confirmed that there is a boundary demarcation done with Sisal plants as well as some trees although these do not run to the end of the boundary as envisaged.
26. In addition to the above demarcation features, there is a new barbed wire fencing which has been erected although it is captured in the documents contained in the Plaintiff filed on the year 2020.
27. According to the 1st Expert Witness, the barbed wire fence begins from where the disputed area is and includes that portion which the church is built.
28. The 1st Expert witness testified that from a normal perspective, the expectation of any land owner is that the acreage of the Title Deed should correspond with the available acreage on the ground.



29. Unfortunately, if the Registered Index Maps of the two properties known as LR No Transmara/ololchani/124 And LR No Transmara/ololchani/96 were to be implemented on the ground as provided on the Title Deeds, then other parcels of land would be adversely affected.
30. The 1st Expert Witness informed the Plaintiff's Counsel that the list of the parcels to be affected is in the Ground Report adduced in Court.
31. According to the evidence gathered in the public barazas, there was an indication that the sisal plants demarcating a portion of the boundary between the properties known as LR No Transmara/Ololchani/124 And LR No Transmara/ololchani/96 were planted by the Adjudication Committee whose members have since died except one who was present.
32. Nevertheless, the 1st Expert Witness admitted that this observation had not been captured in the Expert Report dated 6th June 2022.
33. The 1st Expert Witness informed the Court that during demarcation, the occupants within the Adjudication Section are requested to place natural boundaries.
34. Once this is done, an Aerial Photo is done and the Preliminary Index Diagram is prepared.
35. It is the Preliminary Index Map that facilitates the creation of the Registered Index Map.
36. In other words, the Registered Index Map should reflect how people occupy the ground during the demarcation process.
37. However, the ground occupation by the two properties namely LR No Transmara/Ololchani/124 And LR No Transmara/ololchani/96 does not conform with the Registered Index Map used to issue the Title Deeds.
38. The 1st Expert witness further denied knowledge of whether the barbed wire fencing was done at the time this suit was being filed in this Court.
39. As regards to these two properties known as LR No Transmara/Ololchani/124 And LR No Transmara/ololchani/96, the 1st Expert witness was of the view that the Registered Index Map should be amended to reflect the actual occupation of the ground.
40. The reasoning was that in properties which have general boundaries, the common practice is that registrars are trained to respect how the residents occupy the ground.
41. Similarly, the Registered Index Map is also not an authoritative guideline on how the boundaries should be observed and this is clearly indicated in every Registered Index Map.
42. In other words, the 1st Expert witness was of the view that the Registered Index Map is not the only and/or conclusive document to be relied upon in establishing boundaries.
43. On the part of the Defence, their Counsel also cross-examined the 1st Expert witness in support of their case.
44. The 1st Expert witness reiterated that the property known as LR No Transmara/ololchani/124 measures about 61.42 Hectares which is provided in the Green Card and/or Register.
45. However, physically on the ground, the same occupies only 34.01 Hectares.
46. On the other hand, the property known as LR No Transmara/Ololchani/96 measures approximately 42.47 Hectares according to the Green Card and/or Register.



47. Nevertheless, on the physical ground, the same occupies about 64.52 Hectares.
48. The 1st Expert Witness then referred to the Sketch Map attached to the Ground Report dated 6th June 2022 and identified the disputed area as that marked in Red.
49. The 1st Expert witness clarified that the place which is identified as the boundary with physical features is actually the boundary demarcated with sisal plants.
50. The 1st Expert witness further indicated that the boundary of the neighbouring property known as LR No Transmara/Ololchani/94 was not demarcated by any physical features but just maize and beans which had been planted therein.
51. The 1st Expert Witness reiterated that the Registered Index Map was not an authority on how the boundary is on the ground and this position is usually indicated on every Registered Index Map.
52. According to the 1st Expert Witness, the 1st thing any Registrar is required to establish are the demarcation and/or boundary features.
53. In the event there is no demarcation and/or boundary features, then the Registered Index Map would be used and see how it aligns with the occupation on the ground.
54. On the Ground, the 1st Expert witness informed the Court that the property known as LR No Transmara/ololchani/96 was bigger on the ground if you used the physical features found.
55. The 2nd Expert witness was Boen S. Kirwa who is a licensed Surveyor working in the Office of the Sub-County Survey Office, Transmara West, East and South.
56. The 2nd Expert witness informed the Court that he was present during the ground visits of 10th May 2022 and 16th May 2022 regarding the properties known as LR Notransmara/Ololchani/124 And LR No Transmara/Ololchani/96.
57. The 2nd Expert witness indicated that one of his core mandate was to pick the geographical co-ordinates of both the properties known as LR No Transmara/Ololchani/124 And LR No Transmara/Ololchani/96.
58. This exercise of picking the geographical co-ordinates was indeed done on the 16th of May 2022 in the presence of all the parties in this suit.
59. Upon completion of this exercise, the 2nd Expert witness informed that Court that the properties known as LR No Transmara/ololchani/124 And LR No Transmara/lolchani/96 do not have a common boundary.
60. The 2nd Expert witness therefore proceeded to prepare a drawing of the ground co-ordinates and occupation thereof and attached the same to his Report dated 6th June 2022 which he produced in Court thereafter.
61. The Plaintiff's Counsel then cross-examined the 2nd Expert witness on the Ground Report dated 6th June 2022.
62. According to the 2nd Expert witness, the Court directions was that temporary beacons be placed on the ground in accordance to the mutations and/or Registered Index Maps.
63. In compliance with the above directions, the 2nd Expert witness proceeded to pick out the ground occupation by the Plaintiff and the 1st Defendant.



64. In the 2nd Expert Witness's Report, it was found that the property known as LR No Transmara/ololchani/96 registered in the name of the 1st Defendant occupied a bigger acreage on the ground as compared to the acreage on the title.
65. Similarly, the property known as LR No Transmara/Ololchani/124 owned by the Plaintiff occupied a smaller acreage on the ground as compared to the acreage on the title.
66. According to the 2nd Expert witness, this scenario where the acreage on the title and the one on the ground differs occurs once in a while.
67. The 2nd Expert witness confirmed the existence of the sisal plants as a demarcation feature but indicated that they same do not run to the end of the Plaintiff's property and the 1st Defendant's property.
68. The 2nd Expert witness further confirmed the existence of a barbed wire fence which was recently erected.
69. The 2nd Expert witness nevertheless indicated that both the Plaintiff and the 1st Defendant pointed different demarcation boundaries and the boundary marked by the sisal plants was not agreed upon.
70. So far, the 2nd Expert witness indicated that the Registered Index Map has not been amended and is what he used in preparation of his Ground Report dated 6th June 2022.
71. In conclusion, the 2nd Expert witness stated that the ground occupation of the property known as LR No Transmara/ololchani/124 And LR No Transmara/ololchani/96 doe not reflect the manner in which the Registered Index Map envisaged.
72. The 2nd Expert Witness was further cross-examined by the Defence Counsel.
73. The 2nd Expert witness confirmed to the Court that he was the author of the Ground Report dated 6th June 2022.
74. The 2nd Expert witness further confirmed that the Map attached to the Ground Report dated 6th June 2022 was prepared by him.
75. According to the 2nd Expert witness, the map demonstrated the manner in which the Plaintiff and the 1st Defendant physically occupied the ground in comparison with the Registered Index Maps.
76. In the 2nd Expert Witness's opinion, there were physical features like the sisal plants and trees that demarcated the boundary.
77. These features were shown to the 2nd Expert witness by the 1st Defendant who is the owner of the property known as LR No Transmara/Ololchani/96.
78. As regards the boundary of the property known as LR No Transmara/ololchani/124, the Plaintiff who was the owner did not point out any physical features to clearly indicate the boundary thereof.
79. The 2nd Expert witness also reiterated that the Registered Index Map was not a conclusive and/or authority on determination of boundaries.
80. In concluding the cross-examination by the Defence Counsel, the 2nd Expert witness stated that most of the time, both the Land Registrar and the Land Surveyor also look at the physical features including trees, fences and rivers.



81. At this point in time, the Counsel for the Plaintiff and the Defendants mutually agreed to close their parties cases on the basis that their testimonies were included in the Ground Reports and it was not necessary to have them testify again in Court.
82. The Court therefore directed that submissions be filed which order was compiled with by the Plaintiff filling his submissions on 8th September 2022 and the Defendants filling theirs on the 17th October 2022.
83. The Court upon going through the pleadings, the testimony of the Expert Witnesses as well as the documents produced in Court, the main issue(s) for determination is mainly as follows; -
 - A. Are The Boundaries Of The Plaintiff's Property Known as LR No Transmara/Ololchani/124 clearly demarcated & have the defendant's encroached therein?
 - B. Is the plaintiff entitled to the reliefs sought in the plaint dated 18th November 2020?
84. The Court having outlined the above issues for determination, the same shall now be considered based on the testimony adduced in Court, the documentary evidence produced in Court and the applicable law.

Issue No a- Are the Boundaries of the Plaintiff's Property known as LR No Transmara/Ololchani/124 be clearly demarcated & have the defendant encroached them?

85. According to the pleadings filed herein and the testimony of both Expert witnesses, it is in no doubt that the property known as LR No Transmara/ololchani/124 is lawfully registered in the name of the Plaintiff herein.
86. According to the Plaintiff's List of Documents and the testimony of the Expert witnesses, the total acreage of the property known as LR No Transmara/ololchani/124 is approximately 61.42 Hectares.
87. However, physically on the ground, the Plaintiff claims that the Defendants have encroached, trespassed and/or illegally occupied a portion the property known as LR Transmara/Ololchani/124.
88. The Defendants on the other hand deny the allegations of encroachment, trespass and/or illegal occupation of any portion of the property known as LR No Transmara/Ololchani/124.
89. The Defendants position is that the area which they occupy is part of the property known as LR No Transmara/Ololchani/96 which is registered in the name of the 1st Defendant.
90. The Defendants have placed reliance to the physical features demarcating the boundary including the sisal plants and other trees the between the suit property and LR No Transmara/oLolchani/96.
91. Both the 1st and 2nd Expert witnesses confirmed to the Court that the titles held by the Plaintiff and the 1st Defendant were issued using general boundaries emanating from Registered Index Maps created from the Preliminary Index Diagrams.
92. The Preliminary Index Map and subsequently the Registered Index Maps are maps that should be reflective of the physical occupation of the by the land owners.
93. Unfortunately, in this particular suit, the registrable acreage on the titles held by the Plaintiff and the 1st Defendant do not conform with the ground occupation.
94. The Plaintiff's title of the suit property indicates that the registrable acreage is 61.42 Hectares but the actual physical occupation is 34.01 Hectares.



95. On the other hand, the 1st Defendant title known as LR No Transmara/Ololchani/96 has a registrable acreage of approximately 42.47.
96. However, physically on the ground, the same occupies about 64.52 Hectares.
97. Consequently therefore, the application of the Registered Index Map physical location of the properties known as LR No Transmara/ololchani/124 and LR No Transmara/ololchani/96 would not be reflective of the ground occupation and will further affect other neighbouring parcels of land which have been outlined in the Ground Report dated 6th June 2022 by the Sub-County Surveyor, Transmara East & West.
98. The 1st Expert witness testimony was that the Registered Index Map is not reflective of the ground occupation and required to be amended so that every occupant has his area of occupation ascertained and demarcation done appropriately.
99. The 1st and 2nd Expert witnesses concurred on the fact that the strict application of the Registered Index Map in demarcating boundaries is not correct because they are not authorities in themselves for identification of land boundaries.
100. Both Expert witnesses draw the Court's attention to the remarks "this diagram is not an authority on boundaries" which are endorsed on every Registered Index Map.
101. 1st and 2nd Expert witnesses emphasized that the use of physical features like plants, trees and/or even rivers form a critical part of identifying general boundaries.
102. According to the testimony of the 2nd Expert witness, the Plaintiff herein was not able to identify any physical feature that demarcated the boundary between the suit property and the 1st Defendant's property.
103. Indeed, the Court has perused the Registered Index Maps produced by the 2nd Expert Witness and confirm that indeed, the same contain the words "this diagram is not an authority on boundaries".
104. Plain interpretation of the words "this diagram is not an authority on boundaries" is basically a formal disclaimer by the office of the Director of Surveyor to the strict application of the boundaries drawn in Registered Index Map without looking into other aspects on the ground like physical demarcation features and possibly even occupation thereof.
105. Both the 1st Expert Witness Ground Report as well as the 2nd Expert Witness Ground Report allude to the incorrectness of the Registered Index Map as appertains the occupation of the ground thereby resulting to boundary disputes and possible overlap with other properties.
106. Section 18 and 19 of the *Land Registration Act*, 2012 provides the duty of resolving boundary disputes and fixing boundaries of Registered parcels of land to be the mandate of the Land Registrars.
107. In the case of *George Kamau Macharia v Dexka Limited* (2019) eKLR, the Court held as follows; -

“From the above provisions of the law, it is manifestly clear that the above section gives the mandate to the Land Registrar to resolve boundary disputes of land with general boundaries. Registry Index Map (RIM) only indicate approximate boundaries and the approximate situation on the ground. Even if this Court was to hear and determine this matter it will still require the input of the Land Registrar. The framers of Section 18 (2) of the *Land Registration Act* placed this matter before the land registrar who has the technical advice and resources of the district surveyor to determine and ascertain the boundaries.”



108. It is therefore this Court's considered view that the boundaries of the suit property cannot be ascertained before the Land Registrar resolves the issue of the Registered Index Map and the physical land occupation thereof.
109. By extension thereof, the Defendants can not be deemed to have trespassed, encroached and/or illegally occupied the suit property before the Land Registrar has resolved the issue of the Registered Index Map to reflect actual physical occupation and ownership of the land within this area.
110. In conclusion therefore, the Court hereby makes the following Orders in relation to the Plaint dated 18th November 2020; -
- A. The Plaint dated 18th November 2020 be and is hereby dismissed forthwith.
 - B. The Sub-County Land Registrar, Transmara West, East and South be and is hereby directed to register and resolve the boundary dispute between the properties known as LR No Transmara/Ololchani/124 and LR No Transmara/Ololchani/96 within Ninety (90) Days from the pronouncement of this judgement.
 - C. The Sub-County Land Registrar, Transmara West, East and South is further directed upon resolving the boundary dispute between the properties known as LR No Transmara/Ololchani/124 and LR No Transmara/Ololchani/96 proceed to point out and affix the necessary boundaries separating the two parcels of land thereof.
 - D. Each party shall bear their own costs for this suit.

DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 16TH JANUARY 2023.

EMMANUEL.M.WASHE

JUDGE

In the presence of:

Advocates For The Applicant:

Advocates For The Respondents:

