



**Obonyo v Nyanjom & another (Environment & Land Case
275 of 2017) [2022] KEELC 3114 (KLR) (22 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3114 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 275 OF 2017
A OMBWAYO, J
JULY 22, 2022
(FORMERLY KISUMU HCC NO. 101 OF 2001)**

BETWEEN

FREDRICK OTIENO OBONYO APPLICANT

AND

GILBERT OTIENO NYANJOM 1ST RESPONDENT

MANASSE OWADE NYANJOM 2ND RESPONDENT

RULING

Brief facts

1. The Plaintiff herein filed a Notice of Motion Application dated 28th July 2021 under Article 40 and 159 of *the Constitution*, section 1A,1B and 3A of the *Civil Procedure Act* and Order 51 of the Civil Procedure Rules seeking for the following orders:
 1. That this Honourable Court be pleased to adopt the Surveyors report dated 18th May 2021.
 2. That this Honourable Court be pleased to issue a Mandatory Injunction compelling the 1st and 2nd Respondents to forthwith remove all illegal fixtures and /or structures, buildings illegally erected onto the access road.
 3. That the survey report of the County Land Registrar dated 18th May 2021 be implemented under the supervision of this Honourable Court.
 4. That this Honourable Court be pleased to order that the County Land Surveyor be present during the demolition to determine the position of the access road.



5. That to attain the practical enforcement and implementation of the survey report of the County Land Registrar dated 18th May 2021, an order that the OCS KONDELE Police Station or any other relevant police station shall oversee the execution of the order.
2. The Application was based on grounds that as per the Judgment of this court, the County Land Registrar together with the County Surveyor were ordered to resurvey the disputed parcels Nos KISUMU /MANYATTA “A”/2126 and KISUMU/MANYATTA “A”/3615 and KISUMU/MANYATTA “A”/3614 for purposes of establishing the boundaries and opening an access road. That the Court also ordered that the implementation of the order to be given a priority because the matter had dragged in court for over two decades yet recommendations for reopening of the access road herein were already in place but not implemented by the Land Registrar.
3. That on 18th May 2021, the County Land Registrar and the County Surveyor visited the ground in the presence of the Area Assistant Chief Manyatta ‘A’ Sub-Location and compiled a report dated 18th May 2021 and the report established that parcels number KISUMU/MANYATTA “A”/1203, KISUMU/ MANYATTA “A” /1251,KISUMU/MANYATTA “A”/ 1202 and KISUMU/MANYATTA “A”/1201 have encroached on the access road that passes through the access area and that a brick house has been constructed on parcel number KISUMU/MANYATTA “A”/1201 and part of it encroached on the access road.
4. It was stated that it was necessary for the survey report to be adopted by the court and an order issued against the Defendants jointly and severally compelling them to remove all fixtures, structures and buildings irregularly erected or constructed on the access road is opened and that the OCS KONDELE Police Station or any other police station that oversees the implementation of the survey report and any other orders of the court in relation to this matter for proper enforcement and implementation of the court order.
5. The Application was supported by the Affidavit of FREDRICK OTIENO OBONYO the Plaintiff herein which Affidavit basically relied on the grounds of the Application.
6. The 2nd Defendant herein filed a Replying Affidavit on 8th March 2022 where he stated that he was allocated parcel number KISUMU/MANYATTA “A” 3615 by his father Peter Nyanjom Otieno now deceased and was registered in his name. That in the year 2001, he sold his interest to one Mr. Oloo Michael who then transferred to his name.
7. He stated that pursuant to the sale and transfer, ownership changed and therefore he is not in possession of the suit parcels and the Plaintiff should not seek orders against him. It was the 2nd Defendant’s case that by the time the suit was being instituted in 2001, ownership had already changed.
8. The 2nd Defendant stated that this court cannot issue an order against a party who is not in possession or ownership of the suit parcels for reasons that it may not be enforced and he was not aware of the existence of the suit as he only came to know about the suit when he was served with the present application and he has never been served with summons to enter appearance and/or any notice by the Applicant or his Advocate prior to this Application.
9. He further stated that the Plaintiff is not clear as to who is owning and/ or possessing the parcels mentioned in the Surveyor’s report and that having perused the surveyors report, there was no mention of land parcel number KISUMU/MANYATTA ‘A’ /3615 or 3614 to have encroached and or constructed illegal structures on the road reserve or the Applicant’s parcel and therefore he cannot participate in removal of any illegal erected structures.



10. The 2nd Defendant stated that he has no objection to the issuing and or implementation of any court order as long as the same adheres to the provisions of the law and every other person is given an opportunity to be heard.
11. The matter came up for hearing on 8th March 2022 where I directed the Applicant to file a Supplementary Affidavit within 7 days together with submissions and the Respondents to also file and serve their submissions.

Plaintiff's Submissions

12. I have perused the file and do confirm that the Plaintiff did not file his submissions.

1st Defendant's Submissions

The 1st Defendant herein did not file his submissions.

2nd Defendant's Submissions

13. The 2nd Defendant filed his submissions on 25th March 2022 and submitted that the suit does not qualify for issuance of a mandatory injunction as was held in the case of *Kenleb Cons Ltd vs New Gatitu Service Station Ltd and Another* (1990) eKLR. That the Applicant has failed to make full and frank disclose of all the facts in this suit for the court to consider as the Applicant has failed to reveal the surveyor's report he seeks to implement affect parcels which were not mentioned in the court order or judgment dated 1/12/2018 attached to the application.
14. It was stated that the owners of the affected parcels ought to have clearly stated that the 2nd Defendant's name has not been mentioned in the report to warrant the orders sought. That the suit that gave rise to a report which the Plaintiff seeks to implement was filed against the Defendants/Respondents and the same proceeded in the absence of the 2nd Defendant. He further stated that the Trial Court made an order requiring a surveyor to re-survey parcels number KISUMU/MANYATTA "A"/2126, KISUMU/MANYATTA "A"/3615 and KSIUMU/MANYATTA "A"/3614 to establish the boundaries and open the access road.
15. It was submitted that the 2nd Defendant may not be opposed to the implementation of the surveyor's report however, the 2nd Defendant may not be in a position to remove any illegal structures and /or fixtures as prayed by the Plaintiff for reasons that he does not own the parcels named by the surveyor. That as per the surveyor's report, parcel number KISUMU/MANYATTA "A" /3615 was not captured either to have either to have encroached on the access road or had an illegal structure that the Applicant now seeks to have removed or whether the said parcel has interfered with the Applicant's land.
16. The 2nd Defendant submitted that he is a stranger to the parcels and there is no evidence that the parcels belong to him. That it would be unconstitutional and unjust for this court to issue an order that will affect parties who are not part of this suit without giving them an opportunity to be heard.
17. The 2nd Defendant further submitted the Application be dismissed and if the court is convinced otherwise that the surveyor's report be implemented, the same should be done so save for order number 2 which affects the 2nd Defendant and that each party should bear its own costs.

Analysis and Determination

18. Pursuant to the Judgment delivered on 7th December 2018, this court ordered that the County Land Registrar and the County Surveyor do resurvey the disputed parcel numbers KISUMU/MANYATTA



“A” /2126 and KISUMU/MANYATTA “A” /3615 and KISUMU /MANYATTA “A”/3614 for purposes of establishing the boundaries and opening access road upon payment of the requisite charges and that implementation of the order should be given priority.

19. Pursuant to the Surveyors Report dated 18th May 2021, it was established as follows:
- a. That parcel number KISUMU/MANYATTA ‘A’ /2126, KISUMU/MANYATTA ‘A’ /3614, KISUMU/MANYATTA ‘A’/ 1203 and KISUMU/MANYATTA ‘A’ /1251 are well defined on the ground and have all erected wall fence while KISUMU/MANYATTA ‘A’/3615 has no fence.
 - b. That upon survey it was established that parcels KISUMU/MANYATTA ‘A’/1203, KISUMU/MANYATTA ‘A’ /1251, KISUMU/MANYATTA ‘A’/ 1202 and KISUMU/MANYATTA ‘A’ /1201 have encroached on the access road that passes through to the parking area.
 - c. That the encroachment area is as follows:
 - i. KISUMU/MANYATTA ‘A’/1203=0.002 Ha
 - ii. KISUMU/MANYATTA ‘A’/1251=0.009 Ha
 - iii. KISUMU/MANYATTA ‘A’/1202=0.004 Ha
 - iv. KISUMU/MANYATTA ‘A’1201=0.004 Ha
 - d. That a brick house has been constructed on parcel KISUMU/MANYATTA ‘A’/1201 and part of it encroaches on the access road.
20. The Plaintiff herein had sued the Defendants vide a Plaint dated 2nd March 2001 seeking for an order of unblocking a footpath on parcels number KISUMU/MANYATTA “A”/2126, KISUMU/MANYATTA “A”/3615 and KISUMU/MANYATTA “A”/3614 as the Defendants had encroached and blocked the access road to his parcel of land KISUMU/MANYATTA “A”/2126.
21. Pursuant to the Judgment delivered by this court, it was found out that the Defendants had encroached the Plaintiff’s parcel of land. The 2nd Defendant filed a Replying and stated that he sold his interest in land parcel number KISUMU/MANYATTA “A”/3615 to one Mr. Oloo Michael and therefore the court cannot issue orders against him. It was the 2nd Defendant’s case that land parcel number KISUMU /MANYATTA “A”/3615 does not encroach the Plaintiff’s parcel of land.
22. This court is of the view that as per the surveyor’s report, land parcel number KISUMU/MANYATTA ‘A’/1203, KISUMU/MANYATTA ‘A’ /1251, KISUMU/MANYATTA ‘A’/ 1202 and KISUMU/MANYATTA ‘A’ /1201 have encroached on the access road that passes through to the parking area. This court therefore orders as follows:
1. the Surveyor’s report dated 18th May 2021 is hereby adopted.
 2. An order of Mandatory Injunction compelling the 1st and 2nd Respondents or the proprietors of land parcel number KISUMU/MANYATTA ‘A’/1203, KISUMU/MANYATTA ‘A’ /1251, Kisumu/Manyatta ‘A’/ 1202 and Kisumu/Manyatta ‘A’ /1201 to forthwith remove all illegal fixtures and /or structures, buildings illegally erected onto the access road.
 3. An order that the survey report of the County Land Registrar dated 18th May 2021 be implemented under the supervision of the Deputy Registrar.



4. An order that the County Land Surveyor be present during the demolition to determine the position of the access road.
5. An order that the OCS Kondele Police Station or any other relevant police station shall oversee the execution of the order.

DATED AT KISUMU THIS 22nd DAY OF JULY 2022.

ANTONY OMBWAYO

JUDGE

