



**Masake v Nyangwara (Environment & Land Case E003 of 2022)
[2023] KEELC 16561 (KLR) (29 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16561 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT & LAND CASE E003 OF 2022**

**EM WASHE, J
MARCH 29, 2023**

BETWEEN

SIMION MASAKE PLAINTIFF

AND

HELLEN MORAA NYANGWARA DEFENDANT

JUDGMENT

1. The Plaintiff filed the present Plaint dated 14th February 2022 (hereinafter referred to as “the Plaint”) against the Defendant seeking for the following Orders; -
 - i. Declaration that the Plaintiff is the registered and/or lawful owner of L.r.no.transmara/nkararo/341.
 - ii. An order of eviction directed against the Defendant, her agents and/or servants from L.r.no.transmara/nkararo/341.
 - iii. Permanent injunction restraining the Defendant either by herself,agents,servants and/or anyone claiming under the Defendant from entering upon,re-entering, trespassing unto,cultivating,building structures and/or houses, residing on, interfering with and/or in any other manner dealing with suit land that is L.r.no.transmara/nkararo/341 and/or any portion thereof.
 - iv. General damages for trespass.
 - v. Costs and interest.
2. The Plaint was then served on the Defendant who in response filed a Statement of Defence dated 25th February 2022.



3. The Defendant in the Statement of Defence stated that the Plaintiff had obtained the Title Deed of the property known as L.r.no.transmara/nkararo/341 fraudulently and his ownership did not reflect the actual position of the ground which is that the Defendant was in occupation.
4. The Plaintiff in rebutting the Defendant's Statement of Defence filed a Reply to the Statement of Defence dated 30th May 2022 reiterating the legitimacy of the title he holds and the ownership of the property known as L.r.no.transmara/nkararo/341 generally.
5. The pleadings thereafter closed and the hearing of the suit began on the 27/09/2022.
6. The Plaintiff herein was called as the 1st Plaintiff's witness.
7. PW 1 introduced himself as a teacher by profession and a resident of Nkararo area.
8. PW 1 indicated that he was the registered owner of the property known as L.r.no.transmara/nkararo/341.
9. PW 1 produced a copy of the Title Deed of the property known as L.r.no.transmara/nkararo/341 issued on 29/01/2021 as the Plaintiff's Exhibit 1.
10. PW 1 also produced a copy of an Official Search dated 03/02/2022 for the property known as L.r.no.transmara/nkararo/341 confirming the Plaintiff to be the duly registered owner thereof as Plaintiff Exhibit 2.
11. PW 1 further produced in Court a copy of the Official payment Receipt dated 03/02/2022 for the fees payable while seeking for an official search from the Lands office as Plaintiff Exhibit 3.
12. PW 1 confirmed to the Court that he was familiar with the Defendant herein.
13. According to PW 1, the Defendant had encroached on his property known as L.r.no.transmara/nkararo/341 and constructed temporary structures without his express consent thereof.
14. PW 1 position is that the Defendant did not have any lawful right to enter, use and/or occupy any portion of the land known as L.R.NO.Transmara/nkararo/341.
15. PW 1 further testified that the Defendant did not have any ownership document to prove ownership of the property known as L.r.no.transmara/nkararo/341.
16. PW 1 then produced a bundle of pictures of the illegal structures and activities undertaken by the Defendant on the property known as L.r.no.transmara/nkararo/341 as Plaintiff's Exhibits 4.
17. Based on this unlawful entry and illegal occupation of the property known as L.r.no.transmara/nkararo/341 by the Defendant, the Plaintiff filed this suit to deal with the dispute at hand.
18. PW 1 prayer was that the Court should direct the Defendant to vacate and/or yield vacant possession of any portion of land within L.r.no.transmara/nkararo/341 forthwith.
19. In addition to the above orders, the Plaintiff sought for a permanent injunction against the Defendant from entering, occupying and/or using any portion of the property known as L.r.no.transmara/nkararo/341 and costs of the suits thereof.
20. In cross-examination, PW 1 reiterated that he was a teacher by profession.
21. PW 1 informed the Court that the property known as L.r.no.transmara/nkararo/341 was allocated to him during the demarcation of Nkararo Adjudication Section in the year 1985.



22. PW 1 stated that he was physically present during the demarcation process and his name was entered in the Demarcation Register.
23. PW 1 nevertheless indicated that he had the Adjudication Register for the property known as L.r.no.transmara/nkararo/341 although he had not presented it in Court as part of his evidence.
24. Referring to Item No. 4 in the Defence List of Documents dated 25/02/2022, PW 1 informed the Court that his name did not appear on the said sheet of paper.
25. PW 1 stated that he was not familiar with the Sheet of paper presented by the Defence and could not ascertain the origin or author of the said Sheet of Paper titled Nkararo Rough Book.
26. PW 1 testimony was that the demarcation of Nkararo Adjudication Section began in the year 1985 and a title to the property known as L.r.no.transmara/nkararo/341 was issued in the year 2021.
27. PW 1 confirmed that the Adjudication Record of the property known as L.r.no.transmara/nkararo/341 indicated his name and the subsequent Title Deed issued therefore reflected the same name belonging to the Plaintiff.
28. PW 1 stated that he was a resident of Nkararo and is therefore a lawful owner of the property known as L.r.no.transmara/nkararo/341.
29. Referring to Item No. 5 in the Defence List of Documents dated 15th July 2021, PW 1 position was that the document was not addressed to PW 1.
30. According to PW 1, the said letter indicated that the Title Deed had been issued to the Plaintiff herein.
31. PW 1 stated that the Defendant encroached the suit property in the year 2021 and had produced photograph exhibits to that effect.
32. PW 1 informed the Court that according to the pictures, the Defendant had put up temporary structures, planted maize and sugar cane which is about 14 months old.
33. PW 1 indicated that it was due to these unlawful activities by the Defendant that made him institute this suit before the Court.
34. PW 1 told the Court that he had not personally interfered and/or harassed the Defendant since she trespassed on the property known as L.r.no.transmara/nkararo/341 but instead instituted this suit in an effort to resolve the issue of ownership.
35. PW 1 confirmed being familiar with the Demarcation Committee that allocated land within Nkararo by stating that the Chairman was Sompisha and the Secretary was Peter Ndururu.
36. PW 1 however told the Court that these two officials were not in his list of witnesses to testify in this case.
37. In Re-examination, PW 1 stated that Item No. 4 in the Defence List of Documents dated 15th July 2021 was not an Adjudication Record.
38. Again, referring to Item No. 5 of the Defence List of Documents dated 15th July 2021, PW 1 indicated that the Office of the Ombudsman did not have the legal powers to issue any title deeds.
39. PW 1 denied knowledge of any investigations being undertaken by the office of the Ombudsman regarding the manner in which the Plaintiff obtained the title deed to the property known as L.r.no.transmara/nkararo/341.



40. PW 1 reiterated that the Defendant had planted sugar cane and developed temporary structures within the property known as L.r.no.transmara/nkararo/341 without the Plaintiff's express authority.
41. PW 1 stated that the developments and cultivation done by the Defendant were recently done.
42. PW 1 confirmed that although he was the registered owner of the property known as L.r.no.transmara/nkararo/341, he was not residing on the said property.
43. PW 1 further confirmed that he had never harassed the Defendant at any given time and simply elected to file a suit to assert his legal rights.
44. At the end of this re-examination, the Plaintiff closed his case and did not call any other witness.
45. The Defence hearing commenced on the same day with the testimony of the 1st Defence Witness known as Hellen Moraa Nyangwara, the Defendant herein.
46. DW 1 introduced herself as a farmer residing within Nkararo within Transmara.
47. DW 1 informed the Court that she had prepared a Witness Statement dated 25/02/2022 and adopted the same as her evidence in chief.
48. DW 1 denied knowledge of the Plaintiff in this suit.
49. DW 1 stated that she stays in her own property which is Plot.No. 341 within Nkararo Adjudication Section.
50. DW 1 further stated that she had been in occupation of the said property known as Plot.No. 341 within Nkararo Adjudication Section since 1982 when she built temporary houses and cultivated the land.
51. In 1985, the demarcation of Nkararo Adjudication Section began and she requested to be allocated land.
52. DW 1 informed the Court that the demarcation committee and adjudication officers visited the ground she was occupying and allocated Plot.No.341 within Nkararo Adjudication Section to her and the children.
53. According to DW1, the Adjudication Committee as well as the Adjudication Officer duly recorded her name as the beneficial owner of Plot.No. 341 within Nkararo Adjudication Section.
54 Since this time of demarcation, the Defendant has been occupying the Plot.No. 341 within Nkararo Adjudication Section until now.
55. DW 1 informed the Court that although the photographs produced by the Plaintiff as Exhibit 4 were of her developments and crops, she had not consented to any pictures being taken by the Plaintiff.
56. DW 1 further stated that some of the temporary buildings in the photographs produced as Plaintiff's Exhibit 4 were built in the year 1982 while the structure with iron sheet roofing was built in the year 2000.
57. DW 1 further testified that after she planted sugar cane of Plot.No. 341 within Nkararo Adjudication Section, she went to the Land Adjudication & Settlement Officers and was given a letter dated 13th July 2011 confirming that she was the beneficial owner of the said property.
58. DW 1 stated that it was based on this letter dated 13th July 2011 by the Land Adjudication & Settlement Officer that she was able to plant sugar-cane and the trees in the said picture.



59. Unfortunately, for reasons not known to her, the title deed of Plot.No. 341 within Nkararo Adjudication Section was issued to the Plaintiff herein.
60. It is on the basis of this unlawful issuance of the title known as L.r.no.transmara/nkararo/341 to the Plaintiff that necessitated her to file a complaint with the Ombudsman's Office to seek justice.
61. DW 1 informed the Court that staff from the Ombudsman's office in Nairobi visited the ground and confirmed that she was the person occupying the property known as L.r.no.transmara/nkararo/341.
62. DW 1 reiterated that the property known as Plot.No. 341 within Nkararo Adjudication Section which later became L.r.no.transmara/nkararo/341 was her property and not the Plaintiff's.
63. In cross-examination, DW 1 stated that she had been told the property known as L.r.no.transmara/nkararo/341 had been given to the Plaintiff as the owner.
64. Consequently, the DW 1 wanted the title known as L.r.no.transmara/nkararo/341 issued to the Plaintiff be investigated so that the truth can be known.
65. DW 1 informed the Court that after being served with the pleadings of this case, she looked for the demarcation committee members and talked to them.
66. DW 1 also visited the Lands Offices in Kilgoris seeking for assistance but has not been successful.
67. DW 1 stated that if the Court ordered her to vacate the property known as L.r.no.transmara/nkararo/341, she would do so.
68. However, at the moment, DW 1 deemed the property known as L.r.no.transmara/nkararo/341 as her own property and did not need any permission from the Plaintiff to either reside and/or cultivate the said property.
69. In re-examination, DW 1 stated that she could not seek permission from the Plaintiff because the property known as L.r.no.transmara/nkararo/341 was her property.
70. Referring to Item No. 1 in the Defence List of Documents dated 15th July 2021, DW 1 confirmed that this letter was complaining about the illegal issuance of her title deed to a third party.
71. DW 1 stated that this was the reason she was pursuing this issue even in Court.
72. The Defence 2nd witness was Peter Korir.
73. DW 2 introduced himself as an investigator with the office of Ombudsman located in Nairobi.
74. DW 2 stated that one of the core functions of the Ombudsman's Office was to look into the malpractices of public officers in the execution of their duties.
75. Similarly, DW 2 testified that the office of Ombudsman dealt with issues of abuse of power by public servants, delays in serving the public, inefficiency and incompetent of public servants.
76. DW 2 stated that he was present in Court pursuant to Court Summons issued by the Court to present a Letter from the Office of the Ombudsman dated 15/07/2021.
77. DW 2 indicated that the letter dated 15/07/2021 had been authored by the office of the Ombudsman and addressed to one of the Defendant's sons known as Reverend Thomas Omari.
78. The contents of the letter dated 15/07/2021 was to inform the Defendant that her file at the Ombudsman's Office had been re-opened and investigations commenced.



79. According to DW 2, the Defendant had made a complaint against the Land Adjudication Officer alleging a delay in the processing of her title deed of Plot.No. 341 within Nkararo Adjudication Section.
80. DW 2 who was the investigating officer of the Defendant's complaint then proceeded to produce a number of documents he obtained during his investigation; -
- Defence Exhibit No. 1- Demarcation Book of Parcel No. 341 within Nkararo Adjudication Section.
- Defence Exhibit No. 2- Demarcation Map of Nkararo Adjudication Section within Transmara East.
- Defence Exhibit No. 3- Adjudication Record For Plot.No. 341 within Nkararo Adjudication Section.
- Defence Exhibit No. 4- Letter from the Land Adjudication officers dated 13/07/2011.
- Defence Exhibit No. 5- Letter from the office of the Ombudsman dated 15/07/2021.
- Defence Exhibit No. 6- Letter of Complaint to the office of the Ombudsman dated 27/11/2015.
- Defence Exhibit No. 7- Letter dated 22/02/2016 from the office of the Ombudsman to the Land Adjudication & Settlement Officer Transmara.
- Defence Exhibit No. 8- Letter dated 10/05/2021 from the Defendant herein.
- Defence Exhibit No. 9- Handwritten statement of the Land Adjudication Officer Transmara dated 25/08/2021.
- Defence Exhibit No. 10- An investigation Report in respect to Plot.No. 341 within Nkararo Adjudication Section done by the office of the Ombudsman dated 14/02/2022.
- Defence Exhibit No. 11- Photographs of the developments done by the Defendant in Plot.No. 341 within Nkararo Adjudication Section.
81. According to DW 2 investigations, the person recognised as the beneficial owner of the property known as Plot, No. 341 within Nkararo Adjudication Section was the Defendant.
82. DW 2 stated that the demarcation of Nkararo Adjudication Section was done in December 1987 and the demarcation map exists.
83. However, the Adjudication Record of Plot.No. 341 within Nkararo Adjudication Section was registered in the name of the Plaintiff herein.
84. Referring to Defence Exhibit No. 7- DW 2 informed the Court that this letter was a complaint requesting the office of Ombudsman to investigate why the title of Plot.No. 341 within Nkararo Adjudication Section had delayed.
85. DW 2 confirmed to the Court that this letter was responded by the Land Adjudication Officer with the message that issuance of titles was still on going.
86. Based on this response from the Land Adjudication Officer, the Defendant's file at the office of the Ombudsman was closed.
87. DW 2 informed the Court that he visited the ground and confirmed that the property known as L.r.no.transmara/nkararo/341 is occupied and used by the Defendant and his family.
88. DW 2 stated that the Photographs produced as Defence Exhibit 10 were taken by him.
89. DW 2 further indicated that the property known as L.r.no.transmara/nkararo/341 had temporary houses, sugar cane, maize and bananas planted therein.



90. DW 2 concluded his testimony by indicating that the property known as L.r.no.transmara/nkararo/341 should be the Defendant's property and not the Plaintiff as contained in his investigation report.
91. In cross-examination, DW 2 confirmed that the Title Deed of L.r.no.transmara/nkararo/341 had the name of the owner.
92. DW 2 indicated that the owner of the property known as L.r.no.transmara/nkararo/341 was the Plaintiff herein.
93. DW 2 testified that the Plaintiff herein does not work in the offices of the Land Department.
94. DW 2 confirmed that the Title Deed for L.r.no.transmara/nkararo/341 before the Court was issued by the Land Registrar, Transmara who is authorised to issue such documents.
95. DW 2 stated to the Court that during his investigations, there was no letter retrieved showing that the Defendant had requested for land to be allocated to her by the demarcation committee or the Adjudication Officer.
96. DW 2 was also not able to obtain any minutes from the demarcation committee or the Adjudication Officer indicating that the Defendant had been allocated any land within Nkararo Adjudication Section or was the beneficial owner of Plot.No. 341 within Nkararo Adjudication Section.
97. DW 2 further stated that he did not come across any letter either from the Local Administration indicating that the Defendant was a resident of Nkararo Adjudication Section or the beneficial owner of Plot.No. 341 within Nkararo Adjudication Section.
98. DW 2 admitted that during his investigations, there was no letter from the Defendant raising any objection against the Adjudication Record of the property known as Plot.No. 341 within Nkararo Adjudication Section or an Appeal to the Minister over the said parcel of land.
99. DW 2 recognised the significance of the Adjudication Record during Adjudication of any Section.
100. DW 2 nevertheless stated that the Defendant wrote a letter to the office of Ombudsman in the year 2015 decrying the delay in issuance of the title deed of Plot.No. 341 within Nkararo Adjudication Section.
101. DW 2 admitted that the report dated 14/02/2022 produced in Court as Defence Exhibit 10 had not been signed by the chair.
102. DW 2 stated that in recommendation No. 1 on the Investigation Report is referring to Section 79 (2) of an act which is not identified therein.
103. Recommendation No. 2 is that the Plaintiff should be investigated for criminal activities appertaining to how the title L.r.no.transmara/nkararo/341 was issued to him.
104. Recommendation No. 3 in the investigation report was that the Cabinet Secretary of Lands undertakes an audit of all the titles issued within Nkararo Adjudication Section.
105. DW 2 stated that during their investigations, the Plaintiff's testimony was not taken as he refused to present himself to their offices.
106. DW 2 indicated that he was surprised that the Defendant had not pleaded any particulars of fraud in her defence.
107. Nevertheless, DW 2 insisted that the property known as L.r.no.transmara/nkararo/341 should be registered in the name of the Defendant and not the Plaintiff herein.



108. In re-examination, DW 2 clarified that his reference of Section 79 (2) was in regards to the [Land Registration Act](#), No. 3 of 2012.
109. DW 2 stated that their investigation was to look at abuse of powers by the Land Adjudication and Settlement Officer.
110. To achieve this objective, DW 2 indicated that they had to evaluate the entire process as a whole and how the title was finally issued.
111. DW 2 confirmed to the Court that the Nkararo Adjudication Section was administered under the [Land Adjudication Act](#), Cap 284 and not the Land (Group Representatives) Act, Cap 287.
112. At the end of this Re-examination, the witness was discharged from the witness box.
113. The 3rd Defence witness was Maurice Robert Otieno.
114. DW 3 introduced himself as the Land Adjudication and Settlement Officer in Transmara West, East and South.
115. DW 3 informed the Court that his core mandate is to supervise and oversee adjudication exercises in different Adjudication Sections within Transmara.
116. In addition to the above, DW 3 also receives, listens and determines objections proceedings filed by aggrieved parties during the adjudication and give directions to the demarcation committee.
117. DW 3 explained that an Adjudication process commences with the publication of an Adjudication Section by his office.
118. The main reason for the declaration and publication of an adjudication section is to give notice to all persons in occupation of land within the adjudication section to register their interests.
119. Consequently thereof, the persons within the Adjudication Section are given about 6 months to point out and demarcate the boundaries of the land they occupy.
120. Thereafter, a demarcation committee begins visiting the occupants within the Adjudication Section and picking the boundaries as shown by the land occupants on the ground.
121. During this picking exercise, there is usually conflicts and/or disagreements on who is on the ground but the demarcation committee usually registers the person present on the land.
122. Thereafter, the dispute and/or disagreement is usually heard by the demarcation and/or Adjudication Committee members.
123. If one is not satisfied with the decision of the Adjudication Committee members, then an Appeal can be filed with the Land Arbitration Committee.
124. The members of the Land Arbitration Court are usually different from the Adjudication Committee and are appointed by the Regional Commissioner.
125. The Land Arbitration Court will usually review the decision of the Land Adjudication Committee.
126. Once a decision has been rendered by the Land Arbitration Committee, then the aggrieved party to that decision will have to wait until the final Record is published for inspection to file an objection.
127. According to DW 3, once demarcation is complete, the entire Adjudication Record is published as complete and the general public is invited to inspect the Adjudication Record for 60 days.



128. Usually, the Adjudication Record consists of the Photographic Index Diagram (Map) and Adjudication Register.
129. After the lapse of the 60 days provided for inspection, the Records that do not have objections are sent to the Director of Land Adjudication for processing and issuance of titles.
130. For those Records with objections, the objections are heard and determined by the Land Adjudication Officer.
131. If a party is still not satisfied with the decision of the Land Adjudication Officer, an appeal can be filed to the Minister within 60 days thereafter.
132. After the determination of an Appeal by the Minister from the Land Adjudication Officer, then the records are again forwarded to the Director of Land Adjudication for processing of the titles.
133. Once the Records reach the Director of the Land Adjudication, one copy is retained by the Director of the Land Adjudication and the duplicate copy is sent to the Chief Land Registrar to instruct the local District Land Registrar to open a Green Card and register the person in the Record as the owner of the said property.
134. As appertains to Plot.No 341 within Nkararo Adjudication Section, the extract of the Demarcation Book indicates that the property is allocated to the Defendant.
135. Similarly, DW 3 testified that according to the extract of the Demarcation Book, there was no objection against the entry of the Defendant's name.
136. DW 3 also confirmed to the Court that there was no letter by the Defendant seeking the Adjudication Committee to allocate her land.
137. DW 3 however clarified that the demarcation book was simply a data entry book by the Adjudication Committee.
138. DW 3 informed the Court that the first registerable record recognised under the [Land Adjudication Act](#), Cap 284 is the Adjudication Record.
139. If there is an objection to the accuracy of the Adjudication Record, then such an objection is reflected in the Adjudication Record and the outcome thereof is also indicated therein.
140. According to DW 3, a minor can still be recorded as an owner of land but the land will be registered to an adult in trust for the minor.
141. DW 3 stated that every Adjudication Record is filed in duplicate.
142. Currently, DW 3 stated he did not have the Adjudication Record of Plot.No.341 within Nkararo Section because one was with the Director of Land Adjudication and the second copy is with the Chief Land Registrar.
143. Referring to the letter dated 13/07/2011 which is Defence Exhibit 5, DW 3 confirmed that the letter on the face of it was done by one Land Adjudication Officer by the name BETHA.A.
144. DW 3 informed the Court that the Defence Exhibit 5 stated that the Defendant was the beneficial owner of the parcel Plot.No. 341 within Nkararo Section although DW 3 clarified that he was not the marker.
145. DW 3 reiterated that a Dermacation Book is a guiding data book.



146. DW 3 further stated that although such demarcation books should give guidance of the persons to be allocated land, it was his testimony that in Transmara this was not the case.
147. DW 3 indicated that at times, the names appearing in the demarcation book would be different from those in the Adjudication Records.
148. The main reason adduced by DW 3 for this disparity between the demarcation book and the Adjudication Record is because demarcation is not done in accordance with occupation but by application to the Adjudication Committee.
149. Consequently therefore, DW 3 stated that even if the Defendant's name was in the demarcation book, it was not automatic that it would appear in the Adjudication Record.
150. DW 3 confessed to the Court that he could not tell how the Defendant name was replaced with that of the Plaintiff.
151. DW 3 stated that he was not aware if Plot.No.341 within Nkararo Section was sub-divided or not.
152. In cross-examination, DW 3 denied knowledge of whether or not Plot.No. 341 was titled or not.
153. DW 3 stated that if the property is already titled, then this property is no longer within the land Adjudication department.
154. DW 3 reiterated that the Chief Land Registrar did not rely on the demarcation book but the Adjudication Record to produce a title deed.
155. DW 3 confirmed to the Court that there was no objection filed by the Defendant in regards to the Adjudication Record of Plot.No. 341 within Nkararo Section.
156. DW 3 also stated that the Defendant's name was not on the Adjudication Record of Plot.No. 341 within Nkararo Section.
157. Referring to Defence Exhibit 5- DW 3 stated that this letter did not have any addressee to whom it was written.
158. Similarly, DW 3 was not familiar with the officer who had written the letter verifying the ownership of the Defendant.
159. DW 3 indicated the records are usually kept by the Adjudication Committee.
160. In re-examination, DW 3 stated that their office does not keep the application letters for allocation to the Land Adjudication Committee.
161. DW 3 confirmed that the entries in the demarcation book are usually not verified by any person as to the correctness of such entries.
162. DW 3 stated that he had not interacted with the Land Adjudication Officer called BETHA A but had seen a couple of Affidavits done in the same name.
163. DW 3 informed the Court that BETHA A described herself as a Deputy Land Adjudication Officer and therefore can be assumed that she was a Land Adjudication Officer.
164. Upon completion of this brief re-examination, the witness was then discharged from the witness box.
165. The 4th Defence witness was Isaac Omweri.
166. DW 4 introduced himself as a farmer and resident of Nkararo Adjudication Section.



167. DW 4 stated that he was born in 1988.
168. DW 4 informed the Court that he had prepared and signed a witness statement dated 25/02/2022 which we adopted and relied upon as his evidence in chief.
169. DW 4 confirmed that he was residing on the property known as L.r.no.transmara/nkararo/264.
170. DW 4 testified that their land borders the Defendant's parcel of land that is Plot.No. 341 within Nkararo Section.
171. DW 4 clarified that Plot.No. 341 within Nkararo Section was occupied by the Defendant and her family including the husband.
172. DW 4 denied seeing the Plaintiff on the property known as Plot.No. 341 within Nkararo Section.
173. In cross-examination, DW 4 stated that he had never seen the title of the property known as Plot.No.341 within Nkararo Adjudication Section.
174. DW 4 indicated that he has never seen any title and cannot tell the significance of the same.
175. DW 4 stated that he only came to court to testify that Plot.No.341 within Nkararo Section was occupied by the Defendants.
176. DW 4 recollected that sometime ago, he had been shown a letter confirming that the Plot.No. 341 Nkararo Section belonged to the Defendant.
177. DW 4 clarified that he had no interest in Plot.No.341 within Nkararo Section.
178. At the end of this cross-examination, the Defence Counsel stated that he did not have any re-examination and closed the Defence case.
179. Parties were then directed to file their written submissions in support of their cases.
180. The Plaintiff filed his submissions on the 15th December 2022 while the Defendant filed her submissions on the 16th of January 2023.
181. The Court has indeed gone through the pleadings herein, the testimonies of the parties together with the witnesses thereof, the documentary evidence adduced herein and the submissions filed in support of the parties before the Court.
182. The issues for determination in this suit can be summarised as follows; -
 - Issue No. 1- What Is The Validity Of The Adjudication Record No.212963 Issued In The Name Of The Plaintiff?
 - Issue No. 2- What Is The Validity Of The Extract Of The Demarcation Book Produced By The Defendant?
 - Issue No.3- Is The Plaintiff Duly Registered As The Lawful & Rightful Owner Of The Property Known As L.r.no.transmara/nkararo/341?
 - Issue No. 4- Is The Plaintiff Entitled To The Reliefs Sought In The Plaint Dated 14th February 2022?
 - Issue No. 5- Who Bears The Cost Of This Suit.
183. The Court having identified the above issues for determination of this suit, then it shall not proceed to discuss the same as hereinbelow.



Issue No. 1- What Is The Validity Of The Adjudication Record No.212963 Issued In The Name Of The Plaintiff?

184. The Plaintiff's testimony was that he was allocated the property known as L.r.no. Transmara/nkararo/341 during the Adjudication of Nkararo Adjudication Section.
185. DW 2 during his testimony in Court produced Adjudication Record of the property known as Plot.no. 341 Within Nkararo Adjudication Section issued on the 12/09/1990 and has Serial No. 212963.
186. The Adjudication Record of Plot.no. 341 Within Nkararo Adjudication Section is in the name of the Plaintiff herein.
187. The Defendant herein confirmed in her testimony that she had never lodged an objection against the registration of the Plaintiff as the beneficial owner of the property known as Plot.no.341 Within Nkararo Adjudication Section.
188. The Defendants witnesses and in particular DW 2 and DW 3 also admitted that there are no objection proceedings filed by the Defendant against the Plaintiff's recording as the beneficial owner of Plot.no.341 Within Nkararo Adjudication Section.
189. Section 24 of the *Land Adjudication Act*, Cap 284 provides for the creation of the Adjudication Register being a combination of the Adjudication Record and the Demarcation Map of the entire Adjudication Section.
190. Once the Adjudication Register is published and/or issued, Section 26 provides that any person who considers the same to be incomplete and/or incorrect must file an objection to the Land Adjudication officer within a period of 60 days thereof.
191. In this particular case, the Defendant herein and the Defence witnesses confirmed that no objection proceedings were ever filed against the Plaintiff's registration as the beneficial owner of Plot.no. 341 Within Nkararo Adjudication Section.
192. This inaction by the Defendant in the court's considered view was fatal because this was the only time the Defendant would have asserted her occupational rights and/or beneficial ownership.
193. The Court terms this inaction fatal because under the *Land Adjudication Act*, Cap 284, the Adjudication Register provided under Section 24 can only be rectified and/or corrected by an Objection proceeding by the Land Adjudication Officer under Section 26 or through the determination of an Appeal by the Minister under Section 29 of the same statute.
194. Once a party does not invoke these internal dispute resolution mechanisms provided under the *Land Adjudication Act*, Cap 284, then the alienation of the rights on the property upon which an Adjudication Record is issued to a person cannot be tempered with.
195. In this case, the Defendant upon issuance and/or publication of the Adjudication Record for the property known as Plot.no.341 Within Nkararo Adjudication Section should have moved with speed within the prescribed timelines and asserted her rightful claim.
196. The Court unfortunately under the *Land Adjudication Act*, Cap 284 Laws of Kenya does not have statutory jurisdiction to cancel and/or rectify an Adjudication Record duly published and/or issued by the Land Adjudication Officer thereof.



197. Consequently therefore, the Adjudication Record No. 212963 relating to Plot.no.341 Within Nkararo Adjudication Section in the name of the Plaintiff is lawful and has evidential value in the determination of this suit.

Issue No. 2- What Is The Validity Of The Extract Of The Demarcation Book Produced By The Defendant?

198. The Plaintiff's Position Is That He Was Lawfully Allocated A Property Known As Plot.no. 341 Within Nkararo Adjudication Section On The 12/09/1990 By An Adjudication Record No. 212963 And Subsequently Thereafter, Issued With The Relevant Title Deed Known As L.r.no.transmara/nkararo/341 On The 29th January 2021.

199. The Defendant on the other hand challenges the issuance of the Adjudication Record No. 212963 Relating To Plot.no. 341 Within Nkararo Adjudication Section in favour of the Plaintiff herein.

200. The Defendant's testimony in Court is to the effect that she was the one in occupation of the property known as Plot.no.341 Within Nkararo Adjudication Section as at the time of adjudication in 1985.

201. The Defendant's evidence is that the demarcation and/or adjudication committee visited the ground where she was occupying and recorded in the Rough Book of Nkararo as the beneficial owner of Plot.no.341 Within Nkararo Adjudication Section.

202. According to the evidence of the DW 3 who is the Land Adjudication & Settlement Officer of Transmara West, East and South, the Extract of Demarcation Book presented in Court indicate that the Defendant was in occupation of Plot.no. 341 Within Nkararo Adjudication Section.

203. However, DW 3 also confirmed that the Adjudication Record No. 212963 relating to Plot.no. 341 Within Nkararo Adjudication Section was not issued to the Defendant in line with the Extract of the Demarcation Book but to the Plaintiff herein.

204. The explanation given by DW 3 is that at times, demarcation under the [Land Adjudication Act](#), Cap 284 is done on the basis of applications for allocation of land and not occupation on the Ground.

205. Consequently therefore, while the Rough/Demarcation Book might refer to those occupying the ground, the Adjudication Record might reflect a person that had made an application to the Adjudication Committee directly.

206. DW 3 informed the Court that the Rough/Demarcation Book is usually prepared by the Adjudication Committee as a data recording piece of paper.

207. However, under the [Land Adjudication Act](#), Cap 284, the same is not provided for under the provisions thereof.

208. DW 3 stated that the Adjudication Record provided under Section 24 of the [Land Adjudication Act](#), Cap 284 is the primary document that alienates and/or allocates rights within an Adjudication Section.

209. Consequently therefore, once an Adjudication Record under Section 24 of the [Land Adjudication Act](#), Cap 284 is issued, then this is the record that is sent to the Director of Land Adjudication and the Chief Land Registrar for processing of the title deeds.

210. The Court has carefully looked at the Defence Exhibit No. 1 which is a copy of an Extract of a Rough Book of Nkararo.



211. According to the testimony of the testimony of DW 3, the author of this Rough/Demarcation Book is usually the Adjudication Committee within an Adjudication Section.
212. While the said Rough/Demarcation Book was admitted as evidence in this suit, the person who produced the same was the Investigation Officer from the Ombudsman's office who testified as DW 2.
213. DW 2 informed the Court that he came across this copy of the Rough/Demarcation Book of Nkararo Adjudication Section during his investigations of the complaint filed by the Defendant in their offices.
214. Section 107 of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows; -
- “(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that persons.”
215. Section 67 of the *Evidence Act*, Cap 80 further provides as follows; -
- “Documents must be proved by primary evidence except in the cases hereinafter mentioned.”
216. The reason why the Court is highlighting the above provisions of the *Evidence Act*, Cap 80 is to test the admissibility of the said Extract of the Rough/Demarcation Book in law.
217. DW 3 who is the Land Adjudication Officer indicated that he does not have the said Rough/Demarcation Book as the same remained with the Adjudication Committee.
218. The Defendant on the other part although had listed the Chairman of the Adjudication Committee as a witness, failed to present him to produce the same.
219. The question that begs to be answered is whether or not this piece of evidence is admissible in law in the absence of the maker author and/or a Certified Copy of the same from the said Adjudication Committee?
220. The Court is of the view that in the absence of the primary document as envisaged Section 67 of the *Evidence Act*, Cap 80 Laws of Kenya and/or a certified copy under Section 80 of the *Evidence Act*, Cap 80 Laws of Kenya, it will be unsafe to admit the said extract of the Rough/Demarcation Book produced by the DW 2.
221. In addition to this, DW 3 has stated before the Court that the legality of the said Rough/Demarcation Book is not founded in the provisions of the *Land Adjudication Act*, Cap 284 Laws of Kenya.
222. Consequently therefore, the production of such an extract of the Rough/Demarcation Book and its admission as evidence must be put to strict prove just like other facts alleged by a party.
223. The accuracy and content of the purported Extract of the Rough/Demarcation Book produced by DW 2 who is not the maker must be collaborated and/or verified by a person who is in custody of the Rough/Demarcation Book or participated in its preparation.
224. In this particular case, the Defendant and all the Defence witnesses failed to produce the Original Rough/Demarcation Book or call the people responsible for the preparation and/or safe keeping to collaborate this fact that indeed the Defendant was in the said book.



225. The net effect of this omission is to render the Extract of the Demarcation Book produced as Defence Exhibit 1 to be inadmissible in law and of no evidential value in the determination of this suit.
226. The Defendant also relied on the Letter dated 13th July 2011 which was also produced as Defence Exhibit No. 4 from the Land Adjudication Officer known as Bether A.
227. DW 3 informed the Court that he was not familiar with the person known as Bether A save that he had come across a number of Affidavits sworn by this in their offices.
228. According to DW 3, the person known as Bether A introduced herself as a Deputy Land Adjudication Officer and therefore there was a presumption that he was indeed a Land Adjudication Officer.
229. The Defence Exhibit No. 4 produced in Court indicated that the Plot.no.341 Within Nkararo Adjudication Section belonged to the Defendant.
230. Unfortunately, the contents of this Letter produced as Defence Exhibit No. 4 was not a true reflection of the Adjudication Record that had been issued to the Plaintiff on the 12/09/1990.
231. The said Land Adjudication Officer known as Bether A did not clarify the source of the information contained in the said letter produced as Defence Exhibit No. 4 or how he concluded that the Defendant was the beneficial owner of Plot.no.341 Within Nkararo Adjudication Section.
232. The issuance of the Adjudication Record issued dated 12/09/1990 to the Plaintiff had not been altered and/or amended by way on Objection or an Appeal to the Minister.
233. In essence therefore, the Letter produced as Defence Exhibit No. 4 can not alter and/or change the legal standing of the Adjudication Record issued on the 12/09/1990 without following the provisions of Section 26 and 29 of the *Land Adjudication Act*, Cap 284.
234. In the court's considered opinion, the letter produced by the Defence as Exhibit 4 can only be deemed to be misrepresenting the true facts of the adjudication and cannot assist the Defendant in this suit.
235. Be as it may, the inadmissibility of the Extract of the Rough/Demarcation Book should not be deemed to be a denial that the Defendant does not occupy a portion of the property known as L.r.no.transmara/nkararo/341.
236. The evidence placed before the Court by both the Plaintiff and the Defendant through DW 2 and DW 3 is that a portion of the property known as L.r.no.transmara/nkararo/341 is actually in occupation by the Defendant.
237. The photographs presented by the Plaintiff and the Defendant collaborate these testimonies beyond any reasonable doubt.
238. Consequently, the discussion hereinabove only limits itself to the admissibility of the documentary evidence placed before the Court and their legal implications thereof in this case.

Issue No.3- Is The Plaintiff Duly Registered As The Lawful & Rightful Owner Of The Property Known As L.r.no.transmara/nkararo/341?

239. The Plaintiff herein claims for ownership of the property known as L.r.no.transmara/nkararo/341 by virtue of being the holder of the title Deed issued on the 21st of January 2021.
240. The Title Deed issued to the Plaintiff was processed by virtue of the Adjudication Record No.212963 for Plot.no.341 Within Nkararo Adjudication Section in the name of the Plaintiff.



241. DW 3 confirmed in his testimony that it is this Adjudication Record that is used to process the Title Deed of the said property.
242. Indeed, the particulars in the Adjudication Record No.212963 for the property known as Plot.no.341 Within Nkararo Adjudication Section are similar to those contained in the Title Deed issued on the 21st January 2021.
243. Sections 24,25 and 26 of the [Land Registration Act](#), Cap 3 of 2012 recognises the person whose name appears on the Certificate of Title as the prima facie proprietor of the said parcel of land.
244. In essence therefore, this Court has no choice but to declare the Plaintiff to be the legitimate and lawful owner of the property known as L.R.NO.TRANSMARA/NKARARO/341.

Issue No. 4- Is The Plaintiff Entitled To The Reliefs Sought In The Plaint Dated 14th February 2022?

245. Based on the Court's determination in issue No. 3 hereinabove, the Court is of the considered view that the Plaintiff 'has proved his case to the required standard and should be granted the reliefs sought in the Plaint dated 14th February 2022.

Issue No. 5- Who Bears The Cost Of This Suit.

246. In any litigation, the costs usually abide the outcome of the Court.
247. In this instance, the Plaintiff has been successful in his claim and the Defendant shall pay the costs of this suit.
248. In conclusion therefore, the Court hereby makes the following Orders as appertains the Plaint dated 14th February 2022; -
- A. Declaration Be And Is Hereby Made That The Plaintiff Is The Registered Owner And/or Lawful Owner Of The Property Known As L.r.no. Transmara/nkararo/341.
 - B. The Defendant, Her Agents, Servants, Employees And/or Any Other Person Deriving Their Rights Under The Defendant Are Hereby Directed To Yield Vacant Possession And/or Move Out Of The Property Known As L.r.no.transmara/nkararo/341 Or Any Portion Thereof In Their Occupation Within Sixty (60) Days From The Date Of This Judgement.
 - C. In The Event Of None Compliance With Order B Hereinabove, An Eviction Order Shall Automatically Issued Against The Defendant Upon Expiry Of The Sixty (60) Days Period Provided Therein.
 - D. A Permant Injunctive Order Be And Is Hereby Issued Restraining The Defendant Their By Herself, Her Agents, Servants And/or Anyone Claiming Under The Defendant From Entering Upon, Re-entering, Trespassing Unto, Cultivating, Building Structures And/or Houses, Residing On, Interfering With And/or In Any Other Manner Dealing With The Suit Land Known As L.r.no.transmara/nkararo/341 And/or Any Portion Thereof.
 - E. The Costs Of The Suit Shall Be Borne By The Defendant.

DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 29TH MARCH 2023.

EMMANUEL.M.WASHE

JUDGE



In The Presence Of:

Court Assistant: Ngeno

Advocate For The Plaintiff: Mr. Ochwangi

Advocate For The Defendants: Mr. Osoro

