



**Okemwa v Onchong'a & 6 others (Environment and Land Appeal  
E006 of 2024) [2025] KEELC 3170 (KLR) (8 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3170 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT AND LAND APPEAL E006 OF 2024**

**M SILA, J**

**APRIL 8, 2025**

**BETWEEN**

**PAULINE GESA RE OKEMWA ..... APPELLANT**

**AND**

**ANN BOYANI ONCHONG'A ..... 1<sup>ST</sup> RESPONDENT**

**NELSON BANGE OKEMWA ..... 2<sup>ND</sup> RESPONDENT**

**EDWARD GETUGI AUMA ..... 3<sup>RD</sup> RESPONDENT**

**MARY KERUBO RATEMO ..... 4<sup>TH</sup> RESPONDENT**

**NEHEMIAH ANGWENYI ONGERI ..... 5<sup>TH</sup> RESPONDENT**

**OKERIO ANGWENYI EVANS ..... 6<sup>TH</sup> RESPONDENT**

**AGNES NYANCHAMA OBARE ..... 7<sup>TH</sup> RESPONDENT**

*(Being an appeal from the ruling of Hon. Dorcas O. Mac'Andere, Senior Resident Magistrate, delivered on 16 January 2024 in the suit Kisii CMCELC No. E024 of 2024)*

**JUDGMENT**

1. The appellant filed an application to be struck out of a suit wherein she was named as one of the defendants. That application was dismissed hence this appeal.
2. By way of background, the suit before the lower court was commenced through a plaint filed by the 1<sup>st</sup> respondent on 7 March 2023. The 1<sup>st</sup> respondent sued the appellant as 1<sup>st</sup> defendant, and six other persons being the 2<sup>nd</sup> – 7<sup>th</sup> respondents herein. In her plaint, the 1<sup>st</sup> respondent averred to be the registered proprietor of the land parcel Nyaribari Chache/Bonyamoyio/Bosigisa/Boburia/1994 and 2902 (the suit properties). She pleaded that the defendants she had sued were registered proprietors of



contiguous parcels in the vicinity of the suit properties. She contended that the defendants had created an illegal road through the suit properties and that every time she erects a fence the defendants and their proxies pull it down, and continue using the illegally created road. In the suit she wanted a declaration that she owns the suit properties and that there is no access road through them; permission to erect a boundary fence and the OCS to provide security; a permanent injunction against the defendants; a directive to the OCS Kisii Central to arrest and investigate anybody who trespasses into the suit properties or destroys the fence.

3. Together with the plaint, the 1<sup>st</sup> respondent filed an application seeking an interlocutory injunction to restrain the appellant and the 2<sup>nd</sup> – 7<sup>th</sup> respondents from the suit properties. The order for an interlocutory injunction was given on 26 June 2023.
4. There followed an application dated 26 September 2023 by the 1<sup>st</sup> respondent seeking orders to be allowed to erect a fence. The appellant filed Grounds of Opposition to oppose this motion and also filed an application of her own, that dated 17 October 2023. This application sought the following orders :
  - a. Certification of urgency.
  - b. That the honourable court be pleased to discharge or set aside its orders given on 26 June 2023 as against the 1<sup>st</sup> defendant (now the appellant).
  - c. That the honourable court be pleased to remove the 1<sup>st</sup> defendant (now appellant) as a party to the suit and/or strike out the case against her for being wrongly joined.
5. The application was based on the following grounds :
  - i. That when the order was given the 1<sup>st</sup> defendant was absent in court as she was not served.
  - ii. That the complained of road of access has been in existence and use since the time of the adjudication process.
  - iii. That both the defendants apart from the 1<sup>st</sup> defendant and the members of the public in general (who are not parties to the suit) have used and are still using the said road since 1970 to date.
  - iv. That the 1<sup>st</sup> defendant is the registered owner of the land parcel Nyaribari Chache/B/B/Boburia/8193 which has its own access road and far away from the plaintiff's suit properties and her land is not captured in the RIM extract attached to the documents filed in court by the plaintiff.
  - v. The 1<sup>st</sup> defendant is not one of the parties who attended the Land Registrar's and surveyor's meeting of 27 January 2022.
  - vi. The 1<sup>st</sup> defendant was wrongly or unlawfully joined in the proceedings through misjoinder.
  - vii. Order 1 Rules 3, 5 and 7 of the *Civil Procedure Rules* excludes the 1<sup>st</sup> defendant from the suit.
  - viii. It will only be fair and just that the application be allowed as there is no cause of action against the 1<sup>st</sup> defendant.
6. The application was supported by the affidavit of the appellant. She deposed that she is the registered owner of the land parcel Nyaribari Chache/B/B/Boburia/8193 and annexed the title deed. She averred that there is no proximity between her land and the properties of the 1<sup>st</sup> respondent and that her land is served with a different road of access. She attached an extract of the Registry Index Map. She swore that



she has never used and will never use the road of access complained of to access her land. She contended that she is wrongly sued.

7. The 1<sup>st</sup> respondent swore a lengthy 17 paragraph affidavit to oppose the motion. What I see as important is the averment that the appellant could not claim to be wrongly joined while she is the root cause for being in court. It was deposed that while she claims that she does not use the suit properties to access her land, she has blocked and/or fenced her land, so that the road in the map used by the other defendants to access their parcels of land does not exist on the ground, hence they are now using his land to access theirs.
8. The application was heard, culminating into the impugned ruling delivered on 16 January 2024. In her ruling, the trial court found that by looking at the Registry Index Map, the appellant's land is not adjacent to any of the suit properties. She also found that the appellant had not been in any of the meetings held by the County Commissioner, Land Surveyor and Land Registrar and that the appellant's land was not discussed. However, she found that the hearing of the matter is yet to commence and she could not make any conclusive finding at the preliminary stage. She found no harm with the appellant remaining a party to the suit and reasoned that if she is found not culpable, she will be discharged from any responsibility. She found that pursuant to Order 1 Rule 9, no suit is to be defeated by reason of misjoinder or non-joinder. She held that it was prudent for the case to proceed as it is and be heard on merits.
9. Aggrieved, the appellant has preferred this appeal. There are three grounds raised, being :
  1. That the trial court found as a fact that the appellant herein is unnecessary party to the suit but still wrongly and unlawfully applied Rules 9 and 10 of Order 1 of the Civil Procedure Rules.
  2. Though the trial court found that the appellant's parcel of land does not share a common boundary with the suit properties and that the appellant does not and will never use the suit road of access, still wrongly and unlawfully retained the appellant in the suit.
  3. Though the trial court found that the appellant did not participate in the arbitration meetings and/or proceedings called by the Kisii County Land and Survey offices and Kisii County Commissioner, it wrongly and unlawfully dismissed the appellant's application.

The appellant proposes that the appeal be allowed.

10. The appeal was argued through written submissions and I have taken note of the submissions filed.
11. I will be very brief in my disposition because I am of opinion that the trial court reached the correct conclusion.
12. There is of course argument by the appellant that her land does not share a boundary with the suit properties. However, one can trespass into the land of another, and even create a path through the land of another, without necessarily being a neighbour of that land. The fact that the trial court found that the appellant and the 1<sup>st</sup> respondent do not share a boundary, by itself, would not mean that she now needed to strike the appellant out of the suit.
13. There was also the issue of non-participation in the meetings held by the Land Registrar, Land Surveyor and Assistant County Commissioner and that her parcel of land was not mentioned therein. I have seen that the appellant was not in a meeting that was held by the Land Registrar on 2 February 2022 but I have seen that she was present in a meeting held on 21 September 2022 before the Deputy County Commissioner which meeting discussed the issue in dispute. The minutes show that participant No. 12 was the proprietor of the land parcel B/B/Boburia/8193 and the appellant has stated that she is the owner thereof. If really she was not at all connected to the dispute at hand why



would she be in this meeting? There must have been reason why she was present. Why she was present can only be ventilated at a hearing.

14. The 1<sup>st</sup> respondent in her plaint and in her rejoinder to the application asserted that the appellant is one of the persons interfering with her land and creating or causing the creation of a road therein. It cannot be said that this is a hopeless pleading demonstrating no cause of action. Whether or not the action of the 1<sup>st</sup> respondent is sustainable is one that can only be determined after hearing the case on merits. That is the only forum that the 1<sup>st</sup> respondent can have to say why he thought it fit to sue the appellant and it also in that forum that the appellant will have a chance to absolve herself. A court, upon hearing all parties can then make a determination.
15. Striking out a party from a suit ought only to be made in the clearest of cases and I am afraid that it cannot be said that this is a clear case, particularly given that the appellant was present in the meeting of 21 September 2022 held for purposes of resolving the dispute over the road of access through the suit properties. Whether or not she bears any liability is a matter that can only be determined after hearing the parties. There is truly no prejudice to the appellant because if she is not culpable she can be compensated by an award of costs.
16. The other aspect of the application related to discharging some interim orders. Again I see no basis. If the appellant is not affected by the interim orders i.e does not trespass or cause trespass of the suit land, she has no reason to worry.
17. I need not say too much. It is apparent that I do not find merit in this appeal and it is hereby dismissed with costs to the 1<sup>st</sup> respondent.
18. Judgment accordingly.

**DATED AND DELIVERED THIS 8 DAY OF APRIL 2025**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT AT KISII**

Delivered in the presence of :

Mr. Momanyi Aunga for the appellant

N/A on part of M/s Ombui Ratemo & Co for the 1<sup>st</sup> respondent

N/A on part of the 2<sup>nd</sup> – 7<sup>th</sup> respondents

Court Assistant – Michael Oyuko.

