



**Awori v Kubadi & another (Environment & Land Case 161 of 2017)
[2023] KEELC 22284 (KLR) (18 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22284 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 161 OF 2017
BN OLAO, J
DECEMBER 18, 2023**

BETWEEN

VINCENT JUMA AWORI PLAINTIFF

AND

PRISCA ANYANGO KUBADI 1ST DEFENDANT

LAND REGISTRAR, BUSIA (K) 2ND DEFENDANT

JUDGMENT

1. Vincent Juma Awori (the Plaintiff) impleaded Prisca Anyango Kubadi and the Land Registrar Busia (the 1st and 2nd Defendants respectively) seeking judgment against them in the following terms with respect to the land parcels No Samia/Wakhungu-odiado/617 and Samia/Wakhungu-odiado/443 (the suit land).
 1. A declaration that the 1st Defendant un-lawfully obtained title deed to the land parcel No Samia/Wakhungu-odiado/617 belonging to the family of Masakhalia Awori.
 2. Subject to prayer (1) above, the Honourable Court be pleased to cause the said title deed to be revoked and/or annulled.
 3. A fresh and lawful succession to be carried out in the suit parcels No Samia/Wakhungu-Odiado/617 and Samia/Wakhungu-Odiado/443 to enable each family of the three sons of Masakhalia Awori (Awori Masakhalia Timotheo, Charles Alon Kubadi and Daniel Okong'o Masakhalia) to get their equal shares as required by the law.
 4. Any other order that this Honourable Court may deem fit, just and expedient.
 5. Costs.



2. It is the Plaintiffs case that Masakhalia Awori(the deceased) had three wives Nekhoba, Mamunyekeraand Namuyewith whom he sired three sons namely Awori Masakhalia Timotheo, Charles Alon Kubadiand Daniel Okongo who all lived with their families on the suit land which share a common boundary but which has not been defined. That the 1st Defendant has always frustrated the process of succession to enable the beneficiaries to the Estate of the deceased to get their shares. That following the demise of Charles Alon Kubadi, his widow who is the 1st Defendant fraudulently and secretly carried out the succession process in Busia Principal Magistrate's Court P&A No. 84 of 1996 with respect to the land parcel No Samia/Wakhungu-Odiado/617 which she then registered in the names of her late husband and concealed the fact that the said parcel of land together with the land parcel No Samia/Wakhungu-Odiado/443 was family land. The 1st Defendant proceeded also to fraudulently and secretly register the family of Awori Masakhalia Timotheo, Daniel Okong'o Masakhalia and Ouma Obilo in the smaller parcel being land parcel Samia/Wakhungu-Odiado/443.
3. That dispute was referred to the Funyula Land Disputes Tribunalin 2009 which ruled that the suit land was ancestral land of the family of Masakhalia Aworiand that the children of Daniel Okong'o Masakhaliaand Ouma Obilo had the right to remain on the land No Samia/Wakhungu-Odiado/617. The said Tribunal award was adopted as a judgment of the Court vide PMC Land Case No 122 of 2009 and the Grant of Letters of Administration issued to the 1st Defendant was later annulled and revoked vide orders issued in High Court Succession Cause No 167 of 2012. The Plaintiff and the 1st Defendant were then appointed as the joint Administrators to the deceased's Estate but the 1st Defendant has continued to defy the Court's orders. Instead, the 1st Defendant in conspiracy with the 2nd Defendant has illegally processed the title deed to the land parcel No Samia/Wakhungu-Odiado/617 ignoring the Court order issued on 3rd July 2013 revoking the Grant issued to her thus giving rise to this suit.
4. The Plaintiff filed his statement dated 15th September 2017 which is a rehash of his pleadings aforesaid. He also filed the following documents in support of his case:
 1. Copy of ruling in Busia High Court Succession Cause No167 of 2012.
 2. Copy of order in Busia High Court Succession Cause No 167 of 2012.
 3. Copy of ruling in Busia Chief Magistrate's Court Land Case No122 of 2009.
 4. Copy of Certificate of Official Search for land parcel No Samia/Wakhungu-Odiado/617 dated 15th April 2015.
 5. Copy of certificate of official search for the land parcel No Samia/Wahungu-Odiado/617 dated 23rd May 2015.
 6. Proceedings of Funyula Land Disputes Tribunal.
5. The 1st Defendant filed a defence and counter-claim dated 1st November 2017 in which she pleaded, inter alia, that the land parcel No Samia/Wakhungu-Odiado/617 was registered in the name of her late husband Charles Alon Kubadi on 11th November 1972 being a first registration just the same time that the Plaintiff's late father Awori Masakhalia TIMOTHEO and Daniel Okongo were registered as co-owners of the land parcel No Samia/Wakhungu-Odiado/443.
6. That on 13th August 1987, the 1st Defendant was issued with a Grant in respect to the Estate of her late husband Charles Alon Kubadi in Busia RM'S Court Succession Cause No 84 of 1987 which was confirmed on 17th June 1972.



7. That there was an existing boundary planted in 1972 during the land adjudication process separating the land parcels No Samia/Wakhungu-Odiado/617 and 443 but which was unlawfully and illegally up-rooted and destroyed by the families of Awori Masakhalia Timotheo and Daniel Okongoin 1984. She is therefore a stranger to the allegations contained in paragraphs 7, 8, 9, 10, 11, 12 and 13 of the plaint and put the Plaintiff to strict proof thereof.
8. The land parcel No Samia Wakhungu-Odiado/443 is only smaller because prior to the land adjudication, the Plaintiff's late father Awori Masakhalia Timotheo gave out more than 8 acres of land from his shares of land to his cousin Moody Awori in return for an iron-sheet semi permanent house hence the Plaintiff and his brother are not entitled to any land from the said land parcel No Samia Wakhungu-Odiado/443. That the Funyula Land Disputes Tribunal had no jurisdiction to determine a matter which had already been heard and determined by the Busia Magistrate's Court in succession cause NO 84 of 1986. The 1st Defendant admits the jurisdiction of this Court but adds that there is another matter pending over the same subject matter being Busia ELC Case No 72 of 2017.
9. In his counter-claim, the 1st Defendant averred that she is the only legal wife to the late Charles Alon Kubadi who passed away on 26th January 1983 and whose Estate comprises of the land parcel No Samia/Wakhungu-Odiado/617 which was given to him by his late father Masakhalia Awori prior to his demise on 11th November 1972. That sometimes in 1984, Awori Masakhalia jointly with his brother the late Daniel Okongo and one Ouma Obilo trespassed into the land parcel No Samia/Wakhungu-Odiado/617 and up-rooted the common boundary between the two parcels of land subject of this suit.
10. The 1st Defendant therefore seeks judgment against the Plaintiff as follows:
 1. Dismissal of the Plaintiff's suit.
 2. An order that the land parcel No Samia/Wakhungu-Odiado/617 is private property of the family of the late Charles Alon Kubadi and the re-establishment and re-planting of the common boundary between land parcels No Samia/Wakhungu-Odiado/617 and 443.
 3. Costs of the counter-claim.
 4. Any other relief that this Honourable Court may deem fit to grant.
11. The 1st Defendant filed her statement dated 1st November 2017 and a list of documents of even date.
12. Her statement is similarly a rehash of her defence and counter-claim in which she reiterates that the land parcel No Samia/Wakhungu-Odiado/617 is the property of her late husband Charles Alon Kubadi which has since been distributed among her three sons Stephen Peter Wesonga, Denis Okelo Kubadi and Joseph Andrew Oduori Kubadi. That in 1984, the Plaintiff's late father, Awori Masakhalia Timotheo, Akongo Masakhalia and Ouma Obilo up-rooted and destroyed the common boundary between the land parcels No Samia/Wakhungu-Odiado/617 and 443 and forced themselves into the land parcel No Samia/Wakhungu-Odiado/617 so she reported to the Local Administration and was advised to take out Letters of Administration in respect to her late husband's Estate which she did vide Busia Magistrates Court P&A No 84 of 1987. The Grant was confirmed and land parcel No Samia/Wakhungu-Odiado/617 was adjudged as part of her late husband's Estate. The Plaintiff then filed at the Funyula Land Disputes Tribunal a case whose award was adopted as an order of the Busia Chief Magistrate's Court in case No 112 of 2009 but was stayed pending the hearing of the Busia High Court Succession Cause No 167 of 2012 where Tuiyott J (as he then was) advised the Plaintiff to file her case in this Court within 90 days but that did not happen and while the case was still pending, the Plaintiff and his brothers encroached onto the land parcel No Samia/Wakhungu-Odiado/617 destroying the



boundary and erected a home thereon. The matter was referred to the District Criminal Investigations Office (DCIO) but the Plaintiff were unable to produce any documents of ownership.

13. That the land parcel No Samia/Wakhungu-Odiado/617 belongs to her late husband and the Plaintiff is a stranger to that Estate.
14. The 1st Defendant filed the following documents as per the list dated 1st November 2017:
 1. Copy of adjudication record dated 12th March 1971 in respect of land parcel No Wakhungu Odiado 617 in name of Charels Alon Kubani s/o Masakhalia.
 2. Copy of Green Card for the land parcel No Samia/Wakhungu-odiado/443 in the name of Owori Masakhalia, Oumas/o Obilo, Omongo Masakhalia.
 3. Copy of official search for L.R No. Samia/Wakhungu-Odiado/617 in the name of the Plaintiff.
 4. Copy of certificate of Death of Charles Alon Kubadi.
 5. Copy of letter dated 10th February 1988 from the Assistant Chief Wakhungu Odiado addressed to the District Commissioner Busia.
 6. Copy of Grant of Letters of Administration issued on 13th August 1987 to the 1st Defendant in respect of Estate of Charles Kubadi Masakhalia in Busia CM'S Succession Cause No 84 of 1987.
 7. Confirmed Grant issued in Busia Spm's Court P&A No.84 of 1992 in respect of Charles Kubadi Masakhaliato an un-named Applicant and in respect of un-named property by S. G. O'NGANYI SRM on 17/6/1992.
 8. Copy of letter dated 20th December 2000 from The Chief Odiado Location addressed to District Land Registrar Busia.
 9. Copy of letter dated 24th September 2010 addressed to the Executive Officer Busia Court from the District Land Registrar Busia.
 10. Copy of letter dated 2nd March 2011 from the District Surveyor Busia/teso District addressed to the Chief Odiado Location & Others plus annexure dated 4th March 2011.
 11. Copy of letter dated 25th June 2012 from the District Commissioner Samia addressed to the Principal Magistrate Busia Court in reference to Land Case No 122 of 2009.
 12. Copy of Order issued by Tuiyott J(as he then was) in Busia High Court Succession Cause No167 of 2012 on 18th November 2015.
 13. Copy of letter dated 27th February 2017 from the District Surveyor Busia addressed to Wycliffe Owuor, Prisca Anyango & Others to attend the re-establishing of boundary for parcels No Samia/Wakhungu-Odiado/617 and 443 on 27th April 2017.
 14. Copy of letter dated 23rd March 2017 from the District Surveyor Busia addressed to Wycliffe Owuor, Prisca Anyango & Others to attend re-establishing or boundary for land parcels No Samia/Wakhungu-Odiado/617, 443 and 444 on 6th April 2017.
 15. Photographs taken on 21st June 2016, 14th October 2017, 10th April 2017 and 3rd May 2017.
 16. Ruling delivered by Kaniaru J on 26th July 2017.



15. The 2nd Defendant entered appearance through J.E.N Maroro Chief State Counsel but no defence was filed.
16. The record shows that on 15th October 2018, the 1st Defendant sought the entry of interlocutory judgment against the Plaintiff having failed to file a reply to the counter-claim. There were then other applications including seeking the fixing of the boundaries, change of advocates etc.
17. On 21st September 2020, Omollo J dismissed the Plaintiff's suit for want of prosecution and awarded the Defendants costs.
18. By an application dated 17th December 2021, the Plaintiff sought an order setting aside the dismissal of his suit on 21st September 2020. In a ruling delivered on 14th February 2022 Omollo J allowed that application but awarded the 1st Defendant thrown away costs assessed at Kshs.10,000 to be paid within 45 days. By 28th July 2022, those costs had not been paid and when I became seized of this matter on 20th April 2023, the 1st Defendant reminded me that Omollo J's order as to thrown away costs of Kshs.10,000 was yet to be complied with. I issued the following order:

“The Plaintiff will still have to pay the Kshs.10,000 as ordered on 14th February 2022 or this Court will in default deny him audience.”

Meanwhile Ms Nabulindochen acting for the Plaintiff sought for and was allowed two weeks to file and serve her application to cease acting for the Plaintiff. That application was filed, served and allowed on 3rd May 2023 and the case was listed for hearing on July 2023.
19. On the hearing date, the Plaintiff attended Court in person and said he knew nothing about this case. I however gave it a time allocation for 11am the same day. When the Court re-convened, the Plaintiff sought more time to pay the Kshs.10,000 saying that he had been un-well. And although Mr Otienocounsel for the 1st Defendant objected to a further adjournment, the Court accommodated the Plaintiff but directed that he pays the Kshs.10,000 together with further costs of Ksh.3,000 by 8th August 2023. The matter was then listed for hearing on 21st September 2023. On that date however, the Plaintiff did not attend Court and on the application by Mr Otieno counsel for the 1st Defendant, the Plaintiff's suit was dismissed with costs.
20. The 1st Defendant was then allowed to prosecute her counter-claim. She adopted as her evidence her statement dated 1st November 2017 contents of which I have already summarized above.
21. The 1st Defendant similarly produced as her documentary evidence the documents filed as per the list dated 1st November 2017.
22. MR OTIENO opted not to file any submissions on behalf of the 1st Defendant.
23. I have considered the 1st Defendant's evidence in support of her counter-claim. It is noted that the Plaintiff filed no reply to the 1st Defendant's defence nor any defence to the counter-claim. Further, the Plaintiff having failed to turn up for the hearing on 21st September 2023, a date which had been taken in his presence, the 1st Defendant's evidence remains un-controverted.
24. By her counter-claim, the 1st Defendant seeks the following remedies:
 - a. Dismissal of the Plaintiff's suit with costs.
 - b. An order for declaration that the land parcel No Samia/Wakhungu-Odiado/617 is private property of the family of the late Charles Alon Kubadia.



- c. Re-establishment of the common boundary between the land parcels No Samia/Wakhungu-Odiado/617 and 443.
 - d. The 1st Defendant be paid costs of the counter-claim.
25. I shall start with prayer No (C). Notwithstanding the fact that the Plaintiff neither testified nor filed a reply to the 1st Defendant's defence or counter-claim, I have considered whether the 1st Defendant's counter-claim is infact a boundary dispute which, by virtue of the provisions of Section 18(2) of the [Land Registration Act](#), is the preserve of the Land Registrar and therefore beyond the jurisdiction of the Court.
26. In her counter-claim at paragraph 17(b), the 1st defendant is seeking the "re-establishment and replanting of a common boundary between suit land parcel No Samia/Wakhungu-Odiado/617 and 443." In paragraph 7 of her defence, the 1st Defendant pleads that:

7: "The 1st Defendant equally contents that there is no other common boundary as alleged by the Plaintiff apart from the boundary planted in 1972 during the land adjudication separating the two suit land parcels land parcel No Samia/Wakhungu-Odiado/617 and 443 which was unlawfully and illegally up-rooted and destroyed by the families of Awori Masakhalia Timotheo and Daniel Okongo in 1984"

And in paragraph 7 of her counter-claim, the 1st Defendant has pleaded thus:

7: "The 1st Defendant again avers that the Plaintiff, his brothers and family members of the late Daniel Okong'o and one Ouma son of Obilo have without consent of the 1st Defendant or her family trespassed and constructed permanent and semi-permanent structures on the suit land parcel No Samia/Wakhungu-Odiado/617".

By seeking the "re-establishment and re-planting" of the common boundary between the land parcels No Samia Wakhungu-Odiado/617 and 443, the 1st Defendant is basically seeking a re-instatement of the boundary which she says was established way back in 1972 during the land adjudication process. Indeed among the documents which she produced in support of her case is a copy of the adjudication record dated 12th March 1971 showing that Charles Alon Kubani s/o Masakhalia was the proprietor of the land parcel No Samia/Wakhungu-Odiado/617. The term re-instate is defined in the Black's Law Dictionary 10TH Edition as:

"To place again in a former state or position; to restore"

The letters by the District Surveyor Busia dated 27th February 2017 and 23rd March 2017 both refer to a proposed visit to the suit land "with a view of re-establishing the allegedly destroyed boundaries" between the land parcels No Samia/Wakhungu-Odiado/617 and 443. The Court can only order for the "re-establishing" or "re-instatement" of what previously existed on the ground. That means, as already stated by the 1st Defendant, that indeed the boundary has always been in existence between the land parcels No Samia/Wakhungu-Odiado/617 and 443 and which the Plaintiff has destroyed. The Plaintiff himself made no reference to a boundary dispute and was more content in having the 1st Defendant's title to the land parcel No Samia/Wakhungu-Odiado/617 cancelled. In my view, to re-establish or re-instate a destroyed boundary is not the same thing as determines a dispute over a boundary which has not previously been in existence. That would be extending the definition of boundary dispute beyond reasonable limits. Once a boundary has been established, a party who destroys it is subject to criminal



proceedings under Section 339(1) of the Penal Code. Similarly, Section 21(1) of the [Land Registration Act](#) reads:

“ Any person who defaces, removes, injures or otherwise impairs a boundary feature or part of it unless authorized to do so by the Registrar commits an offence and is liable on conviction to imprisonment for a term not exceeding two years or to a fine not exceeding two hundred thousand shillings or both.”

It is therefore my finding that the boundary between the land parcel No Samia/Wakhungu-Odiado/617 and 443 was, as per the 1st Defendant's uncontroverted evidence, fixed way back in 1972 and what the Plaintiff has done is to deface and remove it. That action removes the 1st Defendant's counter-claim outside the jurisdiction of the Land Registrar and empowers this Court to determine it and order for a restoration, re-establishment or re-instatement of the boundary.

27. That prayer is therefore well merited and is for allowing.
28. With regard to prayNo(b). It is clear from the certificate of search that the land parcel No Samia Wakhungu-Odiado/617 has since August 2016 been registered in the name of the 1st Defendant. Prior to that, and as far back as 1971, the owner thereof, as per the adjudication record was identified as Charles Alon Kubani the 1st Defendant's deceased husband.
29. Section 26(1) of the [Land Registration Act](#) protects the 1st Defendant's title in the following terms:
26(1) “The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-
 - a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

The Plaintiff's suit was dismissed for want of prosecution on 21st September 2023. That notwithstanding, his main prayer was the revocation of the 1st Defendant's title to the land parcel No Samia/Wakhungu Odiado/617 but he had not even pleaded fraud or any illegality in the manner in which the 1st Defendant had obtained her title thereto. Clearly therefore, the Plaintiff, even if he had testified, would have had a herculean task impeaching the 1st Defendant's title to the said title. Perhaps that explains why he did not show up for the trial. This Court has no hesitation in making a finding that the land parcel No Samia/Wakhungu-Odiado/617 is the private property of family of the late Charles Alon Kubadi.

30. On the issue of costs, it has now turned out, having heard the 1st Defendant, that the main protagonists in this case are infact part of the same family. And although Section 27 of the [Civil Procedure Act](#) provides that the costs of any action “shall follow the event”, in a case involving members such as this one, the route which I have always taken is not to further antagonize the parties further by condemning the losing party to pay costs. I think it is the duty of the Court to help them commence the healing process by directing that each of them meets their own costs. The Plaintiff and 1st Defendant shall continue to remain not only part of the same family but also neighbours. This Court can play its small role in protecting the family as provided under Article 45 of [the Constitution](#) by ordering that each party meets their own costs. In the circumstances, the order of this Court issued on 21st September



2023 condemning the Plaintiff to meet the costs of his dismissed suit is vacated and substituted with an order dismissing his suit with no orders to costs.

31. Ultimately therefore, there shall be judgment for the 1st Defendant as against the Plaintiff in the following terms:

1. The Plaintiff's suit is dismissed.

SUBPARA 2.

The land parcel No Samia/Wakhungu-Odiado/617 is the private property of the family of the late Charles Alon Kubadi.

3. The Land Registrar and County Survey Busia shall forthwith move to the land parcels No Samia/Wakhungu-Odiado/617 and 443 and re-establish the common boundary between them.

4. In view of the Plaintiff's antecedents of not complying with Court orders, I further direct that the Officer Commanding (OCS) Busia Police Station shall, upon request, provide the necessary security during the exercise as mandated under Section 24 of the [National Police Service Act](#) should it be needed.

5. The Plaintiff and 1st Defendant shall each meet their own costs of the suit.

BOAZ N. OLAO

JUDGE

18TH DECEMBER 2023

Judgment dated, signed and delivered by way of electronic mail on this 18th Day of December 2023 to the 1st Defendant and 2nd Defendant.

Since the Plaintiff did not attend Court and both MR. J. V. Juma Advocate and Ms Nabulindo Advocate his previous counsel ceased acting for him, the Deputy Registrar shall ensure that this judgment is personally served upon him immediately and affidavit of service filed.

Right of Appeal.

BOAZ N. OLAO

JUDGE

18TH DECEMBER 2023

