



**Obwoge v Nyakundi & 6 others (Environment & Land Case 89 of 2017)
[2023] KEELC 21056 (KLR) (25 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21056 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 89 OF 2017**

M SILA, J

OCTOBER 25, 2023

BETWEEN

DANIEL OGARO OBWOGE PLAINTIFF

AND

JAMES BARARE NYAKUNDI 1ST DEFENDANT

JOHNSON MAGUBO ONDIMU 2ND DEFENDANT

PAUL OMACHE OKIAMBA 3RD DEFENDANT

JAMES MOGIRE 4TH DEFENDANT

SAMUEL M. ORUTA 5TH DEFENDANT

PAUL G. MOKAYA 6TH DEFENDANT

EVANS BUONDA 7TH DEFENDANT

((Suit by plaintiff claiming that defendants have encroached on his land; defendants contending that the suit land belongs to them and that the problem is with the Registry Index Map which needs to be amended to reflect the occupation on the ground; court not persuaded that there is any problem with the Map; position being that the defendants have extended their occupation beyond their parcels of land so as to take possession of part of the plaintiff's land; Judgment entered for the plaintiff and defendants inter alia ordered to give vacant possession).)

JUDGMENT

a. Introduction and Pleadings

1. This suit was commenced by way of a plaint which was filed on 12 April 2017, which plaint was later amended on 26 May 2017. The plaintiff pleaded to be the owner of the land parcel Wanjare/Bogiakumu/4969. He averred that the defendants have encroached on his land claiming it to be part



of their land parcels Wanjare/Bogiakumu/8095, 8790 and 8791. He pleaded that their land parcels are different and distinct. In the suit, the plaintiff asks for the following orders :-

- a. A declaration that parcel number Wanjare/Bogiakumu/4969 is separate and distinct from parcel numbers Wanjare/Bogiakumu/8095, 8790 and 8791.
 - b. An order of eviction
 - c. A permanent injunction to restrain the defendants from interfering with his quiet possession of his land.
 - d. Costs of the suit.
2. The 1st, 2nd, 3rd, 4th, and 6th defendants filed a joint statement of defence and a counterclaim directed against the original plaintiff and the Kisii County Land Surveyor though the suit against the latter was subsequently withdrawn. They denied interfering with the land parcel Wanjare/Bogiakumu/ 4969 (hereinafter simply referred to as parcel No. 4969). They contended that they are in lawful occupation of their land parcels No. Wanjare/Bogiakumu/8095, 8790 and 8791 (hereinafter simply referred to as parcels Nos. 8095, 8790 and 8791). It was pleaded that the 1st defendant owns the land parcel No. 8095, the 2nd defendant the parcel No. 8790 and the 3rd defendant the parcel No. 8791. They averred that their parcels of land are physically located far away from parcel No. 4969 thus impossible for them to commit the illegalities complained of by the plaintiff. They pleaded that the plaintiff's suit is a scheme to unjustly acquire their land. In the counterclaim, they pleaded that the plaintiff's land parcel No. 4969 resulted from a subdivision of the parcel No. 1191 which was registered in name of the plaintiff's deceased father, one Ezekiel Obwoye. They pleaded that Ezekiel had previously leased a portion of their parcel No. 1194 but later claimed to have purchased it and it is this which forms the genesis of the dispute. They averred that they and their family members have been occupying what was formerly parcel No. 1194. In the counterclaim, they have asked for the following orders :-
- a. That the County Land Surveyor to undertake survey and amend the Registry Index Map to reflect the position on the ground.
 - b. Costs of the counterclaim.
3. The plaintiff filed reply to defence and defence to counterclaim. He denied that the parcels of land in issue are physically far away and refuted the allegation that the defendants have been using what was formerly parcel No. 1194.
4. The plaintiff withdrew the suit against the 5th and 7th defendants.

b. Evidence of the Parties

i. Plaintiff's Evidence

5. PW-1 was the plaintiff. He is an accountant and works in Nairobi. He testified that the suit land i.e parcel No. 4969 is registered in his name though it is family land. He averred that the defendants trespassed into the land in October 2016 and put up a fence. He was called and informed about this by his stepmother and brother. He reported to the Lands office on 25 October 2016 and the Lands officers came to the ground. They held the view that what was in issue was actually a claim over the land and it was not a boundary dispute. He testified that there are now five houses constructed on the land. He produced the Registry Index Map (RIM) to show that the parcels of land are adjacent to each other and not far away as pleaded in the defence. He testified that the parcel No. 8790 has now been subdivided into the land parcels No. 8829 and 8830. He acknowledged that there had been a boundary



dispute between the original parcels of land which went before the Land Disputes Tribunal at Suneka. An award was made in 2008 which he produced as an exhibit.

6. Cross-examined, he testified that the parcel No. 4969 arose out of subdivision of the parcel No. 1191. The subdivision brought forth parcels No. 4969, 4970 and 4971. At the Land Disputes Tribunal, the dispute was between the parcel No. 1191 and 1192. He acknowledged that the titles of the defendants emanate from the parcel No. 1194. He was aware that there was a dispute in 2001 relating to the parcels No. 1191 and 1194. He was out of the country at that time and the dispute was resolved at the D.Os office. When he came back he found that his father's land had been reduced by a half. He drew a sketch showing the original parcels and how the defendants have encroached on his land. He drew six houses with boundaries which he stated are all on his land. Before the tribunal in 2008, those involved were the owners of parcels No. 1192, 1194 and 1195. He stated that the panel of elders did a survey and placed live fences. He was aware that there was a boundary dispute before the Magistrates' Court pitting the land parcels No. 4971 and 1192. He also holds the title to the parcel No. 4871 (which neighbours the suit land to the South) though he stated that he holds it on behalf of his uncle, one George Morara Bosire.
7. In the course of his evidence, I found the plaintiff's evidence to be ambivalent on whom exactly he still has an issue with, and I asked him to be precise and very clear on which party he wishes to pursue. I even allowed him some time to refresh his mind. He stated that he has a dispute with the 1st defendant, owner of the parcel No. 8095; for the 2nd defendant, he stated that he owned the parcel No. 8790 but this is now subdivided into the parcels No. 8829 and 8830; he has no dispute with the 3rd defendant, owner of the parcel No. 1192; he has no dispute with the 4th defendant, owner of the parcel No. 1195; he has no issue with the 5th defendant and he even withdrew the case against him; he still has a dispute with the 6th defendant, owner of parcel No. 8791; he has no dispute with the 7th defendant.
8. PW-2 was Philip Wafula. He served as the District Surveyor, Kisii, from September 2016 to September 2021. He testified that he did visit the disputed land upon receipt of a court order dated 20 June 2017 and he compiled a report which was filed in court. He concluded that according to the RIM, the parcels No. 8790 and 8791 had encroached into the plaintiff's land (parcel No. 4696). He did not visit the land with the Land Registrar, his duty purely being to proceed based on the map. Cross-examined, he testified that he did not establish the origin of the parcel No. 4696. He did not conduct a hearing on the history of the land while on site as he did not go with the Land Registrar. He stated that there is a wall put up in the plaintiff's land but he did not know which defendant put up the wall. There is a house inside it but he did not know whose house it was. He was not aware of a dispute over the same land in 2008. He testified that both parties were laying claim to the same land and thus it was not a boundary dispute. He conceded that his report was inconclusive in not having the history of the land. Re-examined he testified that the portions of land claimed by the defendants are not within their titles.
9. With the above evidence, the plaintiff closed his case.

ii. Defence Evidence

10. DW-1 was Johnson Magubo Ondimu, the 2nd defendant. He denied encroaching into the plaintiff's land. He testified that he owned the parcel No. 8790 which he has subdivided into the parcels No. 8829 and 8830. He sold and transferred the parcel No. 8830 to one Lameck Bogonko and retained the parcel No. 8829. According to him the plaintiff's dispute has been mutating over time. He referred to the boundary summons issued on 4 January 2017 (a few months before this suit was filed) and pointed out that it shows that the dispute therein was between the parcels No. 4969 against the parcels No. 1194 and 1195. In the year 2008, he stated that the dispute was between the parcels No. 1191 and



1192. He mentioned that his land arose from subdivision of parcel No. 1194. He offered that the 1st defendant bought land from his brother James Nyamboga. He testified that the plaintiff has put up a wall and there are houses inside and that his land is on the lower side. There is a road between his walled compound and the next occupant. On the plaintiff's upper side is the 1st defendant who has not walled his occupation. The next is a wall put up by Paul Mokaya (6th defendant). After Paul, is Lameck (owner of the parcel No.8830) then himself. He has no issue with the land that the plaintiff has walled. He testified that this walled area initially had a dispute. He claimed that his father had leased to the plaintiff's father (Ezekiel) this portion now walled by the plaintiff, together with the portion occupied by the 1st defendant, but Ezekiel later claimed to have bought it. This brought a dispute which was decided by the Chief in favour of Ezekiel. He stated that the decision made was to divide the leased portion into two, so that what is currently occupied by the 1st defendant is left to their (defendant's) family, and Ezekiel keeps the lower side that is currently occupied by the plaintiff. He testified that in 2005, Ezekiel called a clan elder (George Nyandusi) to divide the rest of the land between the other brothers in the defendant's family. The purpose was to divide the land into four so that each brother gets a share. He stated that this subdivision was done. The plaintiff was not present when this exercise was done but his brothers (said to be now deceased) were present. He averred that they leased part of their land to Mary Ratemo Okindo. He contended that the area leased is what is now occupied by the 1st defendant and Paul Mokaya (6th defendant) and that there was no complaint raised by Ezekiel. He produced the lease dated 5 October 2002 where James was noted as lessor. He testified that what the plaintiff claims is where they now live and is beyond what was given to his father. He stated that he could not have come to the land in 2016 as he was born in it (in 1989) and that the plaintiff saw him being raised in the land. He thought that the problem is with the map as everyone is on his land and that the plaintiff wants to use the map to grab their land.

11. Cross-examined, he reiterated that Ezekiel had leased the land. He stated that there was a written agreement but he did not produce it. He had no minutes for the dispute where Ezekiel allegedly claimed to have purchased the land. He contended that the mutation form for his parcel has a problem as it shows a road which ought not to be there. He subdivided his land parcel No. 8790 in 2017. He asserted that the map extends the plaintiff's land into their land but on the ground every person is on their land. He never called his own surveyor to the ground. He testified that the land that the plaintiff now claims was originally parcel No. 1194 but he did not know if a portion of it was carved out to be part of the parcel No. 4696. He contended that what Ezekiel was given was a portion of the parcel No. 4696. He admitted that where they live forms part of parcel No. 4696 in the map.
12. DW-2 was James Mogire, the 4th defendant. He lives in the parcel No. 1195 and stated that his land does not border that of the plaintiff. He repeated what DW-1 had mentioned, that Ezekiel made a claim to have bought the land when he had leased it; that a dispute arose and the Chief allowed him to retain land measuring about 50 X 100 feet and he fenced it. He testified that the family of the 1st defendant divided the land amongst themselves in presence of Ezekiel and he never complained that any of his land has been taken away. Cross-examined he was unable to respond when asked whether he has seen a surveyor's report stating that the map had a problem. He did not have minutes that the Chief wrote over the alleged dispute where Ezekiel was allowed to keep some land.
13. With the above evidence, the defence closed its case.

c. Analysis and Disposition

14. I invited counsel to file written submissions and I have seen the submissions of Ms. Sagwa, learned counsel for the plaintiff, and Mr. Nyamurongi, learned counsel for the defendant. I have taken these into consideration before arriving at my decision.



15. The plaintiff's case is actually one of trespass. He complains that the defendants have trespassed into his parcel of land No. 4969. The defendants' defence, as I understand it, is that the land that the plaintiff alleges that they have trespassed into, actually forms part of their parcels of land, and therefore the map should be amended. The plaintiff affirmed during the hearing that he only wishes to maintain the suit as against the 1st defendant (owner of the parcel No. 8095), the 2nd defendant, who owned the parcel No. 8790, and the 6th defendant, owner of the parcel No. 8791. He did ascertain that he now has no dispute with the 3rd defendant (owner of parcel No. 1195), the 4th defendant (owner of parcel No. 1192), 5th defendant (owner of parcel No. 8096) and the 7th defendant whom he said resides in the parcel No. 1192. I will therefore consider as withdrawn the suits against the 3rd, 4th, 5th and 7th defendants.
16. In the course of the hearing, I did gather that the parcel No. 4969 owned by the plaintiff, is in the RIM, cut into two by a road, so that there is a southern portion and a northern portion (also described as the lower side and upper side respectively) connected by a brace. The plaintiff has his houses on the lower portion which is fenced. The dispute is actually on the northern portion across the road (the so-called 'upper side'). This upper side is abutted to the left at the southern end by the land parcel No. 8096 (of the 5th defendant, suit withdrawn), followed by the parcels No. 8095 (of the 1st defendant, suit maintained), then parcels No. 8765 (no dispute regarding this parcel), then No. 8791 (of the 6th defendant, suit maintained), then parcel No. 8790 (of the 2nd defendant, before being subdivided into the parcels No. 8820 and 8830, and the plaintiff maintains the suit against the 2nd defendant). The RIM does show that there is a road between this upper side of the parcel No. 4969 and the other parcels of land (which I have mentioned above) that abut it on the left side. The complaint of the plaintiff is that the defendants have moved beyond their parcels of land, crossed over this road, and taken possession of the portions adjacent to what they own.
17. This position of the plaintiff is actually supported by the erstwhile District Surveyor, who testified as PW-2. He did present a report dated 7 June 2019 which contains his findings. He did observe that the plaintiff's parcel No. 4969 is intact on the lower side up to the road that cuts his land into the upper and lower portions. However, on the upper side, he noted overlap from the parcels No. 8791, and 8830 and 8829 (the former parcels No.8790).
18. In his submissions, Mr. Nyamurongi, learned counsel for the defendants, tried to discount this survey report by submitting that it was inconclusive because it was prepared without the input of the Land Registrar. I actually do not think that the report is inconclusive. It is not inconclusive, in the context of identifying what is on the ground, and who is in on the ground, which is what is critical for our case. The issue of the genesis of the dispute between the parties does not form part of the report, but it did not have to, in so far as the District Surveyor was only confining himself to pointing out what is on the land. In essence, this is a ground report. It would be another matter if the District Surveyor had gone to the ground to finalize a boundary dispute but that was not what he was making the report for. As far as I can see, the report confined itself to giving the factual position of what was on the ground, and within that context, it certainly is conclusive that the defendants (against whom the plaintiff maintains suit) are occupying part of the land of the plaintiff. Mr. Nyamurongi also submitted that the dispute of the plaintiff keeps mutating. I don't see it that way. What the plaintiff has presented to court is a dispute between himself and particular neighbours who own specific parcels of land. It was never argued that this suit between the plaintiff and these particular neighbours has been heard before. It may be that the plaintiff, or his predecessors in title, had a dispute with other owners, such as the persons owning the parcels No. 1192 and 1195. I am not too sure of the location of parcel No. 1195, for I have not seen in in the map, but the parcel No. 1192 abuts the lower portion of the plaintiff's land. If the dispute between the plaintiff and his neighbour on the lower side has been resolved, so what if there is still a dispute between the plaintiff and the neighbours on the upper side? Is that a mutation of a dispute? I don't



see it that way. It is merely a different dispute with neighbours on his left upper side, and the plaintiff is within his rights to pursue it, irrespective of whether or not there was a previous dispute with the neighbours on the lower side. He would only be estopped from proceeding if this same dispute had been heard and determined before, which would have invited the res judicata doctrine, but the plea of res judicata has not been raised. There is therefore no substance in arguing that what is before court is the same dispute which has been undergoing a mutation.

19. The defendants certainly did not contest being on the plaintiff's land. DW-1 did a sketch of the land which actually confirms that the 1st defendant is the one occupying the land on the upper side immediately after the plaintiff's houses, then followed by the 6th defendant, then the 2nd defendant and the person he sold a portion of his land to. What the defendants (who remain in the suit) raise is that the plaintiff's upper portion ought to be within their land parcels and I now proceed to analyse this contention based on the evidence that the defendants produced. It will be recalled that DW-1 stated that the land the plaintiff claims was initially owned by his late father and that he leased it to the plaintiff's father (Ezekiel) when it was registered as parcel No. 1194 before subdivision. He alleged that Ezekiel later contended that this land was sold to him, and not leased, which led to a dispute being heard before the Chief. He stated that the Chief assigned to Ezekiel the lower portion of the land and that Ezekiel acknowledged this to be his land. He added that Ezekiel was even involved in apportioning the upper side (the disputed portion) to the defendants.
20. Ms. Sagwa, learned counsel for the plaintiff, in her submissions, pointed out that all the allegations of the defendant remain claims by word of mouth and are unsupported by any other evidence. I agree. Despite the defendants claiming that the land was originally parcel No. 1194, no evidence of this was presented. There would have been nothing easier than obtaining the Green Card for the parcel No. 1194 and the mutation form for it. No surveyor was called by the defendants to confirm this allegation. Further although it was alleged that part of this land was leased to Ezekiel, and despite testifying in cross-examination that he got hold of this lease document, the said lease document was never produced. It was said that the dispute regarding what Ezekiel had leased went to the Chief in the year 2000 but no minutes of such meeting was ever presented. Neither was the Chief or any elder who may have heard such a dispute called as a witness. DW-1 added that in 2005, Ezekiel called a clan elder called George Nyandusi to divide the rest of the land to himself and his brothers. This clan elder was never called as a witness and DW-1 did not offer any further evidence on his whereabouts. DW-1 further stated that the land had been leased to one Mary Ratemo Okindo in the year 2002 and he produced the agreement. What he produced was an agreement between Mary Okindo and James Nyamboga Ondimu who he said was his brother. I have looked at that agreement. It only states that James Nyamboga Ondimu has given Mary Okindo land measuring 300 X 140 feet to use. The land being leased is not identified by the parcel number and one cannot therefore vouch that the said agreement is actually for the land in dispute. Mary Okindo was never called as a witness, to affirm what land it was that she was using, and none of the other people mentioned in that agreement as witnesses ever testified.
21. It will be recalled that DW-1 was owner of the parcel No. 8790 which he subdivided into two. He drew and signed the mutation form. When you look at that mutation form, you will see that the boundary as shown in the map, between this parcel No. 8790 and the plaintiff's parcel No. 4969, was respected. In other words, DW-1 never subdivided his land in a fashion as to include the land parcel No. 4969. He did, by signing that mutation form, acknowledge that the parcel No. 4969 is a distinct and separate piece of land. If he did not believe this to be so, he ought to have filed suit to ask for amendment of the map at the time that he was surveying his land in order to subdivide it. He never, at that time, said that there is any error in the map. DW-2 more or less reiterated what DW-1 said without backing that up with any documentary evidence. The 1st defendant, the owner of the parcel No. 8095 never testified.



22. An analysis of the above evidence shows that there is nothing to suggest that the plaintiff's title to parcel No. 4969 reflects acreage that is more than he is entitled to, or contains some acreage that ought to be comprised in the parcels No. 8095, 8790 and 8791. There is thus no substance in the contention of the defendants that the land that they occupy ought not to be contained in the parcel No. 4969. There is nothing to suggest that there is an error in the map and that the map needs to be amended.
23. It is clear that the defendants still retained in the suit i.e the 1st, 2nd and 6th defendants, are on the plaintiff's land parcel No. 4696, and they have not offered any legally acceptable justification in remaining in that land. Neither have they presented any claim to the disputed land by way of adverse possession. I see nothing that would prevent the plaintiff from obtaining the orders that he seeks from this court. He is the registered proprietor of the disputed land, and as registered proprietor, it is him who is vested with rights over the land including the right to use and occupy that land. This is enshrined in 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; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.
24. From a reading of Section 24 (a) above, the registration of the plaintiff as owner of the land parcel No. 4969 has bestowed on him all rights and privileges that vested in a land owner. That being the case, the plaintiff is perfectly entitled to the prayers in his plaint. The land parcel Wanjare/Bogiakumu/4969 is clearly separate and distinct from the land parcels Wanjare/Bogiakumu/8095, 8790 and 8791. These parcels do not share the same land, and I have seen nothing wrong in the manner in which the Registry Index Map is drawn, and how it separates these parcels of land. The defendants thus ought to restrict their activities to what is shown in the map as covering their land parcels No. Wanjare/Bogiakumu/ 8095, 8790 (and its subdivisions) and 8791. The plaintiff has asked for orders to have the defendants evicted from the land parcel No. Wanjare/Bogiakumu/ 4969. I give the 1st, 2nd and 6th defendants sixty (60) days from the date of this judgment to remove all their items, structures and anything else that they have on the land, and deliver vacant possession to the plaintiff. If they do not do so, the plaintiff is at liberty to apply for an order of eviction, and such eviction will be done at the cost of these defendants.
25. The last issue is costs. I award the costs of the suit to the plaintiff as against the 1st, 2nd and 6th defendants. It would appear that the plaintiff had nothing against the 3rd, 4th, 5th and 7th defendants and he therefore did not need to sue them. He will pay to the 3rd and 4th defendants the costs of the withdrawn suit. I make no orders as to costs for or against the 5th and 7th defendants who did not enter appearance. The 1st, 2nd, 3rd, 4th and 6th defendants will pay to the plaintiff the costs of the counterclaim, which counterclaim is hereby dismissed.
26. For the avoidance of doubt, this judgment is restricted to the parties above, for I note that the owner of the parcel No. 8830 was not sued herein.
27. Judgment accordingly.



DATED AND DELIVERED AT KISII THIS 25 DAY OF OCTOBER 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

In the presence of: -

Ms. Sagwa for the plaintiff

Ms. Kebungo holding brief for Mr. Nyamurongi for the 1st, 2nd, 3rd, 4th & 6th defendants

No appearance entered for the 5th & 7th defendants - Absent

Court Assistant – Lawrence Chomba

