



REPUBLIC OF KENYA



**Obwora v Buluma & another (Environment and Land Case Civil Suit
29 of 2015) [2022] KEELC 2493 (KLR) (21 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2493 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT AND LAND CASE CIVIL SUIT 29 OF 2015**

**AA OMOLLO, J
JULY 21, 2022**

BETWEEN

JULIUS OBWORA PLAINTIFF

AND

JUSTUS NAMANYI BULUMA 1ST DEFENDANT

ALBERT BAHATI OWINO 2ND DEFENDANT

JUDGMENT

1. Through an amended plaint dated December 4, 2018, the plaintiff sought judgment against the defendants for;
 - a) Permanent injunction in terms of paragraph 8A herein.
 - b) An order for eviction against the 1st and 2nd defendants.
 - c) An order of declaration that suit parcel No Samia/Butabona/2245 belongs to the plaintiff herein
 - d) Costs.
 - e) Interests in 2 above and any other court deems fit to grant.

2. The plaintiff pleaded that he is the absolute registered proprietor of all that parcel of land comprised in Title No Samia/Butabona/2245 and he is entitled to the use and enjoyment of the said parcel to the exclusion of all other persons. He claims that in 1989, the defendants without colour of right forcefully trespassed onto his parcel of land by continuously erecting or constructing footpath route and cultivating it without his authority, sanction or consent. The consequence of the defendant's action is the plaintiff has been denied use of his land despite several attempts to stop the same action. He outlined the particulars of trespass as follows;



- i) Continuously creating a road on the plaintiff's suit land parcel by the 1st and 2nd defendants without his consent or knowledge or any court order to that effect.
 - ii) Continuously cultivating on the plaintiff's suit land parcel by the 1st and 2nd defendants without his consent or authority.
 - iii) Removing of the mark stone by the 1st and 2nd defendants without the plaintiff's consent or knowledge or any court order to that effect.
3. The 1st defendant entered appearance and filed his defence dated April 27, 2015. He averred that he is the registered proprietor of LR No Samia/Butabona/34 with one John Abuya Buluma and that issues relating to resurveying and determination of boundaries in respect of LR No Samia/Butabona/33 and 34 were addressed in Busia Principal Magistrate Land CaseNo 20 of 2003 between the plaintiff and the defendant and the present suit is incompetent, bad in law and or *res judicata*. He continued that the plaintiff has been having issues with one Albert Bahati Owino, the registered proprietor of LR No Samia/Butabona/36 and that on 2nd July 2013, the plaintiff caused the county surveyor and county land registrar to visit LR No Samia/Butabona/36 with a view of hiving out a portion of Samia/Butabona/36 measuring ½ acres and registering the same in the name of the plaintiff. He stated that the plaintiff's actions were erroneous and malicious.
 4. The matter proceeded for hearing on April 21, 2021 with the Julius Obwora Bwire testifying as the plaintiff's first witness. He testified that he is the registered proprietor of Samia/Butabona/2245. PW1 said that he is the son of the late Jacob Bwire who prior to his demise had given his brother Israel Onyango and himself, the suit parcel No Samia/Butabona/33 which upon subdivision gave rise to parcel No Samia/Butabona/2245. The 1st defendant who is his cousin is the registered owner of LR Samia/Butabona/34 and they share a boundary. The 2nd defendant is a son of his cousin and is the personal representative of the late Joshua Odiro Obara and Wilfred Makokha Obara who are the joint registered owners of LR Samia/Butabona/36, which parcel had encroached on his land previously LR Samia/Butabona/33 and now number LR Samia/Butabona/2245 since the year 2010 to date.
 5. The plaintiff stated that in the year 1972 during the land adjudication exercise, the disputed portion measuring ½ acre which belonged to his father was included to form part of LR 36. Prior to and after the land adjudication exercise, his late father continued to occupy, use and cultivate the said disputed portion of land measuring ½ acre until his demise in 1975. Sometime in 2010, the 2nd defendant forcefully encroached into the said disputed portion of land despite verbal protest to stop him. PW1 further stated that the 1st defendant without his consent and in collusion with the 2nd defendant created a foot path on the same disputed portion of land and closed down the old access road. In 2011, being aggrieved by their actions he filed a complaint against the 2nd defendant at the Funyula Land Tribunal which ruled in his favour and directed the said ½ acre of land be hived out of LR No Samia/Butabona/36 and the tribunal ruling was adopted as the order of the lower court via Busia CMCC Land Dispute No 32 of 2011.
 6. He added that the award of the Tribunal was quashed via Busia HC JR No 16 of 2011 on the basis that Funyula Land Tribunal acted beyond its powers. He stated that on March 21, 2013 he got an order for the surveyor to come on the land and he came to implement it in July 2013. The 2nd defendant has continued to trespass and encroach into his parcel of land including the undisputed portion of land, an action which is unlawful, provocative and amounts to invasion of private property and also affront to the rights of proprietorship guaranteed by the constitution. He asked the court for survey to be done once more to demarcate the boundaries and for an order of permanent injunction. He produced the documents in his list of documents dated March 17, 2015.



7. On cross examination by counsel for the defendants, the witness admitted that in paragraph 14 of his statement he has asked for an order to hive ½ acre from parcel No 36 and in paragraph 5A of his amended plaint, he pleaded the defendants trespassed onto the land in 1989. His title to LR No 2245 was issued on August 18, 2018 and the ½ acre that he is claiming was included in parcel No LR 36 in 1972. He said that portion belonged to his father who then gave it to him in 1972. The visit by the surveyor on July 2, 2013 was for implementing the court order from the award which was not yet quashed at that time. He stated that the ½ acre is still comprised in parcel no. 36 registered in the names of Joshua Ogiro and Wilfred Makikha Obara, parents to the 2nd defendant.
8. Sebastian Sikuku, PW2 said he is a neighbour to the parties herein. He adopted his witness statement dated May 28, 2018 as his evidence. He testified that the plaintiff and his brother Israel Onyango were given suit parcel No Samia/Butobona/33 by their late father which has now been subdivided to give rise to LR No Samia/Butabona/2245. The dispute began in 2010 when the 2nd defendant trespassed into the disputed portion of land which belongs to plaintiff. In July 2013, the Government Surveyor was called and ½ acre of land was hived out of LR No Samia/Butabona/36 and a boundary between the plaintiff and the 2nd defendant was planted. He was later informed that the 2nd defendant had appealed against the tribunal's ruling and it was vacated by the high court on the basis that the tribunal had no jurisdiction to issue such orders. He continued that the 1st defendant took advantage of the situation and created another new access road and closed the old one which is on the map. He said that the encroachment still continues.
9. On cross examination, PW2 stated that the ½ acre was to be registered in the plaintiff's name and the surveyor came on the strength of the order of the tribunal. The disputed ½ acre is being cultivated by the 2nd defendant.
10. The last plaintiff witness, Fredrick Okello Omanyo testified that sometime in 2009 he bought a portion of land measuring ½ acre from the plaintiff and he has been staying there to date. The portion he bought formed part of the disputed portion of land which the 2nd defendant claims belongs to him and when he purchased it, the plaintiff confirmed to him that the same belonged to his late father and the 2nd defendant never objected to the said land transaction. He stated that he used to see the plaintiff's late mother using the said portion when he was young and in 2010 he built on it and the 2nd defendant started complaining that the land belongs to him. It was in 2011 that he found out that there was a dispute between the plaintiff and the 2nd defendant over the portion when the 2nd defendant forcefully trespassed into the same and began cultivating.
11. On cross examination, PW3 said that he bought land measuring ½ acre from the plaintiff and the portion was sold was to be curved out of LR No 33. They had a written agreement but he did not produce said agreement and that he had not received a title for his portion. He denied being aware that LR No 33 was subdivided and said that the 1st defendant is the one farming the ½ acre. He reiterated that part of the disputed portion was what was sold to him.
12. Justus Namanyi Bulumagiving evidence as DW1 said that the plaintiff is his brother and that LR No Samia/Butabona/33 is registered in the name of the plaintiff and one Israel Onyango while he is the registered proprietor of LR Samia/Butabona/34 together with one John Abuya Buluma. On July 2, 2013, the county surveyor and county Land registrar visited LR Samia/Butabona/36 with a view of hiving out and registering a portion of land measuring ½ acre out of LR 36 in the name of the plaintiff in executing an order of court issued on February 21, 2013 in Busia CMCC Land Dispute No 32 of 2011. He said that the said order was issued in error as the proceedings and judgment of the Funyula Land Dispute Tribunal had on December 8, 2011 been quashed *vide* Judicial Review No 16 of 2011.



13. DW1 denied creating a path and/or encroaching upon the plaintiff's parcel of land as alleged. He said that the plaintiff has all along had issues with the 2nd defendant over LR No 36 and he has been standing with the 2nd defendant as he felt that the plaintiff was out to disinherit him and the present allegations against him are out of spite. He denied ever assaulting the plaintiff and/or interfering with LR 33 He told the court that they had a boundary dispute over parcel LR 33 and 34 and he got it resolved after getting an order from court to have the survey done. He prayed that the suit be dismissed with costs. He produced the documents filed as his exhibits DEX 1-DEX6.
14. On cross-examination, DW1 reiterated that the plaintiff is his brother and LR No 33 neighbours LR No 36 on one side and LR No 34 on another side. He said that he has a title deed though he had not produced it. He had only seen copy of the title for LR No 2245 in court papers. He denied encroaching on the plaintiff's land and said the plaintiff uses his land for cultivation. He denied that they had put a road on the plaintiff's land as the road was put during adjudication. He said he did not produce the Registry Index Map. He stated that the 2nd defendant resides on parcel No 36 and each of the three parcels have boundaries clearly marked out which boundaries are intact.
15. Alvert Bahati Makokha, DW2 stated that LR No 36 is registered in the names of Joshua Obiro and Wilfred Makokha Obara who are all deceased and he is their son. He stated that he is on LR No 36 and the plaintiff is attempting to lay a claim to ½ acre which he brought the surveyors in the year 2013 to hive out but which action was unlawful as the order the surveyor was acting on had been set aside. He denied encroaching on the plaintiff's land and prayed that the suit be dismissed with costs.
16. On cross-examination, DW2 stated that the plaintiff is his paternal uncle and they share a boundary. He said that he did not know of LR No 2245. He denied that they had created a road on the plaintiff's land and said that he farms on LR No 36. He told the court that LR No 36 has a surveyed access road which was surveyed in 2014 and that the boundary between LR No 36 and LR No 33 was put up in 1972 during the demarcation/adjudication.
17. Parties agreed to exchange written submissions. The plaintiff filed his submissions on February 24, 2014 and submitted that the 1st and 2nd defendants have trespassed continuously onto the plaintiff's land parcel No Samia/Butabona/2245 including the ½ acre in Samia/Butabona/36 and as such the ½ acre that forms part of Samia/Butabona/36 belongs to the plaintiff as demonstrated. That the 2nd defendant holds the ½ acre in trust for the plaintiff who is the rightful owner. He asked the court to allow the prayers in the amended plaint.
18. The defendants filed their submissions on March 8, 2022 and submitted that the plaintiff needed the evidence of a surveyor to establish whether indeed the defendant are on LR No 2245 and to what extent the portion of land the plaintiff which he claimed before Funyula Land Dispute Tribunal and which is part of LR No 36 and in possession of the 2nd defendant. They urged the court to find and hold that the plaintiff has not proved the allegations of trespass. They submitted that the plaintiff's claim is time barred. He relied on the decision in *Ezekiel Ochukum (suing as the Personal Representative of the estate of Sebastian Ochieng Ochekumu) versus Fred Ekisa & 4 others* (2022) eKLR, where it was held as follows;

“ The sale agreement that put the 2nd defendant into possession was drawn in 1986.

The sale agreement was not proved to be forged and the possession of the 2nd defendant was not denied therefore even if her title in respect to LR South Teso/Angoromo/2951 is cancelled, her rights on the suit land comprised of 2 acres bought would not be extinguished.”
19. From the pleadings and submissions, the following questions are framed for determination;



- a) Whether plaintiff has made out a case for eviction order;
 - b) Whether the plaintiff is entitled to a permanent injunction against the defendants;
 - c) Who should bear the costs of the suit?
20. The defendant had stated that the issues of resurveying and determination of boundaries in respect of LR No Samia/Butabona/33 and 34 were addressed in Busia PM Land Case Number 20 of 2003 and as such the present suit as filed is res judicata. He produced a copy of an order issued in said suit as DEX 6. In this instant suit, the plaintiff has raised claims that the defendants have trespassed onto his land LR Samia/Butabona/2245 which is a subdivision of LR No Samia/Butabona/33 and further the plaintiff has raised claim to ½ acre of LR No Samia/Butabona/36 by way of trust. I do not think that the instant suit is res judicata as claimed by the defendant as the plaintiff has raised issues of trust which were not determined in Busia PM Land Case No 20 of 2003.
21. On the second issue of eviction, section 3 (1) of the Trespass Act, Cap 294 provides that:
- “ Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”
- a) The plaintiff contends that the defendants have trespassed on his ½ acre plot which is constituted in LR No Samia/Butabona/36 but was being held in trust by the 2nd defendant as the administrator of the estate of Joshua Odiro Obara and Wilfred Makokha Obara. He told the court that the ½ acre was included in LR No 36 in 1972. The plaintiff seemed to be relying on the ruling of the Funyula Land Dispute Tribunal that awarded him the ½ acre but the said ruling was set aside by the High Court in Busia HCC Judicial Review No 16 of 2011.
22. The defendants claimed that the plaintiff is out to disinherit the 2nd defendant of the ½ acre. They submitted that on the amended plaint, it was pleaded that the forceful entry was in the year 1989 hence the plaintiff had a period of 12 years to recover the portion of land. Section 7 of the Limitation of Actions Act provides that actions to recover land cannot be brought after the lapse of 12 years. In the amended plaint, the plaintiff said that the defendants entered the land in 1989 while in his oral testimony he said that they trespassed onto the land from the year 2010. the plaintiff’s evidence is therefore unclear as they do not conform to what was pleaded. If indeed the defendants’ trespassed in 1989, then the suit as filed is time barred.
23. However, on account that the act of trespass is continuous, the claim cannot be said to be time barred. Therefore, the court shall proceed to determine the suit on its merits. The plaintiff asserted that the defendants had created a footpath on his parcel of land number 2245. In the course of discharging the burden of proof, the plaintiff produced a sketch map drawn on July 2, 2013 by a surveyor pursuant to a court order issued in Land Case Number 32 of 2011. The sketch map did not have a report accompanying it so it is difficult for this court to interpret it or rely on it. Neither was there a registry index map to show this court that the two roads appearing on the sketch map does not appear on the RIM and is thus illegal.
24. Besides the complaint of creation of an illegal road (which this court finds not proved), the plaintiff also claimed that the defendants have encroached on to his parcel of land and have continuously cultivated. In his evidence, the plaintiff stated that the ½ acre of land in contention was erroneously included in



parcel number 36 which bears the name of the 2nd defendant. The creation of parcel number 36 was during adjudication thus it is a first registration. The plaintiff pleaded in paragraph 8A of the amended plaint thus:

“The plaintiffs claim against the 1st and 2nd defendant severally and jointly for a permanent injunction restraining the defendants whether by themselves, his agent, servants from entering / using footpath in being on or in any other way however utilizing or occupying the plaintiffs’ land parcel No. Samia/Butabona/2245 without his authority and consent”.

25. Is the plaintiff claiming his portion comprised in parcel number 36 or is he accusing the defendants of encroaching on his portion of land number 2245? If the claim is premised on the later assertion of encroachment on LR2245, there was need to produce a survey report to corroborate the allegation of encroachment which the plaintiff has failed to do. In the event the plaintiff is claiming the ½ acre portion to be curved out of parcel 36, his evidence and pleadings does not support the claim. He pleaded that the defendants encroached on this part in 1989 thus, if he was entitled to the same, those rights were extinguished by operation of law.
26. On the basis of analysis of evidence presented herein, I find that the plaintiff’s claim whether of trespass or for the ½ acre of land has not been proved. The upshot of the foregoing is that the plaintiff’s amended plaint dated December 4, 2018 is dismissed with costs to the defendants.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 21ST DAY OF JULY 2022.

A. OMOLLO

JUDGE

