



**Otieno v Okwako (Environment & Land Case 365 of 2013)  
[2023] KEELC 17512 (KLR) (16 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17512 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT & LAND CASE 365 OF 2013**

**DO OHUNGO, J**

**MAY 16, 2023**

**BETWEEN**

**GEORGE JOSEPH OTIENO ..... PLAINTIFF**

**AND**

**WAMALANDA OKWAKO ..... DEFENDANT**

**JUDGMENT**

1. By plaint filed on December 16, 2013, the plaintiff averred that he is the registered proprietor of the parcel of land known as Marama/Shiatsala/1132 (the suit property) and that the defendant who is the owner of an opposite land parcel number Marama/Shiatsala/1065 trespassed onto the suit property, cultivated it, occupied it, and cut down the plaintiff's trees despite protests. He stated that the two parcels are separated by a permanent stream. The plaintiff therefore sought judgment against the defendant for a permanent injunction restraining the defendant, relatives, agents and or servants from trespassing on, cultivating, occupying, cutting trees and or dealing with the suit property. He further prayed for costs and interests therein.
2. The defendant filed a statement of defence wherein while admitting owning land parcel number Marama/Shiatsala/1065 as well as the plaintiff's ownership of the suit property, he denied the allegations of trespass and cutting down of trees. He averred that although adjacent to each other, the two parcels are not separated by a stream and that the stream is part of his land. He urged the court to direct that a survey be conducted to determine actual boundaries and prayed that the plaintiff's suit be dismissed with costs.
3. On November 3, 2014, an order was made by consent of the parties that the District Land Registrar Kakamega and District Surveyor Kakamega visit the two parcels and establish the boundaries between them and to file a report in court. The two officers visited the parcels on May 14, 2015 and filed in court a report dated July 14, 2015. I will return to the report later in this judgment.



4. At the hearing, the plaintiff testified as PW1 and adopted his witness statement as his evidence. He stated therein that the suit property is opposite the defendant's land known as L.R Marama/Shiatsala/1065 and that the two parcels are separated by a stream. That the defendant encroached into about two acres of the suit property and has been occupying it by cultivating and cutting down trees. He added that the Land Registrar and Surveyor visited the land in May 2015.
5. David Masila Kimauro, a Land Registrar stationed in Kakamega County, testified as PW2. He produced the report dated July 14, 2015 and stated that the two parcels are separated by a permanent stream, but the defendant had moved the boundary 10 metres into the suit property by digging a trench.
6. Livingstone Wetende Namai testified as PW3. He stated that he is the chairman of an organisation known as Firatsi Water Resources Users Development Association and that on receiving a report of diversion of the stream that runs between the two parcels, he went to the site and confirmed that a trench measuring about 10 metres wide, and 60 metres long had been dug by the defendant. He prepared a report dated September 29, 2020 which was produced and added that when he went to the site, he found the defendant and his children digging.
7. Lastly, Clement Kahindi Wangai, a hydrologist working for the Water Resources Authority, testified as PW4. He stated that upon his office received a complaint regarding diversion of the stream, he visited the scene on July 21, 2021 and found that the stream had been unnaturally diverted for 60 metres downstream by human hand through digging of a canal. That they prepared a report dated September 3, 2021 which he produced.
8. The plaintiff's case was then closed. The defendant then sought and was granted an adjournment. A new date for defence hearing was fixed by consent. Come the agreed date for defence hearing, neither the defendant nor his advocate attended court. Upon an application by counsel for the plaintiff, the defence case was closed and directions for filing and exchanging written submissions given.
9. The plaintiff filed his submissions on January 19, 2023 and argued that his case is unchallenged since the defendant did not offer any evidence. The plaintiff therefore urged that his case be allowed as prayed, an order be issued for the restoration of the stream to its original position and that he be awarded damages at an annual sum of Kshs 100,000 from the time encroachment started until the defendant gives him back possession. He further prayed for costs of the suit and interest.
10. In response, the defendant argued that the plaintiff failed to prove his case on a balance of probabilities. That the Land Registrar and the District Surveyor never visited the disputed boundaries and that the report dated July 14, 2015 is wanting in material particulars. He therefore urged the court to dismiss the plaintiff's case with costs.
11. I have considered the parties' pleadings, evidence, and submissions. The issues that arise for determination are whether the defendant encroached onto the suit property and whether the reliefs sought should issue.
12. There is no dispute that the plaintiff is the registered owner of the suit property while the defendant is the registered owner of land parcel number Marama/Shiatsala/1065. It is equally not disputed that the two parcels share a common boundary.
13. Despite having the opportunity to do so, the defendant did not offer any evidence either to challenge the plaintiff's case or to advance his own case. Consequently, the evidence offered by the plaintiff is entirely unchallenged.



14. As noted earlier, following a consent order, the District Land Registrar Kakamega and District Surveyor Kakamega visited the two parcels on May 14, 2015 with a view to establishing the boundaries. They then filed in court a report dated July 14, 2015. They stated thus in the report:

It was however observed that there exists a permanent stream that forms the common boundary for the parcels of land belonging to the warring parties but the owner of No. Marama/Shiatsala/1065 had dug a trench 10 meters or thereabout into No Marama/Shiatsala/1132, claiming that the trench is where the boundary should be.

In view of the foregoing therefore and by virtue of the fact that Mr Wamalanda's action amounted to unlawful encroachment into Mr Otieno's land in disregard of the established boundary, and that the warring parties are fearsly (sic) hostile to each other, it is my considered opinion that the matter reverts back to court for further arbitration and determination.

15. Although the defendant attempted, in his submissions, to cast doubt the accuracy and validity of the report, I note that he did not offer any contrary report or evidence that challenges the contents of the report. Further, David Masila Kimauro, a Land Registrar stationed in Kakamega County who testified as PW2, vouched for the contents of the report.
16. Further confirmation that the defendant had altered the boundary is found in the testimonies of Livingstone Wetende Namai and Clement Kahindi Wangai, who visited the site in September 2020 and July 2021 respectively and confirmed that a trench or a canal measuring about 10 metres wide, and 60 metres long had been dug by the defendant. In particular, the report dated September 3, 2021 which was produced by Clement Kahindi Wangai is instructive since it contains satellite imagery of the area between the years 2011 and 2021. A perusal of the images confirms that the stream had been diverted. Needles to emphasise, Clement Kahindi Wangai is a hydrologist and his evidence that the diversion was by human hand as opposed to being natural is not to be taken lightly. I am persuaded that the defendant encroached onto the suit property by 10 metres.
17. As a registered proprietor of land, the plaintiff is entitled to the rights, privileges, and benefits under Section 24 of the *Land Registration Act* which provides as follows:
24. Interest conferred by registration
- Subject to this Act—
- (a) The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;
18. It follows therefore that the plaintiff has made a case for the relief of permanent injunction, which is what he pleaded in his plaint. I am aware that through his submissions, the plaintiff also urged the court to grant him other reliefs including an order for restoration and damages for trespass. The simple answer to those extra prayers is that I cannot grant them since they were not pleaded in the plaint. Parties are bound by their pleadings.
19. In the result, I enter judgment in favour of the plaintiff as follows:
- a. A permanent injunction is hereby granted restraining the defendant, his agents and or servants from trespassing on, cultivating, occupying, alienating, cutting down trees or dealing in any manner with the parcel of land known as Marama/Shiatsala/1132.



b. The plaintiff shall have costs of the suit and interests thereon.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 16<sup>TH</sup> DAY OF MAY 2023.**

**D. O. OHUNGO**

**JUDGE**

**Delivered in open court in the presence of:**

Mr Wandala for the plaintiff

No appearance for the defendant

Court Assistant: E. Juma

