REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CASE NO. 18 OF 2017

FORMERLY MERU ELC CASE NO.66 OF 2016

CECILIO MURANGO MWENDA.....1ST PLAINTIFF

STEPHEN MUGAO MATHENGE.....2ND PLAINTIFF

BERNARD NJERU.....3RD PLAINTIFF

AGNES MUKOITI MUTHAMBI.....4TH PLAINTIFF

DAVID MWANGANGI GAICHU.....5TH PLAINTIFF

JOSHUA MWIRANGA NJAGI.....6TH PLAINTIFF

NJERU PATRICK NYAGA.....7TH PLAINTIFF

VERSUS

ISAAC KIMATHI IKUNGA.....DEFENDANT

JUDGMENT

BACKGROUND

1. The 1st, 2nd and 3rd plaintiffs approached the court via a plaint dated 31/5/2016 seeking a permanent injunction against the defendant as well as general damages for trespass and interest on the same at court rates. Filed contemporaneously was a Notice of Motion of even date seeking, inter alia, a temporary injunction against the defendant pending determination of the suit.

2. Before determination of the said motion for injunction, an application dated 22/5/2018 seeking to join certain persons in the suit was allowed by consent leading to the addition of the 4th, 5th, 6th and 7th plaintiffs.

3. The application for temporary injunction dated 31/5/2016 was determined by consent of the parties who agreed to have an order of status quo issued pending determination of the main suit.

The 1st plaintiff, for purported cultural reasons, withdrew from the suit on 28/5/2018.

When the matter came up for hearing on 16/7/2018, the 3rd plaintiff was said to have passed away more

than a year before and the court deemed that the claim by the 3rd plaintiff had abated and his suit was withdrawn by operation of the law. On the same date, 16/7/2018, the claims by the 6th and 7th plaintiff were dismissed for non-attendance. The present remaining claims are by the 2nd, 4th and 5th plaintiffs.

THE PLAINTIFF'S CASE

4. The Plaintiffs filed an amended plaint on 7/6/2018. They seek;

a) A permanent injunction to restrain the defendant, his agents, servants, employees and/or anyone else legally acting under his names and behalf from entering, fencing, encroaching and trespassing into the plaintiffs' plots numbers LR N. Tharaka/Marimanti/2272, 2273, 2274, 2277, 2269, 2271 and 2275.

b) General damages for trespass to land.

c) Costs and interests at court rates.

5. The 2nd plaintiff is the registered owner of parcel N. Tharaka/Marimanti/2273. The 4th plaintiff is the registered owner of parcel N.Tharaka/Marimanti/2277. The 5th plaintiff is the registered owner of parcel N.Tharaka/Marimanti/2269.

6. The plaint is to the effect that the plots are situated within Marimanti Township and were acquired sometime in 2002 and title deeds for the same were issued in 2009. The plots were surveyed and beacons were put up and the plaintiffs set up a fence. The defendant acquired his parcel much later while the plaintiffs were already in actual occupation of their plots. They also state that the defendant has encroached and thereby trespassed onto their properties which he has included as part of his plot number N.Tharaka/Marimanti/2391 and has failed to stop his encroachment despite being asked to do so.

DEFENCE CASE

7. The defendant filed a statement of defence on 23/4/2018 and the same bears even date. He states that he is the owner of parcel N.Tharaka/Marimanti/2391 since 17/8/2009 but denied that he found the plaintiffs in actual possession of their plots. He then issued a general denial on the allegations.

WITNESS EVIDENCE BEFORE THE COURT

Plaintiff's case

8. **PW1** was Stephen Mugao Mathenge, (2nd Plaintiff), a resident of Tharaka. He stated that;

1.He adopts his witness statement dated 30/5/2016.

2.He produced a search for parcel 2273, a copy of his title deed and the green card for the parcel.

3.He wishes his land to be returned to him.

9. In cross-exam, he stated that;

1.There is no agreement showing that he bought land and does not recall the date he bought land.

2.He is aware that an agreement for purchase of land must be in writing.

3.He does not recall that the parcel of land was excised from which other parcel. He bought it as part of a group.

4.PW1 got his title on 16/9/2010 while the defendant got his title on 17/8/2009. Therefore the defendant got his title first.

5.He reported the interference by the defendant to the Land Registrar but does not recall when. He is not aware that boundary disputes must be heard by the Lands Registrar first before bringing them to court. He has no evidence that the land registrar heard the matter first.

10. In re-examination, he stated that;

1. He knows parcel 2391.

2. He was on the land before the defendant got his title.

3. They bought the land as Tharaka Welfare as title number 2155 which was held by the officials before they got their portions. That is how the defendant got his title before them.

11. PW2 was Agnes Mukoiti Muthambi, (4th Plaintiff), a teacher. She stated that;

1. She wishes to adopt her statement dated 4/6/2018.

2. She produced her title deed to land parcel 2277. The title deed is in her name and was issued on 18/8/2014 and measures 0.03Ha. She started occupying the land on the date of issue.

3. The land was bought by her late husband in 1996 as part of a welfare group. At the time, the land did not have titles. The original title was 2155 which was thereafter subdivided.

4. She wishes the court to give her orders that ensure she does not lose the land. She also wishes to get costs of the suit.

12. In cross-examination, she stated that;

1. Her land is number 2277 and it was registered in her name on 18/8/2014. Parcel 2277 came from parcel 2155.

2. She does not know the defendant or parcel 2391.

3. After being shown sketch map apposite to parcels 2391 and 2155 she agreed that there was a road between the parcels and therefore they did not share a common boundary. She said that the issue was that the defendant has encroached on part of her piece of land.

4. She has not filed any claim at the Land Registrar's Office.

5. She received a call in 2016 from one Mwangi Mwenda saying that someone had encroached on their plots. She believed there was encroachment because she saw beacons showing new subdivisions. She, however, did not engage the Land Registrar or surveyor to make that determination.

13. In re-examination, she said that;

1.In her statement, she had said that she knew parcel 2391 as well as the owner who is the defendant.

2.The road was not identifiable on the land when they visited it. She saw the beacons put up by the defendant and concluded that there was encroachment.

3.She had not put any identification marks on her land.

14. PW3 was David Mwangangi Gaichi, (5th Plaintiff), from Kikuyu. He stated that;

1.He wishes to adopt his statement dated 4/6/2018.

2.He produced his title deed for parcel 2269. It measures 0.03Ha and the title deed was issued to him on 9/10/2009 and it was from parcel 2155. He started using the land after he got the title.

3.They had bought the land as a group in 1996 and they had started using it back then.

4.He wishes that the defendant unfences his portion of the land and for the court to award him costs of the suit.

15. In cross-examination, he said that;

1.The welfare society bought the land in 1996. The statement indicating 2002 is wrong.

2.He moved into the land after getting the title deed on 9/10/2009. He took possession in 2002. He has no development on the land.

3.He was not there when the welfare society bought the land and was just shown the parcel. His parcel was shown to him by the welfare officials. No surveyor showed him the land.

4.He changed his mind and said that he was shown the land by a surveyor but does not recall the name of the surveyor or when he was shown the portion.

5.He knows the defendant and his parcel which has encroached onto his land. He does not know the number of the defendant's parcel.

6.He and the defendant do not share a common boundary. There is a road separating the defendant's portion from the portion owned by him.

16. In re-examination, he stated that;

1.He knows the defendant.

2.Parcels 2269 and 2391 do not neighbour each other. The road separating them has been fenced by the defendant.

3.He does not remember when he bought the land, either 1996 or 2002. He also does not remember when he occupied it.

17. PW4 was Kenneth Rutere Njiru, the sub-County Surveyor for Tharaka Sub-County.

In cross-examination, he stated that;

1.He produced his report dated 24/4/2017 together with a sketch.

2.He visited land parcels N.Tharaka/Marimanti/2269 to 2274 which were derived from parcel 2155.

3.He also visited parcels 3410 to 3436 which were derived from parcel 2391. He drew a sketch map.

4.The plots overlap.

5.The 1st survey was a subdivision of parcel 2155 which yielded parcels 2269 to 2278. The same surveyor also undertook survey of 2391.

6.He discovered that the measurements shown are not in tandem with the ground measurements. They are in excess by about 22 meters. The mutation cannot fit on the ground. This suggests that the surveyor may have done a theoretical survey without going to the ground.

7.In his opinion, there was carelessness on the part of both the surveyor and on the land owners. The latter who should have put up boundaries. Both parcels have titles.

18. In re-examination, he stated that;

1.He confirms Mr. Wainaina was a licensed surveyor authorized to practice.

(The court noted that there are 2 unnumbered portions after 2269 to 2279 and a curve suggesting that the road was not straight and PW4 could not explain the anomaly)

2.When government surveyors receive documents from a private surveyor they check consistency with original surveys. The Tharaka maps are not very accurate, he stated.

3.There are challenges as land adjudication allows general boundaries to be mapped using aerial photographs. The aerial photographs were not rectified for scale distortion. Therefore in some instances you find distortions between the map and the boundaries.

4.In such a case, the law states that the ground boundaries should be given precedence. Boundaries vest in the land owner. The law states that the general boundary should be physical.

5.The original owner and subsequent owners take responsibility for their boundaries. Only the Court can issue an order to reverse.

19. In cross-examination, he stated that;

1.Both parcels 2391 and 2155 came from the same motherland. He does not have the mother title and the mutation.

2.He had perused the mutation before going to the ground. That is how he saw there was an anomaly.

3.He agrees that the mutation form was registered and signed by the District Surveyor.

4.The mutation shows that there is a clear boundary separating numbers 2391 and 2155. According to the mutation, the 2 parcels are separated by a road. They do not share a common boundary. He also captured the road in his sketch but on the ground, he found that the measurements could not fit the ground. The road does not exist. The road is taken up by the overlap of parcels 2391 and 2155.

5.The maintenance of the road is a public responsibility. The boundaries showing the roads also touch on owners land.

6.The surveyor was a licensed surveyor called O.M. Wainaina.

7.The court order was to the effect that he should visit the ground, which he did, but he did not liaise with Mr. O. M. Wainaina.

8.He is aware that the Land Registrar has powers to rectify maps but not boundaries. Boundaries can only be rectified with the intervention of the Court.

9.Because the documents have been registered, it is inevitable that the Land Registrar comes on board. The court may order a reparcellation to accommodate everyone

DEFENCE CASE

20. DW1 was Isaac Kimathi Ikunga. He stated that;

1.He wishes to adopt his statement dated 23/4/2018.

2.He produced all the documents as per his list of documents filed on 23/4/2018.

21. During cross-examination, he stated that;

> **1.He** bought his plot on 8/9/2003. The plaintiffs seem to have bought their land in 2002. He took possession of his plot immediately he acquired it in 2009.
>
> **2.He** confirmed that he heard the surveyor say the area on the ground and the titles are not compatible.

EXPERT EVIDENCE

22. EXPERT 1 was Winfred Muguro, Land Registrar, who stated that;

> **1.It** is possible to do reparcellation as the parcels are overlapping. The titles which are overlapping are a mockery of the land system.
>
> **2.The** parcels will have to be made smaller and the titles will have to be surrendered together with the mutation. The mutation will be drawn by the surveyor to reflect the change. If possible, the parties should sign the mutation. New titles will be issued with different numbers. The costs of survey and fresh titles are borne by the parties.
>
> **3.The** surveyor is to establish the position on the ground for reparcellation to be done.

23. EXPERT 2 was K.R. Njiru, Sub-County Surveyor. He was also PW4. He stated that:

> **1.He** adopts the evidence as given by the Registrar.
>
> **2.It** is prudent for the court to order that the parties be strict about boundary maintenance. If the same had been done, there would have been no need for a repeat exercise.
>
> **3.The** court can order that no charges are paid.

WRITTEN SUBMISSIONS BY THE PLAINTIFF

24. The Plaintiffs filed their submissions on 14/2/2019. They submit that;

> **1.They** have proven encroachment by the defendant onto their parcels of land.
>
> **2.The** plaintiffs' plots were surveyed before the defendant's plot and therefore the defendant's subsequent survey was of no consequence since there was no extra land as no amendment was done on the map and on the ground and since the plaintiffs' titles have not been cancelled.
>
> **3.The** county surveyor's report and the Registrar confirmed that the defendant encroached on the plaintiff's plot hence the defendant should be ordered to vacate the plaintiffs' plots which he has annexed. The surveyor and registrar's evidence support the plaintiff's case.
>
> **4.The** plaintiffs have established a prima facie case as they have proved ownership of the plots. The continued encroachment has made the plaintiffs to suffer loss. The defendant has also shown intention to dispose of the plots hence the court needs to avert such acts.

5.Article 40 of the Constitution of Kenya 2010 recognises the right to protection of property hence the court should embrace the same and aid the plaintiffs and grant their prayers as sought and dismiss the defence which did not even have a counterclaim.

25. The plaintiffs relied upon the following authorities:

1.Mumina versus Budesiano EALR (2016) Uganda High Court

This was an appeal. The respondent had instituted a suit against the appellant for a declaration that the suit land belonged to the respondent and that the appellant was a trespasser. The trial magistrate found in favour of the respondent and issued orders of eviction and permanent injunction against the appellant. The Appellate Court held that there is no issue of time as trespass is a continuing tort. The was also an issue that the appellant did not actually own the property but it was held by a co-operative sacco capable of suing in its own interest. The respondent had been found to have purchased the suit land while the appellant had conflicting evidence as to how he came about the property. The appellate court found the evidence to tilt in favour of the respondent. The magistrate had also visited the suit property but did not include that evidence and the same was said not to have prejudiced the decision as the evidence relied on was sufficient. Therefore the appeal was dismissed.

2.Metian Kael Nkoibon versus Weinard Salation Nyeri CoA No 262 of 2015

This case was a dispute on ownership of a plot which the appellant cited had been allocated to him by the County Council and the respondent had entered therein and constructed a petrol station which the respondent was operating. The respondent had claimed to be the lawful owner. The High Court had found in favour of the respondent as the respondent also had an allotment letter issued earlier in time. The CoA agreed with the Judge stating that the initial letter had not been cancelled or forfeited for failure to meet the conditions and therefore was still subsisting. No issues were pleaded on ownership. The appeal was dismissed.

3.Giella vs Cassman Brown and Co. Ltd (1973)EA 358

Requirements for grant of an injunction namely establishment of a prima facie case with a probability of success, likelihood of suffering irreparable loss and balance of probability were the pertinent assertions.

4.Lutaaya Society vs Sterling Civil Engineering Company Ltd (2009) 1 EA 274 at page 4 (Uganda Supreme Court). In this case, the appellant was the sole registered proprietor of the suit property. The respondent was said to have trespassed on the same. The Court was of the view that transferring the property did not forfeit the previous owner's cause of action. The court was of the view that trespass is committed against a person and not against land per se therefore only a person in possession of land has capacity to sue for trespass. The slightest amount of possession suffices. However, in this case, there was an illegality in that the transferee of the land did not have capacity to hold the same as a non-African company without approval and therefore there was reversionary interest to the previous owner. Nonetheless, proof of continuous unlawful occupation is sufficient proof of trespass. If the trespass is admitted, there is no need for further proof. The court found in favour of the appellant and reverted the case to the High Court to assess damages for trespass.

DEFENDANT'S WRITTEN SUBMISSIONS

26. The defendant's submissions were filed on 21/3/2019. They submit that;

1.The parties herein are neighbours, which is clear from the evidence on record.

2.The defendant bought 3 acres of land and subdivided the same into 27 parcels and has not encroached on the plaintiff's land. Therefore, the issue is that of a boundary dispute and not a

trespass issue.

3.The Land Registrar is the one with original jurisdiction to determine boundary disputes as per Section 18(2) and 19(2) of the Land Registration Act 2012. This court has no original jurisdiction on this matter and he relies on the case of Andrew Marigwa versus Joseph Ondieki Kebati (2017)eKLR where it was held as much. Therefore this Court should dismiss the suit with costs, according to him.

4.The evidence before the court suggests that the surveyor was responsible for the overlap in boundaries and the same was not due to any fault by the defendant. The plaintiffs received their title deeds after the defendant and have not established that their plots were surveyed before the defendant's plot.

5.If the maxim was to be applied that the first in time shall prevail, it would be the defendant's claim that would succeed.

6.The plaintiffs failed to prove the allegation of trespass on a balance of probabilities, therefore the same must fail.

7.The plaintiffs embroiled the defendants into unnecessary litigation and should pay the costs of the suit which should be dismissed.

27. The defendant relied upon the following case:

1.Andrew Marigwa vs Josephat Ondieki Kebati (2017)eKLR ELC Kisii.

In this case, from the onset, the dispute was clearly a boundary dispute and the plaintiff sought an order of eviction or surrender of vacant possession of the land. The defendant stated that the two parcels were not adjoining nor sharing a common boundary as they were separated by a tarmac road. The Lands Registrar and the Surveyor filed their reports but the plaintiff was not satisfied with the same and filed an application to have the reports disregarded by the court. The Registrar's position was that all parties had actually encroached onto the road and not on each other's property. In deciding the application, the court was of the view that it had referred the matter to the Land Registrar as Land Registrars had mandate over boundary disputes, therefore even if their reports were disregarded, the issue would still remain a boundary dispute under their mandate. The court was of the view that the Land Registrar's report had disposed of the matter and directed that the reports be endorsed as a judgment of the court and the same be implemented. The plaintiff's application and suit were dismissed and the Land Registrar was ordered to effect the necessary amendments to the Registry Index Map to reflect the actual status on the ground as per the reports.

ANALYSIS AND DETERMINATION

28. It is not disputed that the Plaintiffs own different parcels of land that were subdivisions of an original parcel number N.Tharaka/Marimanti/2155. It is also not disputed that the defendant is the owner of parcel number N.Tharaka/Marimanti/2391. The two properties were acquired at different times and surveyed at different times though by the same surveyor.

The issues herein appears to be mainly three;

i) Jurisdiction of the court vis a vis the powers of the land registrar

ii) The distinction between an act of trespass and a boundary dispute

iii) Whether the orders sought ought to issue

29. The first issue of jurisdiction is very consequential and thus should be handled at first. The following

various sections of the Land Registration Act No 3 of 2012 are relevant for our purposes and show a small sample of the kind of functional powers the Registrar wields with regard to registered land:

Section 18(2) provides;
(2)The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.

Section 16. power to alter boundary lines and to prepare new editions

(1)The office or authority responsible for the survey of land may rectify the line or position of any boundary shown on the cadastral map based on an approved subdivision plan, approved combination plan or any other approved plan necessitating the alteration of the boundary, in the prescribed form, and in accordance with any law relating to subdivision of land that is for the time being in force.
(2) Whenever the boundary of a parcel is altered on the cadastral map, the parcel number shall be cancelled and the parcel shall be given a new number.

Section 17.Approval for further surveys
(1) Further surveys may be made for any purpose connected with this Act, but such surveys shall be used to amend the cadastral map only if it is approved by the office or authority responsible for the survey of land.

Section 23.Reparcellation
(1) Subject to section 15 and authentication of the cadastral map, on the application of the proprietors of contiguous parcels who are desirous of changing the layout of their parcels, and with the consent in writing of all other persons in whose names any right or interest in the parcels is registered and of any cautioner, the Registrar may—

(a) cancel the registers relating to those parcels and prepare new registers in accordance with the new edition of the cadastral map; or
(b) refuse to effect the reparcellation if the Registrar considers that the proposed reparcellation involves substantial changes of ownership, which should be effected by transfers without invoking this section, in which case, the Registrar shall direct the proprietors accordingly.

(2) Upon reparcellation, the new parcels shall vest in the persons in whose names they are registered.

30. In the case of **WILLS OCHOLLA V MARY NDEGE [2016] eKLR,** the ELC at Kisumu faced a similar issue and the court upheld a P.O. on jurisdiction, analyzing as follows;

1.“ court has carefully considered the notice of preliminary objection, the pleadings, the rival written submission and come to the following determinations;

a) That in terms of Section 18 (2) of the Land Registration Act, proprietors of registered land with a boundary dispute are obligated to first seek redress or solution from the Land Registrar before moving or escalating the dispute to this court. That where such a party fails to do so, and comes to court without first seeking redress from the Land Registrar, the court being a court of law, has to remind such a party that he/she has moved the court prematurely. That the provisions of Section 18 (2) of the Land Registration Act shows clearly that the court is without jurisdiction on boundary disputes of registered land until after the land Registrar's determination on the same has been rendered.

b) That the parties submission and pleadings shows clearly that the dispute before this court is one of the correct position of the boundary between, land

parcels Kisumu/Karateng/298 and 296 owned by the Plaintiff and Defendant respectively. That this clearly mean that the first forum with authority to settle the boundary dispute is the Land Registrar in accordance with Section 18 of the Land Registration Act.

c) That contrary to the submissions by the Plaintiff's counsel, the list of documents filed by the Plaintiff do not include any document with the Land Registrar's determination of the boundary dispute between the parties herein as proprietors of land parcels Kisumu/Karateng/298 and 296. That the Kisumu County Surveyor's report dated 27th April 2015 cannot be a substitute of a land Registrar's determination under Section 18(2) of the Land Registration Act for reasons that the two offices are not synonymous or the same."

31. Onyancha J sitting at the High Court in Nairobi dealt on an appeal from a District Land Tribunal in the case of **KISANDA KILANDA ENTERPRISES V LETEIPA OKEDIENYE OLE KISUA & 2 OTHERS [2015] eKLR** stated as follows;

"As earlier stated, the parties and indeed this court, recognized the fact that the dispute between the two parties owning the two registered and directly neighbouring parcels of land, is a boundary dispute. They recognized the dispute and recorded the issue in a consent order which this court recorded on 16th November, 2011, ordering the Chief Land Registrar and the District Surveyor of Narok to go to the two pieces of land and establish the legitimate boundary between them. In the view and finding of the court, that establishment was accomplished. That is to say, the Registrar and Surveyor took measurements and fixed the positions of the present boundaries of the two pieces of land, thereby confirming in their report above cited that Parcel L.R. Cis-Mara/Ololulunga/144 is overlapping into L.R. Cis-Mara/Ololulunga/126.

The court as earlier stated accepts that the overlap is equal to 19.42 Ha by which measurement L.R. Cis-Mara/Ololulunga/144 had been unjustly and probably unlawfully increased or enlarged. If the boundary is re-established in such a way that the 19.42 Hectares are returned to L.R. No. Cis-Mara/Ololulunga/126, the dispute will be resolved fairly and justly as between the two. Such a correction will leave L.R. No. Cis-Mara/Ololulunga with 169.0 Hectares which would be the correct acreage originally allocated to the Respondent and always and presently contained in the Land Registry records. At the same the L.R. CIS-Mara/Ololulunga/126 was, will partly be restored by the same acreage although its other acreages are found in other parcels of land directly neighbouring with…..

…The end result is that this appeal succeeds. The Narok District Land Registrar and Narok District Surveyor, are hereby ordered to visit the two pieces of land aforesaid within 90 days and restore the ground boundary of L.R. Cis-Mara/Ololulunga/144 into parcel L.R. Cis-Mara/Ololulunga/126 by a measurement of 19.42 Hectares following strictly the Registry Index Map used by the District Surveyor and District Land Registrar to draw the plan annexed to the Report filed in court on 19th July, 2014 and dated 12th July, 2014. Orders are made accordingly."

32. I find that the present case is one regarding a boundary dispute and not an issue of contested ownership of property. This is because it is not disputed that the plaintiffs own their claimed properties i.e. parcels 2272, 2277 and 2269(2nd, 4th and 5th plaintiff respectively) and it is not disputed that the defendant owns his claimed property, parcel 2391. The surveyor PW4 also said that the issue is one of survey in that the properties as drawn on the registry index map do not match the area on the ground. In my view, none of the parties presently before the Court bear any actual fault with regard to the boundary save perhaps that if the plaintiffs had marked their boundaries earlier, the issue may have been avoided all together or may have been resolved.

33. Having expressed myself as above, I opine that the present suit is prematurely before the Court as the

issue of the boundary should have been handled by the Land Registrar. On that note, it appears that there may be two remedies. Firstly, this Court may choose to dismiss the suit. Alternatively, rather than throw out the parties entirely, I am of the view that the court ought to order that the dispute be referred to the Land Registrar who should reparcel the property and issue fresh title deeds to all the parties within a time frame to be determined by the Court. In this way, justice will be seen to have been done to all parties. I will, therefore, make an order to that effect.

34. I will also order status quo to be maintained pending reparcellation of the various properties. For avoidance of doubt, the status quo is that no party shall be subject to eviction by another party and no party shall sell or transfer any parcel of land until the reparcellation of the original parcels 2155 and 2391 is concluded and new title deeds are issued to the parties.

35. I will now turn to the issue of trespass as prayed by the plaintiffs. The ELC at Muranga (Kemei J) in **TELKOM KENYA LIMITED V COUNTY GOVERNMENT OF MURANGA [2019] EKLR** set out the definitions of trespass as below;

> **"25. According to the 10th Edition of Black's Law Dictionary trespass is defined as follows;**
>
> > **"an unlawful act committed against the person or property of another; especially wrongful entry on another's real property. Clark & Lindsell on Torts, 18th Edition on page 923 defines trespass as any unjustifiable intrusion by one person upon the land in possession of another. The onus is on the Plaintiff to proof that the Defendant invaded his land without any justifiable reason".**
>
> **Continued trespass is defined as:-**
>
> > **"A trespass in the nature of a permanent invasion on another's rights, such as a sign that overhangs another's property's …**
> >
> > **"Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues" See Clerk & Lindsel on Torts 16th Edition, paragraph 23 – 01."**

36. In the present circumstances, I find that the actions of the defendant should not be considered as trespass. This is because the property itself is not properly defined on the ground in order to conclude that a particular party breached another party's rights. Trespass has to be an unjustifiable intrusion and in the present case, the justification seems to be the uncertainties of the boundaries. At this stage, the Land Registrar would need to first make a determination and undertake reparcellation so that the boundaries can be ascertained in order for one party to claim an ascertainable encroachment by another. Therefore, the issue of trespass is not ripe at this moment.

37. I address the issue of if or if not the orders sought by the plaintiffs can issue. As definitively settled by the case of Giella versus Cassman Brown(1973)EA, a party seeking grant of injunctive relief needs to establish a prima facie case with probabilities of success, show he shall suffer irreparable damage and show that he deserves the order on a balance of convenience.

38. I find that the plaintiffs' case for trespass cannot be ascertained in the present circumstances due to the boundary anomaly. Therefore it is premature to determine that they would have had any success. In any event, the plaintiffs have failed to show any ill will by the defendant in the perceived trespass and for that reason, I find that there was no prima facie case proved for trespass. The plaintiffs have also not shown what kind of damage they may suffer that cannot be compensated by way of damages. They also did not tell the court if there were any developments capable of being lost due to the actions of the defendant. With regard to the balance of convenience, the evidence of PW4 as well as that of the two expert witnesses lead one to believe that all the parties in this suit have definite proprietary rights which only needed to be ascertained on the ground. Therefore convenience has not been shown to tilt in favour of the plaintiff. Therefore, I find that the threshold for grant of the permanent injunction sought was not met.

This prayer is, therefore, denied.

39. In the circumstances, I issue the following orders:

a) The suit fails in terms of prayers (a), (b) and (c) of the Plaint dated 31/5/2016.

b) The Land Registrar with the help of the apposite Surveyor is ordered to conduct a fresh survey and any other exercise necessary towards the reparcelling of the original parcels N.Tharaka/Marimanti/2155 and N.Tharaka/Marimanti/2391 and issue fresh titles to all the parties who had held various titles therein within a period of six months AND attendant costs are to be shared by all the parties.

c) An order of status quo is issued pending reparcellation of the properties named in order (b) above.

d) Parties are to bear their own costs.

Delivered in open Court at Chuka this **22nd day of May, 2019** in the presence of:

CA: Ndegwa

Dennis Muthomi h/b Mithega Kariuki for defendant

Kiogora Arithi for 2nd, 4th and 5th plaintiffs - absent

P. M. NJOROGE,

JUDGE.