



**Achola & another v Musungu (Environment & Land Case 63 of 2015)
[2023] KEELC 21549 (KLR) (16 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21549 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 63 OF 2015
BN OLAO, J
NOVEMBER 16, 2023**

BETWEEN

REBECCA M MBONE ACHOLA 1ST PLAINTIFF

ARGWINGS MILLAN ACHOLA 2ND PLAINTIFF

AND

MARGARET TABU MUSUNGU DEFENDANT

JUDGMENT

1. By a plaint dated 17th june 2015 and filed herein on 18th june 2015, rebecca m. mbone achola and argwings millan achola (the 1st and 2nd plaintiffs respectively) and suing as the registered proprietors of the land parcel no bukhayo/ bugengi/7903 (the suit land) impleaded margaret tabu musungu (the defendant and registered proprietor of the land parcel no bukhayo/ bugengi/7902) and sought against her judgment in the following terms:
 1. An order of eviction of the Defendant from the road access leading to the suit land by demolition of the structures thereon and a permanent injunction restraining the Defendant from ever closing it again.
 2. Costs
 3. Interests.
 4. Any other or further relief this Honourable Court deems fit and just to grant.
2. The basis of the Plaintiffs' case is that they are the registered proprietors of the suit land entitled to all the rights appurtenant thereto including a 6 metre road of access. That the Defendant who is the proprietor of the land parcel No Bukhayo/ Bugengi/7902 has, without any colour of right, encroached onto the access road leading to the suit land by constructing a pit latrine and kitchen thereby restraining the Plaintiffs' access and causing the suit land to be landlocked.



3. That the Plaintiffs reported to the district land registrar busia who, together with the district surveyor, visited the area and confirmed the above averments. However, the Defendant has refused to remove the pit latrine and kitchen in order to open the access road thus necessitating the filing of this suit.
4. Together with the plaint, the Plaintiffs filed their statements and list of documents also dated 17th June 2015.
5. In her statement, the 1st Plaintiff stated that she and the 2nd Plaintiff who is her son are the joint owners of the suit land which adjoins the Defendant's land parcel No Bukhayo/ Bugengi/7902. In 2012, or thereabout, the Defendant blocked the access road leading to the suit land by constructing a pit latrine thereon. the plaintiffs made a report to the district land registrar who, in the company of the county surveyor, visited the site, established the blockage and recommended that the pit latrine be demolished. A report was made to that effect but despite several requests and demand the Defendant has remained adamant.
6. The 2nd Plaintiff adopted the 1st Plaintiff's statement.
7. The Plaintiffs filed the following documents as per their list of documents:
 1. Copy of title deed to the suit land.
 2. Copies of the certificates of search for the land parcels No Bukhayo/ Bugengi/7902 and 7903.
 3. Mutation Form for the land parcel No Bukhayo/ Bugengi/1677.
 4. Boundary dispute summons dated 22nd July 2014 and 8th August 2014 and addressed to the defendant and one enock maragi.
 5. Letter from the land registrar dated 25th february 2015 and addressed to the chief bukhayo west location.
 6. Report by the County Surveyor Busia dated 16h September 2014.
The Plaintiff had earlier obtained an exparte judgment against the Defendant for failure to file his defence. that judgment was however set aside by omollo j vide her ruling dated 26th january 2021 and the defendant was allowed to file her defence.
8. On February 21, 2022, the Defendant filed a defence and counter-claim in which for some unexplained reasons, she included on julius orina manwari as a 2nd defendant. i shall revert to that later in this judgment.
9. In her defence she confirmed that the plaintiffs are the registered proprietors of the suit land but denied having encroached on a 6 metre access road leading thereto by building on it a pit latrine and kitchen. She added that no such road exists and denied having been invited by the District Surveyor to participate in any survey. She pleaded further that she had purchased the land parcel no bukhayo/ bugengi/7902 in 2006 from one julius manwari and was issued with a title deed thereto on 28th july 2006. then she and her neighbour one thadayo marabi agreed to surrender 30 metres of their respective portions of land to create a mutual access road in 2007. by that time, the plaintiff who obtained title to the suit land on 19th november 2012 had not even purchased the suit land nor obtained title deed thereto. He is therefore surprised that the Plaintiffs are now claiming an access road and have produced among their documents, the Mutation Form dated 17th May 2006, sketch plan and surveyor's report dated 16th September 2014 which implies that there is an access road.



10. The defendant questions the legality of the access road and has pleaded in paragraph 10(i) to (v) the following reasons for doing so:
- i. It is not clear when the access road was created and who sanctioned it.
 - ii. The Defendant was never involved or consulted prior to the creation of the said access road.
 - iii. It is not clear whether the original seller sold land to the Defendant being land parcel No Bukhayo/ Bugengi/7902 when the access road was passing through her land an act that amounts to fraudulent sale and misrepresentation of facts as the actual size of land sold to the Defendant was 3 acres. Therefore, the creation of the access road through the Defendant's land unlawfully reduced the size of the land which must attract compensation against the original seller in the unlikely event that the Plaintiffs claim is justified and lawful.
 - iv. That a perusal of the Mutation Form shows the Plaintiffs' portion of land having the size of 0.3 hectares with no explanation given by the Plaintiffs where that extra portion came from.
 - v. That there is a high probability that the Plaintiffs' claim for an access road lacks merit for the reason that it cannot be true that the sub-division of the original seller's portion of land parcel No Bukhayo/ Bugengi/1677 was done at the same time and created an access road between the Plaintiffs' and the Defendant's land at the time the Defendant was buying her portion of land in 2006 and there was going to be no justification for the Defendant to build her latrine on access road which she knew was there in the first place.
11. The Defendant sought the dismissal of the Plaintiffs' suit on the grounds that the alleged road if any, was illegally and fraudulently created by the Plaintiffs in collusion with the District Surveyor which action should be revoked. The particulars of illegality and fraud on the part of the Plaintiffs and the District Surveyor were pleaded in paragraph 12(a) to (h) of the defence and counter-claim as follows:
- a. Illegally encroaching on the Defendant's portion of land and hiving out an access road.
 - b. Failing to consult the Defendant before creating the alleged access road.
 - c. Illegally causing the reduction in size of the Defendant's portion of land contrary to the *Constitution*.
 - d. Owning extra portion of land without any justification in law or fact.
 - e. Stealing a portion of the Defendant's parcel of land to create an access road.
 - f. Grabbing the Defendant's portion of land.
 - g. Impersonating the Defendant and falsifying documents in the names of the Defendant while creating an access road.
 - h. Colluding with the District Surveyor to trespass into the Defendant's portion of land and creating an access road against her will.
12. The Defendant goes on to plead in paragraph 13 of her defence and counter-claim that she instructed a registered surveyor to conduct a survey on the land to establish its size on the ground in the event that a 30 metre size access road is hived from it and what is the actual size of her portion of land inclusive of the access road and it was established as follows:
- a. That her current size of land, inclusive of the alleged road is 1.2 hectares (2.97 acres).



- b. That if a 30 metre size of land is hived from her portion of land, the same is reduced to a total size of 2.5 acres which size is less than 1.2 hectares (2.97 acres) indicated in the copy of her title deed.
- c. That creation of an access road to her land will illegally reduce her size of land without attendant compensation by the Plaintiffs or the original seller Mr Julius Manwari as it is required under the Constitution of Kenya 2010 which act is illegal.

That further and contrary to the District Surveyors' report dated 16th September 2014 and in comparison with the Defendant's survey report filed herein, it is not correct that the Plaintiffs are landlocked as alleged. on the contrary, the plaintiffs have another access road passing through bukesa area which connects them straight to their home and land parcel no bukhayo/ bugengi/7903. The Defendant therefore claims that the Plaintiffs and the County Surveyor colluded and illegally encroached onto her portion of land. Impersonated her and falsified documents to create an access road.

13. The Defendant counter-claimed against the Plaintiffs as follows:

1. That all the documents created and registered by the Plaintiffs, if any, in collusion with the busia county surveyor and/or with one julius manwari in creation of the alleged access road on land parcel no bukhayo/ bugengi/7902 be revoked at the cost of the plaintiffs within 60 days after delivery of this judgment.
2. That subsequent to (1) above, the register book and survey map for land parcel No Bukhayo/ Bugengi/7902 be amended to reflect the actual size of 1.2 hectares reflected on the title deed at the costs of the plaintiff within 60 days after delivery of this judgment while the size of the plaintiffs' portion of land being bukhayo/bugengi/7903 should be corrected both in the register book and title deed to read 0.3 hectares as reflected in the Mutation Form dated 17th May 2006.
3. That cost of the counter-claim be paid to the Defendant.

14. The Defendant filed her statement dated July 1, 2022 and also provided the names of thadayo marabi and josephat o. masiga a surveyor as her witness. however she was the only witness who testified in support of her case. She also filed the following documents as her documentary evidence as per her list of documents dated 1st July 2022:

1. Copy of title deed for the land parcel No Bukhayo/ Bugengi/7902 measuring 1.2 hectares registered in her name.
2. Copy of Mutation Form dated 17th May 2006 for the original land parcel No Bukhayo/ Bugengi/1677.
3. Sketch plans from the above mutation.
4. Survey report by josephat o. masiga dated 8th march 2021.
5. Letter by the County Surveyor Busia dated 16th September 2014.

15. Her statement dated 1st July 2002 is a rehash of what is contained in her defence and counter-claims. For purposes of completeness, she confirmed that the Plaintiffs are her neighbours but she obtained the title to her land on 28th July 2006 after purchasing it from one julius manwari. that it had no access road so she and another neighbour one thadayo marabi mutually agreed that each would surrender 30 metres from their respective parcels of land to create an access road. by that time, the Plaintiffs



who obtained their title on 19th November 2012 had not even occupied the suit land. It is therefore surprising for the Plaintiffs to claim an access road from her land when there has never been such a road passing through her land. The legality of the Plaintiffs' list of documents and the surveyor's report dated 16th September 2014 which implies that here is an access road is questionable because she was never involved in its creation, it is not clear whether the original owner knowingly sold her the land parcel No Bukhayo/ Bugengi/7902 when there was an access road passing through it and which would amount to fraud and misrepresentation entitling her to compensation from the original owner. The Plaintiffs' suit land is shown on the Mutation Form as measuring 0.3 hectares but on the title deed it is 0.3 hectares and there is a probability that the Plaintiffs' claim for an access road lacks merit because it should have been marked and established at the time when she was obtaining the title. It cannot therefore be true that the Plaintiffs' land includes a 6 meter of access road which she has encroached upon. That she instructed a registered surveyor who confirmed that:

1. The size of her land inclusive of the alleged access road is 1.2 hectares (2.97) acres.
2. That if a 30 meter portion of land is hived from her land, it's size will be reduced to 2.5 acres which is less than 2.97 acres indicated in her title deed.
3. The creation of an access road will therefore illegally reduce the size of her land without any attendant compensation by the plaintiffs or the original seller mr julius manwari.

it is therefore not correct that the plaintiffs' land is landlocked as alleged and to the contrary, plaintiffs have another access road through bukesa area. if the plaintiffs are indeed entitled to an access road through her land, then the same was procured fraudulently and illegally by the plaintiff through collusion with the county surveyor. the plaintiffs' suit should be dismissed and her counter-claim allowed as prayed.

16. The Plaintiffs filed a reply to defence and defence to the counter-claim. They joined issue with the Defendant and added that if the Defendant was summoned to participate in the survey to confirm the existence of the access road and refused to attend, then she has herself to blame. That the Defendant's allegations that she was registered as proprietor of the land parcel No Bukhayo/ Bugengi/7902 and obtained title when there was no access road beats logic since the suit land and the Defendant's title were created by a mutation dated 20th march 2006 and registered on 19th june 2006 with the access road clearly defined. the defendant cannot now purport to have created a road with one thadayo marabi when the same was already in existence. the fact that the suit land was registered on 19th november 2012 after the registration of the defendant's land does not change the position on the ground since both parcels were created on the same day.
17. the defendant's claim of illegality cannot stand because the access road was created on 20th march 2006 through the sub-division of the land parcel no bukhayo/ bugengi/1677 long before the defendant purchased her land and she could not have been consulted or involved in the creation of the access road because the land originally belonged to Julius Manwari who had all the rights to create the road. The size of the Defendant's land could not be affected or reduced since it was created contemporaneously with the access road.
18. The Plaintiffs denied the allegations of fraud and illegality as enumerated in paragraph 12(a) to (h) of the defence and counter-claim. They denied that they had colluded with the County Surveyor to create the access road or that the Defendant is entitled to the orders sought in the counter-claim. Instead, the Plaintiffs pleaded that the Defendant's counter claim is vexatious, an abuse of the Court process and discloses no cause of action and it should be struck out.



19. The *ex-parte* hearing of the suit had commence before Kaniaru J on July 17, 2017 when he heard the evidence of the Plaintiffs.
20. They adopted the contents of their statements and produced as their documentary evidence the documents filed herein as per the list referred to earlier in this judgment.
21. martin osano (pw3) the county land registrar also testified before kaniaru j on 27th november 2017 who then delivered the ex-parte judgment in favour of the plaintiffs on 19th april 2018. that judgment was however set aside by omollo j vide a ruling delivered on January 26, 2021 and the Defendant was allowed to file her defence.
22. The hearing thereafter commenced before me de novo on 16th November 2022 when the Plaintiffs testified and adopted as their testimony the contents of their respective statements which I have already summarized above.
23. They also produced as their documentary evidence the documents referred to in their list of documents dated June 17, 2015.
24. They then called as their witnesses james ondima onyinkwa (pw3) a land surveyor based at the county survey office in busia. being an expert witness, he had not recorded any statement but he produced his report dated 16th september 2014 as part of the plaintiffs evidence. he told the court that he and the land registrar Busia visited the land in dispute following a complaint by the Plaintiffs that they had been landlocked. On visiting the land, they found that there was no access road to the suit land and a pit latrine had been constructed on the land parcel No Bukhayo/ Bugengi/7902 which was blocking access to the suit land. He prepared a report in which he recommended that the pit toilet and building be removed to allow for access to the suit land. He denied having colluded with the Plaintiffs to create a new road of access adding that it had always been there as per the Mutation Forms. He confirmed that from the mutation, the suit land is 0.36 hectares while parcel No Bukhayo/ Bugengi/7902 is 1.2 hectares.
25. The Defendant also testified on 1st February 2023 and adopted as her evidence, the contents of her statement dated 1st July 2022. She also produced as her documentary evidence the documents listed in her list of documents dated 1st july 2022 except documents no 3 and 4 whose production counsel for the plaintiffs mr onsongo objected to on the ground that they should have been produced by the land surveyor. the land surveyor who prepared the report dated 8th march 2023 one josephat o. masiga as well as the mutation form did not testify as attempts of the defendant's counsel to get him to attend court were futile. the record shows that the defendant was granted two adjournments to call the said surveyor on 21st march 2023 and a last adjournment on 20th april 2023 before her case was closed. the court did not therefore have the benefit of his evidence.
26. Submissions were thereafter filed by mr onsongo instructed by the firm of obwoge onsongo & company advocates for the plaintiffs and mr musungu instructed by the firm of musungu pekke & company advocates for the defendant.
27. I have considered the evidence by both parties including the documents filed and the submissions by counsel.
28. Before I consider the respective claims by the parties herein, it is important that I address the issue as to whether infact there is a 2nd Defendant by the name julius orina manwari properly enjoined in these pleadings. it is clear from the plaintiffs' plaint dated 17th june 2015 that they only sought judgment against margaret tabu musungu and who is the only defendant in this case. however, when



the defendant's counsel filed her statement of defence and counter-claim dated 18th february 2022, he named one julius orina manwari as a 2nd defendant the plaintiffs counsel followed suit and on 18th march 2022 filed the plaintiffs' reply to defence and defence to counter-claim in which he impleaded the said julius orina manwari as a 2nd defendant. the misjoinder of parties did not end there. when counsel for the defendant filed his summons dated 10th july 2023, another stranger this time by the name wilson henia was introduced as the 2nd Defendant.

29. It is not clear how these two strangers found their way in these proceedings. the name of julius orina manwari was of course mentioned as the original proprietor of the land parcel no bukhayo/bugengi/1677 which was sub-divided to create the suit land and the land parcel no bukhayo/bugengi/7902 and which were sold to the plaintiffs and the defendant respectively. however, the plaintiffs having filed no claim against him and there being no evidence to show that he was subsequently enjoined in these pleadings as a 2nd defendant either by the plaintiff or by court in accordance with the provisions of order 1 rule 10(2) of the civil procedure rules, it follows that there is only one defendant in this case namely margaret tabu musungu and although counsel have been making reference to 1st defendant and 2nd defendant in their submissions, there is only one Defendant in this case and that is why in this judgment, I have steered clear of making any reference to a 1st or 2nd Defendant.
30. The names of julius orina manwari and wilson henia, in so far as they are referred to variously as the 2nd Defendant, are struck from these pleadings.
31. I consider the following issues to fall for my determination in this dispute:
 1. Whether the Defendant has encroached onto the access road leading to the suit land by constructing thereon a pit latrine and building and ought to be evicted therefrom and permanently enjoined after demolishing the said structures.
 2. Whether infact it is the Plaintiffs who, in collusion with the County Surveyor Busia, have created an access road onto the Defendant's parcel of land No Bukhayo/ Bugengi/7902 thus necessitating an amendment of the register and survey map to reflect it's size as 1.2 hectares.
32. It is not in dispute that the suit land and the Defendant's land are adjacent to each other. The Plaintiffs' case is that the Defendant has constructed a pit latrine and kitchen on the 6 meters access road leading to the suit land for the main road an allegation which the Defendant has denied stating that there has never been such an access road.
33. Given those conflicting versions, this court must rely on the evidence of james ondima onyinkwa (pw3) who is not only an independent witness but also an expert. he testified that he and the land registrar visited the plaintiffs and defendant's land and confirmed that the access road had been blocked by the defendant's toilet and other building. he also took the court through the map. when he was led by mr onsongo in his evidence in chief, he said:

“When we visited the land, we saw there was no road of access to the land parcel No Bukhayo/ Bugengi/7903 as per the map. There was a pit latrine/toilet and a building on the land No Bukhayo/ Bugengi/7902 which was blocking access to the parcel No Bukhayo/ Bugengi/7903. The access road was blocked by about 6 metres. This is my report dated 16th September 2014 and I recommended that the pit toilet and the building be removed to allow for access to the Plaintiffs' land.”



34. When he was cross-examined by Mr Musungu, he repeated the same. He said:

“The boundaries and the beacons of the land parcel No Bukhayo/ Bugengi/7903 were there. The access road was 6 meters. The evidence is in my report and the other documents which I have produced. The Defendant had blocked the whole access road. It had been blocked by the toilet and the building. It is true that in my report, I have not shown the extent of the encroachment. My report has to be read together with the map.”

35. In his report dated September 16, 2014 and which is part of the Plaintiffs’ documentary evidence, this witness makes the following findings which I shall cite in extenso since the report is brief but relevant to the matter in consideration:

“Re: Surveyors Report Onopening Of Access

road to plot No Bukhayo/ Bugengi/7903:

A site visit was made to the above mentioned parcel of land on 2nd September 2014 in the presence of the District Land Registrar to open up the non-existing surveyed road of access branching from Busia-Mumias highway to LR No Bukhayo/ Bugengi/7903. The 6m access road was a creation out of the sub-division of parcel L.R. No Bukhayo/ Bugengi/1677 which gave rise to L.R. 7900, 7901, 7902 and 7903. The road abuts L.R No 7902 and ends at the entry to LR. 7903.

From the field observation, this road was not existing on the ground. Literary, L.R No 7903 is land locked. To ascertain its mapped position survey measurement were made. At the entry point, it was established leaving L.R No 7902 with its mapped measurements of 30m. Further up, a distance of 210m, a permanent pit latrine was realized constructed on the position of the access road.

At the entry of L.R No 7903 a width of 25m was realized after giving the road measurement.

It is highly recommended that the latrine be demolished to ensure the possibility and usability of the access road. Attached is a diagram showing the survey findings and action.

James Onyinkwa

For County Surveyor

Busia County.”

36. Apart from that report there is also the report of Mr Tom Chepkwesi the District Land Registrar Busia dated February 25, 2015 and which is also part of the Plaintiffs’ documentary evidence and was produced without objection. It is also brief and I will also cite it in extenso. It reads:

“The Chief

Bukhayo West Location

RE: Access Road To Parcel

No Bukhayo/ Bugengi/7903.

This is to inform you that my office visited the above parcel and established that a neighbour Margaret Tabu Musungu had constructed and encroached on the space of the road of access to the above parcel.



this is therefore to request you to summon margaret tabu musungu to explain a program of demolition of the toilet and part of the kitchen.

Tom Chepkwesi

District Land Registrar

Busia.”

37. The plaintiffs have also produced boundary disputes summons dated July 22, 2014 and August 8, 2014 addressed to the defendant.
38. It is instructive to note that the plaintiffs had also produced as part of their documentary evidence the report by james onyinkwa (pw3) dated 16th september 2014. however, in an attempt to controvert the contents of that report, the defendant lined up as her witness one josephat o. masiga also a surveyor to produce his report dated March 8, 2021. that witness did not attend court on February 1, 2023, March 21, 2023 and also April 20, 2023 when the defendant had been granted the last adjournment to call him. this court did not therefore have the advantage of hearing his testimony both oral and through his report. the only report that this court can rely on therefore is that of the plaintiffs’ witness james onyinkwa (PW3).
39. The role of an expert witness’s evidence was set out as far back as 1995 by the Court of appeal in *Dhalay v R* 1995 – 1998 E.A. 29 as follows:

“Where the expert who is properly qualified in his field gives any opinion and gives reasons upon which his opinion is based and there is no other evidence in conflict with such opinion, we cannot see any basis upon which such opinion could ever be rejected. But if a Court is satisfied on good and cogent ground(s) that the opinion though it be that of an expert, is not soundly based, then a Court is not only entitled but would be under a duty to reject it.” Emphasis mine.

There is no doubt that james onyinkwa (pw3) as a surveyor, is an expert in that field. no evidence was led to discredit his expertise. this court, in the absence of other contradictory expert evidence, must find, which i hereby do, that indeed the defendant had blocked the road of access to the suit land. that evidence fully compliments that of the plaintiffs. it is clear that the access road was created when the original land parcel suit no bukhayo/ Bugengi/1677 was sub-divided to create both the suit land and the defendant’s land. it cannot therefore be correct for the defendant to state, as she has attempted to imply, that the access road was created later on. and when the defendant was cross-examined by mr onsongo, she owned up to having earlier removed a toilet from the road. She said:

“It is not true that I built my toilet and house on the access road. I do not know what the Plaintiffs are saying. When I bought the land, there was no road. It is true that I called the Plaintiffs so that we discuss the issue of the toilet and house. She wanted me to remove them. So I removed the toilet. No I did not remove the toilet. I however later removed it and put up a gate. She was using the neighbour’s gate to access her land.”

That prevarication on the part of the Defendant can only mean that she was being evasive and economical with the truth. The truth is that infact she was aware that she had blocked the access road to the Plaintiffs’ land and that is why she initially moved the offending structure.

40. This Court is satisfied that the Plaintiffs have proved their case against the Defendant.



41. The Defendant's counter-claim, as is clear from her pleadings, is hinged on the allegation that the Plaintiffs and the County Surveyor colluded to falsify documents in creating the access road through her land. In paragraph 2 of her counter-claim, she has pleaded thus:

2: "The Plaintiffs in collusion with the County Surveyor have illegally encroached on the 1st Defendant's portion of land, impersonated her and falsified documents to create an access road."

In paragraph 12 of her defence and counter-claim, the Defendant has set out what she considers to be acts of fraud and illegality on the part of the Plaintiffs and the District Surveyor and I need not repeat them. They include reducing her land, stealing, grabbing, impersonation and falsification of documents. These are very serious allegations which amount to criminal conduct. The burden of proof was therefore on the defendant to prove those allegations to the required standard which is higher than in ordinary civil cases. In the case of *Ndolo -v- Ndolo* 2008 1 KLR (g&f) 742, the court of appeal described that standard as follows:

"We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases namely proof upon a balance of probabilities. In cases where fraud is alleged, it is not enough to simply infer fraud from the facts." Emphasis mine.

In the case of *R.G. Peter v Lalji Makanji* 1957 E.A. 314, the then court of appeal for East Africa described that standard thus:

"Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required." Emphasis mine

42. Other than making the above allegations of fraud and illegality, the Defendant led no cogent evidence to prove them. It is not enough to plead such serious allegations without placing before the Court sufficient and credible evidence to prove them. In the background of the evidence of James Onyinkwa (PW3), and which was not controverted by other expert evidence, it was always going to be a herculean task for the defendant to establish collusion, impersonation or falsification of documents on the part of the defendant and the County Surveyor Busia. Indeed the only documents which could have been falsified are the same documents which James Onyinkwa (PW3) provided in support of the plaintiffs' case. Clearly, the defendant was groping in the dark when she made those serious allegations. Indeed in paragraph 10(v) of her defence and counter-claim, the Defendant has pleaded thus:

"That there is a high probability that the Plaintiffs' claim for an access road lacks merit for a clear reason that it cannot be true that the sub-division of the original seller's portion of land parcel No Bukhayo/ Bugengi/1677 was done at the same time and created an access road between the Plaintiffs and the 1st Defendant at the time the 1st Defendant obtained her title on 28/7/2006 ..." Emphasis mine

The use of the word "high probability" can only mean that the Defendant herself was not even sure about the truth of the allegations which she was raising. When a party approaches the Court seeking a specific remedy against another party, he or she must be sure about the cogency of the allegations being made and the supporting evidence. I cannot say the same about the Defendant's counter-claim.



43. Secondly, the allegations of fraud and illegality have been levelled against both the Plaintiffs and the County Surveyor Busia. However, that office has not been enjoined in these proceedings to enable them defend those claims. The matter has been made worse by the fact that the said County Surveyor has in fact supported the Plaintiff's case.
44. Finally, no evidence was placed before this Court to suggest that the said County Surveyor had any reasons to give false testimony against the Defendant with respect to the creation and obstruction of the access road leading to the Plaintiffs' land. If the said County Surveyor had any reason to lie against the Defendant, this Court has not been informed.
45. The up-shot of all the above is that the Defendant has been unable to prove her counter-claim. The same is therefore dismissed.
46. Ultimately therefore and having considered all the evidence herein, this Court makes the following disposal orders.
 1. The defendant's counter-claim is dismissed.
 2. There shall be judgment for the Plaintiffs against the Defendant in the following terms:
 - a. The Defendant shall within 60 days of this judgment demolish the pit latrine and kitchen erected on the access road leading to the land parcel No Bukhayo/ Bugengi/7903.
 - b. In default of (a) above, the Plaintiffs shall be at liberty to demolish the said structures in order to open the access road.
 - c. Thereafter, the Defendant, her servants, agents and any persons acting through her shall be permanently enjoined from obstructing the access road leading to the land parcel No Bukhayo/ Bugengi/7903.
 - d. The Defendant shall bear the costs of the Plaintiff's suit and the dismissed counter-claim.

BOAZ N. OLAO

JUDGE

16TH NOVEMBER 2023

**JUDGMENT DATED, SIGNED AND DELIVERED ON THIS 16TH DAY OF NOVEMBER 2023
BY WAY OF ELECTRONIC MAIL WITH NOTICE TO THE PARTIES.**

