



**Odiango v Nyakado & another (Environment & Land Case
30 of 2021) [2023] KEELC 17812 (KLR) (30 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17812 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND CASE 30 OF 2021
GMA ONGONDO, J
MAY 30, 2023**

BETWEEN

RICHARD OYUGI ODIANGO PLAINTIFF

AND

THOMAS TONTON OLUOCH NYAKADO 1ST DEFENDANT

MELLEN AKEYO NYAKADO 2ND DEFENDANT

JUDGMENT

1. By a plaint dated August 27, 2012 and filed on August 30, 2012, the plaintiff, initially represented by M/S Oguttu Mboya and Company Advocates, is seeking the orders infra;
 - a. Declaration that the plaintiff is the registered and/or lawful owner of LR No Central Kasipul/ Nyalenda/1462, measuring 0.08 Ha (the suit land herein).
 - b. An order of eviction directed against the defendants, their agents and/or servants, from the portion measuring 0.01 Ha of the suit land.
 - c. Permanent injunction restraining the defendants either by themselves, agents, servants and/ or anyone claiming under the defendants from entering upon, re-entering, trespassing onto, building structures, interfering with and/or in any other manner dealing with the portion of the suit land measuring 0.01 Ha or at all.
 - d. General damages for trespass.
 - e. Interest on (iv) hereof of court rates.
 - f. Costs of this suit be borne by the defendants.
 - g. Such further and/or other relief as the honourable court may deem fit and expedient so to grant.



2. Originally, the suit was lodged at Kisii High Court. The same was transferred to Migori Environment and Land Court and subsequently to this court on October 28, 2021, upon its establishment, for hearing and determination in the spirit of Articles 6 (3), 48 and 159 (2) (b) and (e) of the *Constitution of Kenya, 2010*.
3. In brief, the plaintiff's lamentation is that on or about May 2009, the defendants encroached onto and/or trespassed upon a portion of the suit land measuring 0.01 Ha in area and built a permanent structure thereon without the plaintiff's consent. That he lodged a complaint with the District Land Registrar and Surveyor, Rachuonyo District who visited the land and confirmed that the acreage of the suit land had diminished while acreage of the defendants' parcel of land had increased by the same margin. Thus, he urged the court to grant the orders sought in the plaint.
4. PW1, Richard Oyugi Odiango, testified that he bought the suit land measuring 0.08 Ha in area from Joshua Awino Otiwu. The same was excised from LR No Central Kasipul/Nyalenda/1122. That the 1st defendant also purchased a portion of the mother title and his parcel is LR No Central Kasipul/Nyalenda/1463. He stated that the defendants encroached onto and/or trespassed upon a portion of the suit land measuring 0.01 Ha in area and built a permanent structure thereon. He admitted that he did not issue the defendants with a demand notice, prior to lodging the instant suit.
5. During cross-examination, PW1 admitted that he had removed boundary features on the land and was charged with the offence of malicious damage to property in Oyugis PM Criminal Case No 557 of 2009. That he pleaded guilty and was ordered to pay a fine of Kshs. 5,000. That the 1st defendant was the complainant. PW1 also clarified to the court that the suit land is neither fenced nor developed. That the 1st defendant put up his house on LR No Central Kasipul/Nyalenda/1463 in the year 2009.
6. In his evidence, PW1 produced various documents including, a copy of title to the suit land, a certificate of official search, sale agreement, a copy of search certificate for LR No Central Kasipul/Nyalenda/1463, sketch plans and surveyor's report (PEXhibits 1 to 6).
7. PW2, Peter Juma Wanyama, then provincial surveyor Nyanza, produced in evidence a letter written by his predecessor, one AK Mursoi, dated August 26, 2009 (PEXhibit 7). During cross-examination, PW2 stated, inter alia, that he was not privy to the dispute herein.
8. PW3, Joseph Nanzala Munyendo, a land surveyor, produced a mutation form no. 239901 in evidence (PEXhibit 8). In cross-examination, he admitted that he has never visited the suit land. He stated that acreages appearing in titles are an approximation of the area. That PEXhibit 7 produced by PW2 reveals that the problem relates to the road reserve and not the neighbouring land parcels.
9. By a joint statement of defence dated October 4, 2012 and filed herein on October 11, 2012, the defendants through Omonde Kiseru and Company Advocates, opposed the claim and sought that it be dismissed with costs.
10. DW1, Thomas Tontone Oluoch Nyakado, relied on his statement dated October 9, 2012 and filed on October 11, 2012, as well as his further statement dated March 7, 2014 and filed on even date. Both statements were adopted as part of his evidence. He denied trespassing onto the suit land and testified that the suit land was originally LR No Central Kasipul/Nyalenda/1122 in the name of Joshua Owino Otin (the deceased) who sold a portion measuring 75ft by 100 feet to the plaintiff and a portion measuring 50 ft by 100ft in area to the 1st defendant herein. That later, the deceased added him a portion measuring 0.01 Ha in area.
11. DW1 relied on a sale of land agreement for LR No Central Kasipul/Nyalenda/1463, a sale of land agreement for the additional portion measuring 0.01 Ha in area, a copy of court proceedings in



- Oyugis Senior Principal Magistrate’s Court Criminal Case No. 557 of 2009, survey map, a photo of the defendants’ house on LR No Central Kasipul/Nyalenda/1463 (DExhibits 1(a), 1(b), 2, 3 and 4 respectively).
12. In cross-examination, DW1 stated that the plaintiff (PW1) and the deceased had a dispute over a portion of the land measuring 9ft by 7ft. That the sale did not materialize and the deceased refunded PW1 the purchase price.
 13. Behan and Okero Advocates, learned counsel for the plaintiff, filed submissions dated December 14, 2022 on December 15, 2022. Counsel submitted that the mutation form R. L 29 No. 239905 dated March 27, 2008 (PExhibit 8) does not support the defendants’ assertion of acquiring an additional portion of land measuring 0.01 Ha in are from the deceased. That since the alleged acquisition by the 1st defendant of 0.01 Ha from the deceased occurred nearly six months after the title for Central Kasipul/ Nyalenda/1463 was created as a parcel measuring 0.05 Ha in area. Furthermore, it was submitted that the area of the said parcel could not have been lawfully altered by a contractual agreement between the deceased and the 1st defendant herein. To buttress the submissions, counsel relied on the case of *Kimotho v Kenya Commercial Bank Ltd.* (2003) 1EA 108.
 14. The defendants’ counsel filed submissions dated 15th February 2023 on February 16, 2023 and identified twin issues for determination thus: whether the plaintiff has proved trespass by the defendants onto a portion of the suit land and whether the plaintiff is entitled to the remedies sought. Counsel submitted that the instant suit concerns a boundary dispute hence, ought not to be entertained by the court pursuant to Section 18(2) of the [Land Registration Act 2012](#). That no Land Registrar has ever visited the suit land in an effort to resolve the dispute. Further, counsel submitted that the acreage of land parcels is an approximation as stated by both PW3 and DW1. Thus, he sought that the instant suit be dismissed with costs.
 15. I have studied the entire plaint, the defendants’ statement of defence and the parties’ respective submissions. In that regard, the following issues fall for determination:
 - a. Whether the instant suit concerns a boundary dispute
 - b. Subject to issue (a) hereinabove, what orders can this court grant in the interest of justice?
 16. On the first issue, the defendants’ counsel submitted that the instant suit concerns a boundary dispute. That therefore, it ought not to be entertained by the court pursuant to Section 18(2) of the [Land Registration Act 2012](#).
 17. The plaintiff stated that the defendants encroached onto and/or trespassed upon a portion of the suit land measuring 0.01 Ha in area. That they built a permanent structure thereon.
 18. Indeed, the parties’ respective parcels of land share a common boundary. They were both excised from LR No Central Kasipul/Nyalenda/1122.
 19. This court has jurisdiction to hear and determine issues in the present dispute pursuant to Article 162 (2)(b) of the [Constitution of Kenya, 2010](#). Also, Section 13 (2) of the [Environment and Land Court Act](#) No 19 of 2011, speaks to the said jurisdiction. It is also true that Section 18 (2) (supra) prohibits this Court from hearing a boundary dispute unless the boundaries have been fixed in accordance with Section 20 of the same Act.
 20. Disputes relating to general boundaries are the province of the Land Registrar under Section 19 of the said Act. It is my considered view that the same is in order since the Land Registrar is possessed of technical skills and expertise to accomplish this exercise.



21. It is trite law that where a statute has provided for a mechanism of dispute resolution, the court cannot abrogate that mechanism. That a litigant must exhaust the said mechanism before moving to the next level. That where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed; see *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR.
22. I have duly considered the plaint herein. In my view, the issues raised therein are within the purview of Section 18 (2) and 19 of the *Land Registration Act*, 2016 (2012). Therefore, the Land Registrar has powers to resolve the same.
23. At paragraph 8, 9 and 10 of the plaint, the plaintiff stated that he mounted a complaint with the District Land Registrar, Rachuonyo District, with a view to ascertaining the exact acreages of the two adjoining parcels of land. That the District Land Registrar and the Surveyor, Rachuonyo District visited the land. However, no Land Registrar's report was produced in evidence in support of the allegations.
24. The defendants averred that no Land Registrar has ever visited the land with a view to resolving the dispute. PW3 also stated that he has never visited the site.
25. This court cannot therefore, make a determination on the instant suit before all the avenues established by statute for redress of the dispute are exhausted; see also *Geoffrey Muthiga Kabiru & 2 others v Samwel Mungai Henry & 1750 others* (2015) eKLR.
26. Wherefore, the plaintiff's suit is misconceived. The same is hereby struck out.
27. The proviso to Section 27(1) of the *Civil Procedure Act*, Chapter 21 Laws of Kenya provides that costs follow the event within the discretion of the court. Thus, I grant costs in favour of the defendants.
28. Orders accordingly.

DATED, DELIVERED AND SIGNED AT HOMA BAY THIS 30TH DAY OF MAY, 2023.

G. M. A ONGONDO

JUDGE

Present

Plaintiff, present in person

Mr. J. Omonde Kisera, learned counsel for the defendants

Okello and Mutiva, Court Assistants

