



REPUBLIC OF KENYA



**Oporia & another v Okiru & 6 others (Environment & Land Case  
158 of 2014) [2022] KEELC 2758 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2758 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT & LAND CASE 158 OF 2014**

**AA OMOLLO, J  
JULY 28, 2022**

**BETWEEN**

**EMMANUEL OPORIA ..... 1<sup>ST</sup> PLAINTIFF**

**NICHOLAS IKOL ADUNGO ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**PHILIP OKIRU ..... 1<sup>ST</sup> DEFENDANT**

**JOHN ODONGO ..... 2<sup>ND</sup> DEFENDANT**

**KANOTI OKUBE ..... 3<sup>RD</sup> DEFENDANT**

**PAUL OKWARE ..... 4<sup>TH</sup> DEFENDANT**

**ELIKASIO ETYANG ..... 5<sup>TH</sup> DEFENDANT**

**CHARLES OKEPA ..... 6<sup>TH</sup> DEFENDANT**

**ODAUYA ILUKUNYA ..... 7<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. Vide a Complaint dated on the 7<sup>th</sup> of August, 2014 the Plaintiffs impleaded the Defendants in this suit and prayed for judgement against them jointly and severally for:
  - a) An order of permanent injunction restraining the Defendants, their agents, servants, employees and such persons acting through them from encroachment and/or interfering with the Plaintiff's land parcel number South Teso/chakol/1281 and South Teso/chakol/1282
  - b) Damages;
  - c) Costs.



2. The Plaintiffs contend they are the registered owners of Land parcels number South Teso/Chakol/1281 and 1282 respectively, while the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are the owners and occupiers of land parcel number South Teso/Chakol/301, the 3<sup>rd</sup> and 4<sup>th</sup> Defendants are the owners and occupiers of land parcel South Teso/Chakol/345 and that the 7<sup>th</sup> Defendant is the owner of land parcel South Teso/Chakol/347, occupied by the 5<sup>th</sup> and 6<sup>th</sup> Defendants. That the Defendants' parcels adjoin the Plaintiffs' parcels of land and that since January, 2014 the defendants have unlawfully and without permission encroached onto the Plaintiffs' land and committed the tort of trespass.
3. The Defendants filed two statements of defence: one on the 24<sup>th</sup> of September, 2014 and the second on the 11<sup>th</sup> of October, 2016. At the beginning of the hearing the Defendants opted to rely on the second defence. In the said defence the Defendants agree that their respective parcels of land adjoin those of the Plaintiffs but deny any encroachment. They averred that this being a boundary dispute the same should be handled by the Land Registrar as this Court is not seized with jurisdiction to act in this present case.
4. The defendants averred further that if at all they are using the said Plaintiffs' parcels then they are using the said portions as recognised overriding interests to the Plaintiffs' titles as easements to access grazing and watering areas. That the present suit is time barred because the Defendants' forefathers have been utilising the said portion from as early as 1948. They urged the Court to dismiss the Plaintiffs' suit with costs.
5. The hearing began on the 5<sup>th</sup> of December, 2016 with the testimony of the 1<sup>st</sup> Plaintiff, Emmanuel Okumu Oporia as PW1. He confirmed that knowing the Defendants because they border his land. He testified that his land parcel South Teso/Chakol/1281 and that of his brother, the 2<sup>nd</sup> Plaintiff, land parcel South Teso/Chakol/1282 are a subdivision of South Teso/Chakol/297. It is their case that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants started trespassing onto their land parcel in the year 2003, while the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants started interfering in the year 2013. Pw1 reported the matter to the chief who in turn referred them to the Land Registrar. That the Land Registrar issued summons to visit the land on various dates including the 11<sup>th</sup> of February, 2014 when the defendants failed to show up necessitating the deferment of the site visit. On the 5<sup>th</sup> of March, 2014 both the Registrar and the Defendants failed to show up and he managed to obtain further summons for a site visit on the 12<sup>th</sup> of March, 2014 when the Land Registrar sent two surveyors and the Defendants were also present. That immediately the surveyors started working, the Defendants got violent and the exercise stopped hence the Registrar's report dated 18/3/2014.
6. He stated further that the Defendants continued to use portions of their land hence the present suit. PW1 stated that the he has incurred a lot of costs and produced receipts as proof of the expenses and urged this Court to grant them the orders in the Plaint. During cross-examination, PW1 agreed to the fact that the Defendants had their own parcels of land except they had trespassed onto their land. He stated that he had no agricultural report to indicate the extent of the damage to their trees and crops and that neither did the surveyors report indicate the extent to which the Defendants have interfered with the boundary.
7. In re-examination, PW1 reiterated that the Defendants have interfered with the boundaries and that he had no interest in the destroyed plants and trees. He concluded by stating that he went to the lands office to have the boundary problem fixed and that the Surveyor and Registrar urged him to obtain a court order for them to visit the site.
8. The 2<sup>nd</sup> Plaintiff, Nicholas Ikol Adungo testified as PW2. He adopted PW1's evidence as his own. Upon cross-examination, PW2 stated that there was no report from the surveyor showing interference



- with the boundary and that a court order can have the surveyors visit the site to fix the boundary issue. During re-examination, PW2 reiterated that the Land Registrar ordered the Surveyor to visit the site which the surveyor did but was unable to conduct the survey because the Defendants got violent.
9. Nicholas Obiero, the Land Registrar Busia testified as PW3 and produced the mutation forms for South Teso/Chakol/297 together with copies of the summons for boundary dispute in relation to the said land for three different dates as PEx 5-7. While discussing the history of the said land, he stated that the land was subdivided into two portions: 1281 and 1282 whose titles he produces and PEx 2(a) and 2(b). The copies of the receipts were produced as PEx 9(a) and (b) while the survey report was produced as PEx 8. He concluded by stating that the Surveyor in his letter stated that the exercise was not completed because the owners wanted the boundaries to remain as they were on the ground.
  10. During cross-examination, PW3 stated that the boundary dispute was never determined. That from the letter dated 18<sup>th</sup> March, 2014, the parcels in dispute were 298, 1281, 345 and 301 and upon being shown the RIM for the area, he stated that he can identify a river and that LR No. 345 did not reach the river. He stated that he was conversant with section 28 of the [Land Registration Act](#) and access to communal water might be one of the overriding interests. This marked the close of the Plaintiffs' case.
  11. David Odongo alias John Odongo kick-started the defence case as DW1 and his adopted his witness statement dated 16<sup>th</sup> September, 2014. That his father Sylvester Okiru –deceased was the owner of land parcel South Teso/Chakol/301 whereon he resides. He confirmed that the Plaintiffs were his neighbours and that he had not encroached on the Plaintiffs' land because they have always used the disputed portion which measures approximately 10 acres. That there was a river separating their land from the other parties who were on the other side of the river. That the disputed portion was bought by his father in the 1990s and is being used as a grazing land.
  12. Upon cross-examination, DW1 stated that he still lives in his father's home on LR No. 301. That they are cultivating the portion between the land and the river and that they do not access the river by passing through someone's land. That the Plaintiffs' homestead is about a kilometre from their home. DW1 denied that the Defendants blocked the survey exercise. In re-examination, DW1 stated that they were using land parcel number 301 up to the river as there was no boundary between the land and the river. He concluded by stating that the Plaintiffs have not used the disputed portions since the 1900s.
  13. Kanoti Okube testifying as DW2 also confirmed knowing the Plaintiffs as they are his neighbours. Dw2 stays on land parcel No. South Teso/Chakol/345 which parcel is registered in his father's name. He continued in evidence that they have used the disputed land up to the river and the Plaintiffs have never used the said portion. The witness denied the allegation that they refused to have the survey done and neither is it true that they started using the disputed portion in the year 2014. Upon cross-examination, DW2 stated that no one has restrained them from using the river and that the portion to the river belongs to them and not the plaintiffs.
  14. The 4<sup>th</sup> defendant, Paul Okware testified as DW3 by adopting his witness statements dated 27<sup>th</sup> July, 2018 and 17<sup>th</sup> September, 2014 as his evidence in chief and produced the documents on the defendant's list dated 25<sup>th</sup> May, 2018 as Dex1-4. He confirmed knowing the Plaintiffs as they come from the same area. That DW2 was his brother and they lived together on land parcel South Teso/Chakol/345 owned by their father and that on the ground, the land extends to the river.
  15. DW3 stated further that there was no boundary on the ground except the river. That the Plaintiffs have never used the disputed portion, which is approximately 10 acres and that it was not true that they started using the land in the year, 2014. That their grandfathers also used the same portion and the



- Plaintiffs never sued any of them. During cross-examination, DW3 reiterated that land parcel number 345 is registered in their father's name but they have never ascertained the entire size of their land.
16. The 6<sup>th</sup> defendant Charles Okepa also adopted his witness statements dated 16<sup>th</sup> September, 2014 and 27<sup>th</sup> July, 2018 as his evidence in this case. He testified that his home and that of the Plaintiffs were not far apart. That the 7<sup>th</sup> Defendant who is deceased, was his father and that together with his family they live on land parcel number South Teso/Chakol/347. DW4 stated that since his birth, his father has been using the land up to the river and that he has never seen the Plaintiffs use the disputed portion which measures approx. 10 acres and there exists no boundary that separates the land from the river.
  17. On cross-examination, DW4 stated that there was no marked road that was fences towards the river and there was only a road that was being used by people as a footpath but they were cultivating the land. That in the year, 1948 there was a land dispute between the Plaintiffs' father and his father and that they are the ones who gave the Plaintiffs way to the river. DW4 denied ever chasing the surveyor from the land.
  18. Philip Okiru testimony as DW5 is contained in his witness statements dated 16<sup>th</sup> September, 2014 and 27<sup>th</sup> July, 2018. He stated that land parcel number South Teso/Chakol/301 was registered in his father's name and the same is to be shared between him and David Odongo Okiru. He denied entering into the Plaintiffs' land instead stating that the land was previously occupied by his father without any dispute and the boundaries are intact to date. He confirmed being present during the second survey visit but could not explain why the survey did not take place. He concluded by stating that there is a river separating their land and that of the Plaintiffs' and according to him, the river is on their land.
  19. During cross-examination, DW5 stated that he was born in 1972 and his father acquired the land in 1994/1995. That before his father's demise, there was no dispute between them and the Plaintiff. On being shown the mutation form for parcel number 297, he confirmed that land parcel 301 did not reach the river, despite his previous averments that their land reached the river. He admitted that the surveyor visited the land. This marked the close of the defence case.

## Submissions

20. The Plaintiffs filed their submissions on the 25<sup>th</sup> of January, 2022. They submitted that they were the registered proprietors of land parcels number South Teso/Chakol/1281 and 1282. That from the mutation forms produced showed the location of their land vis-à-vis the position of the Defendant's and that their land is between the Defendants' parcels of land and the river. They submitted further that given that they had tried to sort out their differences with the Defendants to no avail hence the present suit. They urged this Court to grant them the orders as per the Plaintiff.
21. The Defendants filed their submissions on 23<sup>rd</sup> of March, 2022. They submitted on the following issues for determination: whether this Court has jurisdiction to determine this matter; whether the portions they occupy are overriding interests in terms of access water and a community grazing ground; whether the Plaintiffs' suit is time barred; and whether the Plaintiffs are entitled to orders of injunction and damages. On the first issue, the Defendants submitted that this being a boundary dispute then it should have been handled by the Land Registrar's office and the Surveyors as provided under section 18 (2) of the *Land Registration Act*. They urged the Court to dismiss the Plaintiffs' entire suit on this basis.
22. With regards to the second issue, the Defendants submitted that there was no dispute that the Plaintiffs are the registered proprietors of the land parcels in dispute by virtue of the title deed. However, these titles are subject to overriding interests as provided under section 28 of the *Land Registration Act*. They submitted that their fathers and forefathers have been in occupation of portions of the land to access stream water for themselves and their animals. That the reason why the survey exercise could



- not be carried out is because it could alter the position on the ground concerning the easements on the Plaintiffs' parcel of land. They submitted that the boundaries should remain as they are on the ground.
23. For their defence raised of this suit being time barred, the Defendants submitted that they have been on the land for the past 80 years and there were proceedings between the 7<sup>th</sup> Defendant's father and the Plaintiffs' father in 1948. That the Plaintiffs are therefore barred by section 7 of the Limitations of Actions Act and their titles were extinguished in favour of the Defendants.
24. On whether the Plaintiffs are entitled to the orders of injunction and damages, the Defendants submitted that the Plaintiffs have not met the threshold for the issuance of an order for injunction and damages. That the Plaintiffs have not demonstrated that they will suffer irreparable loss because they have never been in use, occupation or benefitted from the claimed portions of land and neither does the balance of convenient shift in the Plaintiffs' favour. They urged this Court to dismiss the suit with costs.

### **Determination**

25. Based on the pleadings filed, evidence adduced and submissions rendered, the issues which in my opinion arise for determination are framed as follows:
- a) Whether the Court has jurisdiction to handle this suit;
  - b) Whether the suit is time barred;
  - c) Whether the Plaintiffs have established that the Defendants have encroached onto their parcel of land;
  - d) Who pays for the costs of this suit?
26. The Defendants pleaded that this Court had no jurisdiction to handle this matter on account of the provisions of section 18 (2) of the [Land Registration Act](#) which stops this court from entertaining any actions that relate to boundary disputes. The Plaintiffs in their rebuttal stated that they have tried in vain to have the matter settled by the Land Registrar to no avail hence the present case. While testifying as PW3, the Land Registrar stated that he had issued summons for the boundary dispute but the survey but the exercise was not completed because the owners wanted the boundaries to remain as they are on the ground.
27. Although the mandate to determine disputes lies with the Land Registrar first and any other subsequent appeal to the Chief Land Registrar or a complaint to this Court. In this instance, the court's jurisdiction is not ousted on basis that the Plaintiffs first approached the Land Registrar's office for determination of the boundaries. It was only after the third attempt to have the survey exercise failed that they approached this Court. The Defence witnesses have also confirmed that the Surveyor visited the disputed land before the claim was filed.
28. While opposing the claim, the Defendants contend that they have been using the suit land from the 1940s and as such section 7 of the Limitations of Actions Act, CAP 22 Laws of Kenya bars the plaintiffs from claiming the suit portion and that their titles to that section of the land were extinguished. For their part, the Plaintiffs pleaded that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants started the encroachment in the year, 2003 while the 3<sup>rd</sup> to 7<sup>th</sup> Defendants is alleged to have encroached the land in 2014. This court is called to determine which version is supported by evidence.
29. The Plaintiffs admit that the defendants' parcels of land adjoin their land (para 9 of plaint) and in para 13, they pleaded that their father and the 7<sup>th</sup> defendant had a case over same subject matter in



- 1948 with the 7<sup>th</sup> defendant being directed to move back to his land. In the mutation form dated 17<sup>th</sup> December 1990 for subdivision of parcel number 297 and produced by the plaintiffs, at page 3 thereof, it is indicated the boundaries were fixed during the survey. From the mutation, it is not comprehensible what the boundaries are as no expert evidence was called to expound on the document.
30. In the letter by the County Survey Office dated 18<sup>th</sup> March 2014, Mr Masibo stated the survey exercise could not take place because the owners of LR 298, 301 and 345 did not recognise the boundaries as per the RIM and wanted the boundaries to remain as they are. Some of the Respondents argue that the portions claimed to be encroached form part of their land while others argue they have used the disputed portion for a long time that the plaintiffs' rights over the land have been extinguished by operation of the law.
  31. The evidence on record does show that there exists a boundary dispute between parcels numbers 297 (now subdivided), 298, 301 and 345. How the nature of the orders to be granted is subject to proof of extent of the encroachment and the defence of limitation (raised by the defendants). It was incumbent for the defendants to prove use of the same that extinguished the rights of the plaintiffs. The defendants are sued jointly and severally, and their offending parcels of land clearly stated. In this court's view, the 1<sup>st</sup> and 2<sup>nd</sup> defendants as the owners of LR 301 needed to state the extent of the land they have used comprised in the Plaintiffs title and how that use has extinguished the rights of the said plaintiffs.
  32. In his witness statement made in 2014, the 1<sup>st</sup> defendant recorded that the land 301 belongs to a deceased person and if the plaintiff's claim is allowed, the same amounts to intermeddling with the estate of a deceased person. He added that he was wrongly joined to these proceedings. The same position was taken by the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants. The 5<sup>th</sup> and 6<sup>th</sup> defendants wondered why they had been sued. In the witness statements filed on 9<sup>th</sup> August 2014, the 6<sup>th</sup> defendant stated he owns no land as he is the son of the 7<sup>th</sup> defendant. The 7<sup>th</sup> said his land goes up to the river but does not say what size of the plaintiffs' land has been extinguished by operation of law. Besides denying the plaintiffs' claim, the 1<sup>st</sup> and 4<sup>th</sup> defendants also do not give evidence that support the defence of time-bar. Neither of the defendants could say with certainty whether their parcels end at the river other than stating the boundaries are intact as they have always been. This court finds that the defence of time-bar is only available where it is demonstrated that the claim is in respect to a demarcated portion.
  33. On the issue of proof of the extent of encroachment, each of the plaintiffs hold separate title to their land (after subdivision of the original number 297). There was no evidence led whether the two parcels of land (LR 1281 and 1282) share a common boundary with parcel numbers 298, 301 and 345. The boundaries between the suited parcels are yet to be identified since the exercise that was scheduled was not successful. The plaintiffs only brought a prayer seeking permanent injunctive orders to restrain the defendants and their representatives from trespassing on their parcels of land.
  34. In my view, and I so hold that the plaintiffs proceeded on a wrong presumption that by the filing of this suit, they had established that the defendants encroached on their parcels of land 1281 and 1282. An order of injunction need to be specific for instance, that parcel 301 has extended into parcel number 297 (1281 or 1282) by this size and so the owner is restrained from using the offending section. Having also failed to demonstrate the extent of the encroachments by each of the suit parcels 298, 301 and 345, the court finds their case is not proved and are thus not entitled to the orders of permanent injunction sought.
  35. In light of the foregoing, I am not satisfied that the Plaintiffs have proved their case to a balance of probabilities. Therefore, the suit is dismissed with an order that each party bears their respective costs of the suit.



**DATED, SIGNED AND DELIVERED AT BUSIA THIS 28<sup>TH</sup> DAY OF JULY, 2022.**

**A. OMOLLO**

JUDGE

