



**Owindi & another v Sitalo (Environment & Land Case  
131 of 2000) [2022] KEELC 3393 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3393 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT & LAND CASE 131 OF 2000  
FO NYAGAKA, J  
JULY 28, 2022**

**BETWEEN**

**JOSEPH WANDERA OWINDI ..... 1<sup>ST</sup> PLAINTIFF**

**RAILI OWINDI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**MESHACK WAFULA SITIALO ..... DEFENDANT**

**RULING**

1. On November 11, 2021, the County Surveyor's office represented by one, Boaz Atai Onduso, made a report (herein after known as the report) on a survey carried out on land parcel number Trans Nzoia/Makutano/47 which is situate in Trans Nzoia County. The report was made following a court order made on June 29, 2021 by my brother Judge who previously handled this matter. The order was given following an application dated April 3, 2019 made before him, which sought orders for a County Surveyor to visit the suit land under the supervision of the Deputy Registrar of this court and prepare a report thereon. At the end of the ruling the Judge made the following orders:
  - (a) A Surveyor from the Trans Nzoia County Surveyor's office other than Mr Protus S Muindi shall conduct the survey within the next 21 days in accordance with the orders of court made on February 16, 2017.
  - (b) The parties shall bear the survey expenses equally and in default of payment by any party of his share of those fees which may delay the process, the other party shall pay and the same shall if not refunded within 14 days be executed on as would costs of a suit.
  - (c) The OCS Kitale police station shall provide security on the day of the survey.
  - (d) The Surveyor shall file a report before this court on July 20, 2021 when the matter will be mentioned before me for further orders and directions.



2. It would appear, from the orders that parties had reservations on the survey work being done by the said Protus Muindi. I have read through the file and noted a few issues that may have caused that, and will not go into the reasons as of now. But following the order, one Mr Onduso BA of the Trans Nzoia County Survey office visited the disputed parcel of land on November 2, 2021, conducted the survey and compiled the report dated November 11, 2021 which he filed on December 14, 2021. It was the said report that elicited this ruling since parties were of the view that the same did not resolve the dispute and they opted to submit on it.
3. In summary, the report was on two parcels of land, namely, Trans Nzoia/Makutano/478 and Trans Nzoia/Makutano/31. The visit was done by the said Mr Onduso representing the Trans Nzoia County Survey Office, in the presence of the 2<sup>nd</sup> plaintiff and his relative, and one Ben Situma, a private surveyor appointed by the plaintiff, the defendant, and two surveyors, namely, one Constant Simiyu and Andrew William Wanyama who were private surveyors employed by the defendant.
4. The Surveyor concluded that the acreage of Trans Nzoia/Makutano/47 was approximately 0.905 Ha and that of Trans Nzoia/Makutano/31 approximately 2.660 Ha. He then recommended that since the ground acreage was less than that of the registered acreage, the lost area be shared equally among the parties. He also recommended that the court orders both the Land Registrar and County Surveyor of Trans Nzoia County do visit the affected parcels of land and align the boundaries and amend the records.
5. The report followed observations the Surveyor made that land parcel No Trans Nzoia/Makutano/31 which was initially a parallelogram had substantially changed to a hexagon and this led to the alteration of the boundaries of land parcel Nos Trans Nzoia/Makutano/47 and 45 respectively. He observed further that the registered acreage of land parcel No Trans Nzoia/Makutano/31 was 2.428 Ha while the current ground size was 2.660 Ha and that of land parcel No Trans Nzoia/Makutano/478 was 0.905 Ha which was less than the registered acreage by 0.309 Ha
6. The Land Surveyor was called upon to testify orally as to the report. His evidence was that in making the report, he relied on the map of the area, the previous mutations of the land parcels, the subdivisions and the ground occupation. He took measurements of the ground and he noted that the earlier report by one Protus Muindi showed that land parcel No Trans Nzoia/Makutano/31 encroached onto land parcel No Trans Nzoia/Makutano/47 by a triangular shape, and that the encroachment was by 0.3 Ha. He stated that both parties had lost some land. He also stated that the surveyor who excised land parcel No Trans Nzoia/Makutano/39 which gave rise to land parcel Nos Trans Nzoia/Makutano/45, 46 and 47 made an error by omitting a portion of land which could have been included in the subdivision which could have catered for the error in relation to land parcel No 31. It was the said error what was taken in by the owner of land parcel No 31 when she made the resurvey by including a portion that was not to be hence affecting land parcel No 47. Thus, the land parcel No 31 had an excess acreage in comparison with the registered one.
7. The parties submitted on the report. The plaintiff rehashed the decree of the court which was made on November 3, 2004. It was to the effect that the defendants had encroached onto the plaintiff's land parcel by 0.528 Ha which formed part of land parcel No Trans Nzoia/Makutano/31. He stated that the report dated November 11, 2021 was at variance with the decree of the court which the defendants did not challenge by way of appeal or review.
8. The defendant, on the other hand, stated that the manner in which the report was made was contradictory and its findings do not assist the court in any way. He challenged the findings and recommendation of the Surveyor about sharing of the lost acreage. He then gave the history of the creation of the land parcels. He noted that the mutations of the same date showed that land parcel



No 31 was changed without any explanation. He then submitted that the plaintiff tampered with the boundaries to suit his claims. He submitted that the original boundaries be replanted to make the 1.214 Ha and 2.428 Ha for the defendant and plaintiff respectively.

### **Analysis and Determination**

9. I have considered the application before me. I have taken into consideration the decree of this court which the orders given on February 16, 2017 and July 29, 2021 sought to give effect to. The issue before me is, first, whether the report dated November 11, 2021 is in tandem with the decree of the court, two, if the report is at variance, what the court should order, and three, who to bear the costs of this application.
10. The decree of this court made on November 3, 2004 and issued on February 26, 2010 was that the plaintiffs had proved their case against the defendant on a balance of probabilities; the defendant had encroached onto the plaintiffs' land to the extent of 0.528 Ha forming part of LR No Trans Nzoia/Makutano/31; the defendant to deliver the vacant possession of the said 0.528 Ha in default of which an order of eviction would issue.
11. The defendant neither appealed from nor applied for review of the judgment. Thus, as things stand the judgment is undisturbed and intact and ought to be implemented. However, since the court directed the County Surveyor of Trans Nzoia to visit the ground and ascertain the measurements and the survey returned the finding and conclusion that the boundaries of land parcel Nos Trans Nzoia/Makutano/47 and Trans Nzoia/Makutano/31 have been interfered with, and that the mutations which were used by the surveyors who caused the subdivisions of the parcels to give rise to the current parcels of land differed, and that the registered sizes of the two parcels differ with the ground measurements, it clearly shows that the report dated November 11, 2021 is at variance with the decree. While it is in the interest of justice that the error or errors which gave rise to the current differences be corrected, it is not possible to do so while the decree of the court stands. Moreover, it appears that there is a possibility that the neighboring parcels of the land are too likely to be affected if the report is implemented as advised by the Surveyor who made it.
12. Thus, in my view, what remains to be implemented is the decree of the court as given in so far as the same has not been varied. for this reason, since I have no application before me to set aside or vary the judgment of the court and the decree extracted therefore, the report cannot be implemented as it is. Given the variance of the respective reports that have been given and especially the latest one which was done in the presence of private surveyors appointed by the parties, it is incumbent upon any party aggrieved by the judgment to apply to have it varied appropriately so that the court may determine the real issue in the implementation of the decree. In my view the variance of the ground acreages and the sizes and shapes of the plots in relation to the registered acreages are grounds of new matters or evidence that have arisen upon which the judgment of the court can be disturbed.
13. The upshot of the whole issue herein is that the report has not assisted the court in implementation of the decree and the same is then not to be considered in determining this matter. Parties are at liberty to move the court appropriately. In the meantime, the Land Registrar and the County Surveyor of Trans Nzoia County should visit the land and implement the decree of the court. The OCS of the nearest police station to provide security during the exercise. The above exercise be undertaken at the cost of both the plaintiff and defendant in equal sharing, in default of payment by either party then notice of the expenditure be given within 14 days to the defaulting party and in case of failure to pay, then the same be executed for in the manner of taxed costs, without any further application to court.

Orders accordingly.



**RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS  
28TH DAY OF JULY, 2022.**

**DR.IUR FRED NYAGAKA**

**JUDGE, ELC, KITALE.**

