



**Keter v Seurei (Environment & Land Case 8 of 2021)  
[2023] KEELC 16131 (KLR) (28 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 16131 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET  
ENVIRONMENT & LAND CASE 8 OF 2021  
MN MWANYALE, J  
FEBRUARY 28, 2023  
(FORMERLY ELDORET ELC APPEAL NO. 61 OF 2012)**

**BETWEEN**

**STEPHEN KIPRUTO KETER ..... PLAINTIFF**

**AND**

**EZEKIEL K SEUREI ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff vide his amended plaint dated 6<sup>th</sup> March 2001, has sought a permanent injunction to issue against the Defendant and his agents and/or his servants and or his executors from interfering with the Plaintiff's parcel of land know as Nandi/ Lolkeringet/344 measuring 7.5Ha.
2. The Plaintiff seeks costs and interest thereon as well as any other or further relief the Court may deem just and fit to grant.
3. The suit proceeded partly before the High Court at Eldoret in terms of interlocutory application which was comprised by way of a consent dated 1<sup>st</sup> December 2006.
4. Thereafter the matter was transferred to Eldoret ELC Court assigned case No. 61/2012 and two Plaintiff's witnesses PW1 and PW2 were heard at Eldoret and the matter was again transferred to Kapsabet ELC Court, for hearing and determination upon establishment of this Court.
5. Parties took directions to proceed from where it had reached and proceeding were typed.

**Plaintiff's Case and Evidence:**

6. It is the Plaintiff case as pleaded in the Amended plaint aforementioned.
  - i. That he was the registered owner of all that piece of land known as Nandi/ Lolkeringet/344 measuring 7.5 Ha.



- ii. That he had been in occupation and use of the parcel of land uninterrupted for a period of over 12 years.
  - iii. The Defendant is an adjoin land owner where there is a district boundary separating the Plaintiff's and the Defendant's pieces of land.
  - iv. The Plaintiff further pleaded that the Defendant had been laying a claim over a portion of the Plaintiff's parcel and had commissioned a surveyor to undertake a survey with the aim of subdividing the Plaintiff's parcel without a valid Court order.
  - v. The Plaintiff further avers that he had no dealings with the Defendant over Nandi/Lolkeringet/344, and as a result the Plaintiff sought for the injunction as outlined in paragraph 1 of this judgment.
7. PW1 was the County Nandi Surveyor Nandi County Mr. Kiplimo. It was his evidence that pursuant to a Court order he did visit the suit parcels to fix boundaries; and he found that where the original acreage of Nandi/ Lolkeringet 83 was indicated to be 53.5 acres in the title deed before subdivision to Nandi/ Lolkeringet 248 and Nandilolkeringet 249, his team picked the actual acreage of Nandi/ Lolkeringet 83 was 44 acres. He produced the survey report as P Exhibit No. 1.
  8. In cross – examination, the witness stated, he stated that the surveyor had the whole parcel and if it is less on the ground then the issue has to be brought to the attention of the Land Registrar.
  9. In re-examination, he did not have records to show that parcel No. 83 was subdivided to parcel No. 248 and 249.
  10. PW2, the then Nandi County Land Registrar Violet Lamu testified. It was her testimony that Nandi/ Lolkeringet/83 was originally registered in the name of Kibichi arap Maiyo and was closed on 22/9/66 on subdivisions 248 and 249.
  11. She did not have any supporting documents to that effected the subdivisions, (mutation consent to subdivide and an amended RIM). Parcel number 248 registered in names of Kibichy arap Maiyo measuring 33.5 acres, and parcel number 249, registered on 22/9/196 in the name of Kimetei A. Chebon measures 8.0 hectares.
  12. The witness had not seen the P Exhibit No. 1 and could comment on it, and she needed further instructions to ascertain the acreage of plots Nos. 248 and 249. The witness produced copy of extract of record for parcel No. 83 as P Exhibit No. 2, extract for parcel number 248 measuring 33.5 acres as P Exhibit 3, and parcel No. 249 measuring 20 acres as P Exhibit No. 4. It was her evidence that the case called for actual measurement on the ground.
  13. On cross – examination, the witness stated that parcel No. 83 was approximately 53.5 acres according to records.  
  
Plot No. 248 and 249 were registered in the name of two different people Kibichi arap Maiyo and Kimeli A. Chebong respectively, but there was no transfer to Kimeli A. Chebong. 249 measured 20 acres. Or 8 hectares. She stated that the actual measurement is supposed to be picked on the ground, when there is disparity or discrepancy then a resurvey has to be done to correct the same.
  14. She answered that the mutation and RIM ought to be on the file.
  15. In re-examination, the witness stated that the report indicated the acreage as 44 acres. It was her answer that under 79 of the [Land Registration Act](#), it is provided for actual acreage. Hence Court can order for a resurvey.



16. The Plaintiff Stephen Keter testified as PW3, and adopted his witness statement and produced documents in the list of documents as P Exhibit 5 to 20. It was his testimony that his late father owned Nandi/ Lolkeringet which had 53 ½ acres and sold 20 acres to the Defendants father and he remained with 33 ½ acres. No subdivision was effected on the ground but was done on paper. Nandi/ Lolkeringet 248 was thus 33.5 acres while Nandi/ Lolkeringet 249 was 20 acres.
17. It was his further testimony that upon demise of his father, he and his sister undertook succession and he got 20.5 acres while the sister got 13 acres but no subdivision was also made on the ground. In 1982, a survey found that parcels 248 and 249 did not exist, which led him to file a suit against Defendant's father and a determination was made that the two parcels Nandi/ Lolkeringet 248 and 249 were different parcels with distinct a acreage and registered to different persons.
18. The Plaintiff accepted the Surveyors report, that there was a missing acreage of about 9 acres and it was his wish that they (Plaintiff and Defendant) shared the loss on prorata basis, with the Plaintiff to get 28.5 acres in plot number 248 and plot number 249 for the Defendant to be 16.3 acres, making it 44.8 acres as surveyed for plot number 83 as it originally was.
19. On cross – examination by Mr. Keter, the Plaintiff stated that his father had sold 20 acres to the Defendant's father. That the titles or 248 and 249 were issued in 1996 and the green card for 83 was closed on 12/9/1962.
20. He stated that he had sued the Defendant's father for fraud and the case was dismissed. That he sued in the tribunal and his sister was one of the witnesses in the tribunal. The property is not fenced. His father had sold 20 acres but the Defendant should get 16.5 acres; he would not be happy if the Registrar hives out 20 acres.
21. In re- examination, he stated that he was not prosecuted for damaging any fence. The mutation was done on paper not on the ground. He stated that he didn't know the acreage of 248 on the ground. He do not have mutation for 1962. He wished the survey conducted by the Surveyor showing where each party was occupying to be sanctioned by the Court.
22. After the close of the testimony of the three witnesses, the Plaintiff's case was closed.

**Defendant's Case: -**

23. The Defendant filed his defence on 15<sup>th</sup> June 2004. In his defence the Defendant admitted the existence of a common boundary between land parcels numbers Nandi/ Lolkeringet 344 and Nandi/ Lolkeringet 249. The Defendant pleaded that there was no grant of letters of representation issued to him in respect of his late father's estate and there was no cause of action against him.  
  
The Defendant further pleaded that the Plaintiff had illegally and without any justifiable cause without part of the deceased's land and declined to have the long standing boundary fixed and determined and to have the boundary dispute resolved.
24. It was the Defendants further defence that issues raised in the suit were resjudicata as they were finally adjudicated and determined in Kapsabet CMC Land case No. 13/ 1986. Stephen K. Keter vs Kimurei A. Chebong.
25. It was the Plaintiff further defence that the Court lacked jurisdiction to deal with issues of boundary to registered land as jurisdiction is exclusively and expressly vested on the Land Registrar and as such prayed for the suit to be struck out and/or dismissed and the Defendant reserved the right to raise the issues by way of preliminary objections before hearing of the suit.



26. The Defendant was the sole witness in his case testifying as DW1. It was his evidence while adopting his witness statement dated 11/4/2018 as part of his evidence in chief that he have undertaken a succession cause in respect of Kinei Arap Chebong his late father, and that he had been given Nandi/ Lolkeringet 249. His father had purchased the same from the father of the Plaintiff and he had taken possession of the property in 1976. The property was only subdivided on paper but not on the grounded.
27. The Defendant produced the documents listed on his list of documents dated 11/4/2018 as D exhibit 1 to 14.
28. The Defendant confirmed that succession in relation to his late father's estate, and as a result of the succession he (the Defendant) was the owner of Nandi/ Lolkeringet 249 for 20 acres.
29. It was his testimony that his father had purchased 20 acres from the father of the Plaintiff Kibichy Arap Maiyo, and that his father had taken possession of the property and the he had lived thereon since 1976, but the property had not been subdivided on the found, though it had been subdivided on paper.
30. The Defendant stated that he wanted his 20 acres, as he was occupying 17 acres, yet the green card for Nandi/ Lolkeringet indicated that the property was 20 acres. The Defendant produced the green card for Nandi/ Lolkeringet 249 as D Exhibit 15 and prayed for the Court to grant him the 20 acres together with costs.
31. On cross – examination by Mr. Ngigi, he stated that he did not have the agreement for sale, neither did he have the Land Control Board consent to transfer. He stated that he did the property had not been subdivided on the ground, although he had been shown the boundaries of the property by his late father, there were no beacons. He did not accept the survey report, because his property was not 20 acres.
32. He stated that he did not have a counterclaim. On D Exhibit 249, he stated that the approximate hectares recorded was 8.0 hectares which was about 20 acres. He answered that the vendor and purchaser believed that the property was 53.5 acres. He stated that he wanted to be peaceful.
33. On re- examination, he stated that he did not agree with the surveyor's report since his father had bought 20 acres and he should be given the said acreage. He stated that the vendor and purchaser were responsible for any consents, he did not sign any agreement, and the agreement was not disputed. He wanted to be given 20 acres.
34. On the sole testimony of the Defendant, the Defence case closed and parties were directed to file submissions.
35. In his submissions before Court, the Plaintiff framed two issues for determination.
  - a. Whether or not the Plaintiff has made a case for rectification of the register of the suit land to wit Nandi/ Lolkeringet/83 and the resultant subtitles No. Nandi/ Lolkeringet/248 subtitles (No. 344 AND 343).
  - b. Whether or not the plaintiff has established a case for the grant of permanent injunction against the Defendant over his land parcel.
  - c. Whether or not the Plaintiff deserves costs of the suit.
36. The Plaintiff submits invoking Section 80 (i) of *Land Registration Act* that the Court should order a rectification of the registers as there is an error apparent on the face of records for Nandi/ Lolkeringet/83 whose acreage read 53 instead of 44.



37. The Plaintiff further submits that he has made out a case for permanent injunction; between the two parcels No. 344 and 249.
38. On his part the Defendant submits that the issue for the Court to determine is how the boundary between the land parcel number Nandi/ Lolkeringet 249 and Nandi/ Lolkeringet 344 is to be determined.
39. The Defendant further submits that there were previous cases and decrees in involving the parties which all were resolved in favour of the Defendant. In Kapsabet RMC Land case No. 13 of 1996. It was held that the 20 acres belonged to the Defendants father in Nandi/ Lolkeringet/83.
40. The Defendant further submit that the determination of the 20 acres in Nandi/ Lolkeringet/249 was already made and that this Court thus remains with the duty of determination of the boundary between the Defendant's twenty acres an Nandi/ Lolkeringet 249 and the Plaintiff's parcel in Nandi/ Lolkeringet/344.
41. The Defendant further submits that a seller of land retains the balance of his title after what is sold is curved out and the Defendant submits thus that the Court directs that in fixing the boundary, 20 acres should first be curved out, from the initial Nandi/ Lolkeringet 83 being Nandi/ Lolkeringet/249 and beacons fixed thereto.

**Issues for Determination: -**

42.
  - i) Whether or not the Plaintiff has proved his case on a balance of probabilities.
  - ii) Whether or not the Defendant is entitled to additional 3 acres so as to make Nandi/ Lolkeringet/249 20 acres.
  - iii) What reliefs ought to issue?
  - iv) Who bears the cost of the suit?

**Analysis and Determination: -**

43. Both the Plaintiff and the Defendant are registered owners of parcels number Nandi/Lolkeringet 248 (sub 344) on the part of the Plaintiff and Nandi/ Lolkeringet 349 on the part of the Defendant. They were registered respectively through transmission, after the Plaintiff's father sold 20 acres in Nandi/ Lolkeringet/83 to the Defendant father, although no subdivision was done on the ground to confirm the acreage. It was initially believed that Nandi/ Lolkeringet/83 was 53.5 acres, so that upon sale of 20 acres, the residue was 33.5 acres, but upon survey Nandi/ Lolkeringet/83 was found to have actually been 44 acres so that upon sale of 20 acres, the residue was 24 acres.
44. It is the Plaintiff position that there as there was a mistake as to the actual acreage of Nandi/ Lolkeringet/83, resulting to a loss of 9.5 acres then the loss should be shared on a prorata basis. The Defendant however is of the view that his father had purchased 20 acres, and he is therefore entitled to the 20 acres, as there the mistake in the acreage did not affect the sale as there was no mistake in sale of the 20 acres.
45. If the Court were to be persuaded by the Plaintiff's argument of sharing the loss on prorata basis, the same would be based on whether there was a mistake in the initial agreement of sale, so as to vitiate the said agreement.



46. Whereas it is clear that the intention of the parties was to sale and purchase 20 acres, the mistake was on the acreage of Nandi/ Lolkeringet/83 as per the title. The Court finds merit in the Defendant's submission that a seller of land retains the balance of his title after what is sold is curved out.
47. The Courts have had occasion to determine similar issues as to whether a mistake in acreage would affect the property already sold and have found that such mistakes would not affect the privity of the contract entered between the parties especially where the intention is clear, as was in this case, where the Plaintiff confirmed that his father had sold 20 acres and the Defendants father had bought the said 20 acres.
48. In the case of *Nebart Njeru Munyi vs Nicholas Murithi Zakaria* (2015) eKLR the Learned Judge when faced with similar circumstances held as follows;
- “It is my considered opinion that the mistake on part of the Appellant on the size of the land did not affect the contract. The Magistrate correctly held that there was no basis of restitution the parties to their original position. It was irrelevant that the Appellant tried to make amends after the breach of the agreement.”
- This Court agrees with the above position and there is thus no basis for sharing of the lost acreage on prorata basis; as submitted by the Plaintiff.
49. Having found that the Plaintiffs claim has no basis, it follows that on a balance of probabilities the Plaintiff has not proven his case and does not deserved the reliefs sought issue number 1 is thus answered in the negative.
50. With regard to issue number 2, the Defendant produced as D Exhibit 2 a decree in Kapsabet R.M. Land case No. 13 of 1986 Stephen K. Keter vs Kimurei A. Chebong, where 20 acres were decreed to have formed part of Nandi/ Lolkeringet/249, owned by the Defendants father. Consequently the said decision settled the issue of acreage, and it was incumbent on the Defendant to have implemented that decision by undertaking the survey.
51. The current case was filed in the year 2001, while the decree was issued in 1988. The actions giving rise to the suit and complained of at paragraph 8 of the plaint were thus meant to give effect in the decree issued in 1988. However in 2001, the decree in land case No. 13/1986 was already statute barred by Section 4 (4) of the *Limitation of Actions Act*. The Defendant could not therefore implement the decree. The Defendant in his testimony has sought for the 20 acres. The Court finds that whereas he is entitled to the 20 acres as was found in Kapsabet RMC Case No. 13 of 1986 and having reached the same conclusion, the Defendant regrettably did not file a counterclaim for the balance of the 3 acres; to make 20 acres as he is currently occupying 17 acres. The Defence filed on 15<sup>th</sup> June 2004 does not have a counterclaim pleaded and the Defendant confirmed the same in cross – examination. Had the Defendant filed a counterclaim, in view of the findings of this Court, the same would have succeeded.
52. Parties are bound by their pleadings and whereas the Court has determined that the Defendant is entitled to the 3 acres the Court cannot award the 3 acres to the Defendant as he has not counterclaimed the same.
53. The issue of the difference in acreage arose during the evidence of the Defendant and was not pleaded but the Court had to make a finding on the same. In making the finding the Court is guided by the Court of Appeal decision in *Odd Jobs vs Mubia* (1970) E. A. 476 which decision was quoted in the



case of *Ann Wairumu Wanjohi vs James Wambiru Mukabi* (2021 eKLR) where the Court observed as follows;-

“ 33 Odd Jobs vs Mubia remains good law that in limited circumstances where an unpleaded issue is crucial to the matter in issue, the Court may determine a suit on the unpleaded issue provided both parties have clearly addressed the unpleaded issue in evidence or submissions. However such determination will not extend to determining or awarding a relief that was not specifically sought in the pleadings.....”

54. Consequently the Court is not able to award the 3 acres to the Defendant so as to it make 20 acres, in the absence of a counterclaim.
55. On issue number 3, what reliefs are to be granted? As noted from the earlier from the judgment, the Plaintiff has not proven his case, and the Defendant has not pleaded a counterclaim, to enable him seek the less acreage. The solution to this case is found in the application of the doctrine of deference in AJS (Alternative Justice System). Under Article 159 (2) (c) the Court is required to recognise Alternative Dispute Resolution Mechanisms and Traditional Dispute Resolution mechanism for AJS form part of the Alternative Dispute Resolution.
56. Under Section 20 of the Environment and Land Court, the Court can on its own motion, recognise, Alternative Justice System and adapt the same in its judgment. So long as it is not repugnant to justice and morality. This Court in the case Kapsabet ELC Case No. 68 of 2021 Kitur vs Kitur as well as Kapsabet ELC Case No. 103 of 2021 Hellen Maiyo vs Eveline Chemogon Ngisirei, applied, and recognised traditional dispute resolution mechanism as forms of Alternative Dispute Resolution Mechanism.
57. In the course of proceedings the Court has ordered a survey report to be filed. A survey report dated 6<sup>th</sup> June 2021 with an Annexure of a survey report dated 30/6/2021 was filed in Court under the provisions of Order 18 Rule 10 of the *Civil Procedure Rules* and Section 146 (4) of the *Evidence Act*. In the said report, it was observed that there was no defined boundary but the parties had a “boundary of peace” which enabled the parties to exist peaceful, the boundary of peace is said to clearly seen by blue gum trees and tall thick grass as the boundary, and it is clearly identifiable on the ground.
58. The Court thus recognises the boundary of peace and adopts the as boundary of peace between the parties as a judgment of the Court. In the said survey report dated 30<sup>th</sup> June 2021, the acreage of Nandi/ Lolkeringet 248, comprising of subdivision 343 and 344 measures 27.77 acres, while Nandi/ Lolkeringet 249 measures 17.03 acres.
  - i. The parties are thus directed to stay in their respective portions, as per the survey report 30/6/2021 and the boundary of peace currently existing.
  - ii. The County Land Surveyor to demarcate and place beacons on the ground as per the survey report dated 30/6/2021 to wit Nandit/Lolkeringet 248 comprising (subdivisions 343 and 344) to measure 27.77 acres and the Nandi/Lolkeringer 249 to measure 17.03acres.
  - iii. The County Land Registrar to rectify the titles to correspond with the actual acreage on the ground as follows; Nandi/ Lolkeringet 248 (Comprising subdivision 343 and 344 to measure 27.77 acres and Nandi/ Lolkeringet/ 249 to measure 17.03 acres.
59. As the Plaintiff’s case is dismissed. The Plaintiff shall bear the costs of this suit.
60. Judgment accordingly.



**DATED AT KAPSABET THIS 28<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**HON. M. N. MWANYALE,**

**JUDGE**

In the presence of;

Mr. Keter Nyolei for the Defendant

Mr. Ngigi Mbugua for the Plaintiff

