



**Owila v Awuor & 2 others (Environment & Land Case 603 of 2017)
[2023] KEELC 18638 (KLR) (12 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18638 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE 603 OF 2017**

**MN KULLOW, J
JUNE 12, 2023**

BETWEEN

HARRISON OTIENO OWILA PLAINTIFF

AND

DALMAS OJUOK AWUOR 1ST DEFENDANT

PAULUS ONYUNA OMOYO 2ND DEFENDANT

CHARLES ODHERU ONJULE 3RD DEFENDANT

JUDGMENT

1. The Plaintiff herein commenced this suit by way of an Originating Summons dated December 7, 2011; seeking the following Orders against the Defendants: -
 - i. An Order that the Plaintiff's parcel of land No Kanyamkago/ Kawere II/797 and the adjacent land parcel No Kanyamkago/ Kawere II/794 belonging to the 1st Defendant, Kanyamkago/ Kawere II/3815 belonging to the 2nd Defendant and Kanyamkago/ Kawere II/1387 belonging to the 3rd Defendant be resurveyed.
 - ii. An Order directing the District Land Registrar and District Surveyor Migori to rectify the position on the ground in respect of the aforesaid parcels of land.
 - iii. A Declaration that a portion of parcel Nos. Kanyamkago/ Kawere II/ 794, 1387 and 3815 respectively belong to the Plaintiff's parcel No Kanyamkago/ Kawere II/797.
 - iv. An Order of Permanent Injunction restraining the Defendants' by themselves and/or agents, and/or servants and/or any person acting on instructions of the defendants from interfering with the aforesaid parcel of land.
 - v. An Order for costs.



- vi. Any further relief that the Honourable court will deem fit and just to grant under the circumstances.
2. The Plaintiff contends that he is the registered proprietor of the suit land No Kanyamkago/ Kawere II/797, the 1st defendant is the beneficial owner of parcel No Kanyamkago/ Kawere II/794, the 2nd defendant is the beneficial owner of parcel No Kanyamkago/ Kawere II/3815 while the 3rd defendant is the registered owner of parcel No 1387. That the three parcels of land borders the suit land No 797.
3. It is his claim that on diverse dates in the year 2008; the defendants without any color of right or justifiable cause, took occupation of his portion of land and started cultivating the same. As a result of the said actions by the defendants, he has been deprived the rightful use of the said portion of his parcel of land and he stands to suffer irreparable loss.
4. He further contends that he lodged a complaint before the District Land Registrar and the District Land Surveyor, who both informed him that his claim was for registered land and they were not vested with the requisite jurisdiction to adjudicate over the same without a court order. He maintained that there was need for resurveying the said parcels of land to ascertain the correct portion and thus urged the court to allow his claim as sought.
5. The 3rd Defendant filed a Replying Affidavit sworn on January 23, 2012 in response to the allegation levelled against him by the Plaintiff. He denied taking occupation of the Plaintiff's land or cultivating any portion thereof and maintained that he has his own parcel of land No Kanyamkago/ Kawere II/1387; which he occupies and has been cultivating the same for over 60 years. He further maintained that he has confined himself within the well-established boundaries and has never trespassed into the Plaintiff's portion of land. He therefore urged the court to dismiss the plaintiff's claim with costs.

Trial

6. The matter proceeded for hearing of the Plaintiff's case on 22/5/2023 ex-parte. The Plaintiff testified as PW1 and called 2 witnesses James Osoo Owila as PW2 and Christopher Otuk as PW3, to testify in support of his case. It was the Plaintiff's testimony that the dispute arose when the defendants; who were the owners of the adjacent parcels of land Nos. 3818, 1387 and 796, encroached into a portion of his land. He produced the documents on his Supporting Affidavit sworn on December 7, 2011 and marked as "HOO 1 – 8" as PExhibits 1 – 8 in support of his case.
7. It was his claim that the boundaries planted by the surveyor were removed by the defendant hence the instant suit to have the same fixed. The Plaintiff thereafter closed his case.
8. Since the matter proceeded ex-parte; upon close of the Plaintiff's case, I issued directions on the filing of final written submissions. The Plaintiff filed his submissions dated May 26, 2023, which I have read and taken into account in arriving at my decision as hereunder.

Analysis And Disposition

9. It is this court's considered view that the sole issue arising for determination are: -
 - a. Whether the Plaintiff is entitled to the reliefs sought in his Originating Summons dated December 7, 2011.
10. The ownership of the said parcels of land is not in dispute; the plaintiff is the registered owner of parcel No 797, the 1st defendant is the beneficial owner of No 794, the 2nd defendant is the beneficial owner of parcel No3815 while the 3rd defendant is the registered owner of parcel No 1387. What however appears to be in dispute is the common boundary between the plaintiff's parcel No Kanyamkago/



Kawere II/ 797 and the 3 adjacent parcels of land, 794, 1387 & 3815 and whether there has been an encroachment into the plaintiff's portion by the defendants.

11. It is the Plaintiff's claim that sometimes in the year 2008, the defendants encroached and/ or without any color of right forcefully took possession of a portion of his land and started cultivating the same. He contends that as a result of the said actions by the defendants, he has been deprived of the use of his portion of land and he stands to suffer irreparable loss.
12. The 3rd defendant in his part maintained that he has been occupying and cultivating his lawful parcel of land No 1387 for over 60 years and his use and occupation has been confined within the well-established boundaries.
13. The 1st and 2nd defendants did not file any response to the plaintiff's claim. However, this court is mindful of the burden of proof required of the Plaintiff in proving his case on a balance of probabilities and the 1st and 2nd defendants' failure to file a response does not waive this onus of proof.
14. In the case of *Gichinga Kibutha -vs - Caroline Nduku* (2018) eKLR, the Court held that: -

“It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”
15. This court will therefore be guided by the Gichinga Kibutha (supra) decision above in determining the plaintiff's claim against the 1st and 2nd defendants.
16. The Plaintiff has urged this court to order for the resurvey of the boundaries between his parcel of land No 797 and the 3 parcels of land Nos. 794, 3815 and 1387. Section 18 and 19 of the *Land Registration Act* vests the Land Registrar with the mandate of fixing boundaries and states as follows: -
 - (1) Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.
 - (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.

19. Fixed boundaries

 - (1) If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.
 - (2) The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.”
17. Vide an Order dated 26/02/2020 and issued on 05/03/2020; my predecessor Ong'ondo J. ordered the Land Registrar and Surveyor, Migori County to visit the suit parcels of land Nos. Kanyamkago/ Kawere II/ 797, 794, 3815 and 1387 and ascertain their respective boundaries, ownership and occupation on the ground and their records and thereafter file a report.



18. In compliance with the said orders; the Land Registrar issued a Notice of Intention to ascertain and fix boundaries dated February 16, 2021 to all the parties and he visited the site for the said purpose on the 13/5/2021. A report dated June 24, 2021 was thereafter filed and whose findings and conclusions read in part as follows; -

“upon carrying out the measurements and doing physical examination of the boundaries of these four parcels of land on the ground, the following facts were revealed;

- i. That the common boundary between parcel numbers 797 against parcel number 794 was intact on the ground.
- ii. There were some meanders of the common boundary line between parcel number 797 and against 3815.
- iii. The proprietor of parcel number 1387 had encroached into parcel number 797 on an acreage of 0.15Ha (see the area marked ABCD on the attached maps) and thus reducing the acreage of parcel number 797 to 15.85Ha on the ground and increasing the acreage of parcel number 1387 to 3.69Ha on the ground.
- iv. That the acreages of parcel numbers 794 and 3815 on the ground were in accordance to the registered acreages on the land register.
- v. That all these four parcels of land are occupied by the registered owners with their families and some have sold portions of their land to a buyer who occupies them.

Conclusion and Recommendation

From the above findings, though the boundaries of these parcels of land were determined, re-aligned and planted on the ground, it is good to note that the proprietor of parcel number 1387 had encroached into parcel number 797.

Upon re-establishing the boundaries of these parcels of land, the proprietors/ users/ occupants of these parcels of land were advised to respect the boundaries as planted on the ground and to maintain peaceful co-existence amongst each other.

19. This court therefore seeks to wholly rely and adopt the Report dated June 24, 2021 by the District Surveyor as its findings in this matter. I do also note that from the findings of the Surveyor, the boundaries between the 4 parcels of land was determined, re-aligned and re-established and therefore prayers (a) and (b) on the Originating Summons seeking the resurvey and the rectification of the boundaries thereof have been dispensed with.
20. Further, I have also noted that the Plaintiff has raised the issue of compensation and/or damages for trespass at the submission stage. I wish to restate that parties are bound by their pleadings; from the Originating Summons, the Plaintiff did not seek any orders of general damages for trespass. This court is therefore unable to award the same.
21. In view of the foregoing, I accordingly find that the Plaintiff has proved his case against the 3rd Defendant to the required standard to warrant the grant of the orders sought. However, there was no proof of the claim against the 1st and 2nd defendant and the case against them is therefore dismissed with no orders as to costs.



Conclusion

22. The upshot of the above is that the Plaintiff's claim against the Defendant is partially merited and I accordingly enter judgment on the following terms: -
- a. A Declaration be and is hereby made that a portion of parcel No Kanyamkago/ Kawere II/1387 measuring 0.15Ha (marked ABCD on the Map) belongs to the Plaintiff's parcel No Kanyamkago/ Kawere II/797.**
 - b. An Order of Permanent Injunction be and is hereby issued restraining the 3rd Defendant either by himself, agents, servants and/or any person acting on his instructions from interfering with the aforesaid portion of Kanyamkago/ Kawere II/797 measuring 0.15Ha belonging to the Plaintiff.**
 - c. Each party to bear his own costs of the suit.
 - d. All the parties are hereby ordered to strictly comply and use their respective land parcels within the confines of the fixed boundaries to avoid further conflict as a result of the boundaries thereto.

It is so ordered

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 12TH DAY OF JUNE, 2023.

MOHAMMED N. KULLOW

JUDGE

In presence of; -

Plaintiff in person

No appearance for the 3rd Defendant

No appearance for the 1st and 2nd Defendants

Court Assistant - Tom Maurice/ Victor

