



Ombogo & another v Ombati & 7 others (Environment & Land Case 100 of 2021) [2022] KEELC 13682 (KLR) (30 August 2022) (Judgment)

Neutral citation: [2022] KEELC 13682 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT & LAND CASE 100 OF 2021
JM KAMAU, J
AUGUST 30, 2022
(FORMERLY ELC NO. 1182 OF 2016 – KISII)**

BETWEEN

**CALLEN ONGIGE OMBOGO 1ST PLAINTIFF
CALLEN ONGIGE OMBOGO 2ND PLAINTIFF**

AND

**JOHN NYAGECHI OMBATI 1ST DEFENDANT
JOHN NYAGECHI OMBATI 2ND DEFENDANT
JONES NYAGECHI 3RD DEFENDANT
JONES NYAGECHI 4TH DEFENDANT
BENARD NYAGECHI 5TH DEFENDANT
BENARD NYAGECHI 6TH DEFENDANT
DENNIS NYAGECHI 7TH DEFENDANT
DENNIS NYAGECHI 8TH DEFENDANT**

JUDGMENT

1. The Plaintiff claims that she is the widow of one James Ombogo Ombati who died in 1973 having been the owner of the Parcel of land registration No. North Mugirango/BOisanga/232. She is also the Administratrix of James Ombogo Ombati's Estate. The 1st Defendant is her brother in law and the 2nd, 3rd and 4th Defendants are her late husband's nephews. The claim is that the Defendants felled down 310 trees worth Kshs. 345,719.50 from the suit premises on 4/12/2008 and she now prays for special damages for the same, an order of eviction of the Defendants from the suit land and a permanent



injunction restricting the Defendants from trespassing on the suit premises. The Defendants deny the entire claim and further claim that there is a civil Appeal No. 98 of 2009. A preliminary objection on the court jurisdiction was raised on behalf of the Defendants and the same was dismissed on 14/6/2022.

2. After 3 out of the 4 Plaintiff's witnesses testified the case seems not to have proceeded further after 23/7/2014. On 10/6/2021 parties consented that the land Registrar and County surveyor, Nyamira would visit the suit land as well as L.R. NO. North Mugirango/Boisanga/2535 for purposes of establishing the common boundary between the 2 parcels of land and also find out whether there is any encroachment by either party after which the County Surveyor shall fix the boundary between the 2 parcels and both officers file their Reports within 90 days. Each party was given liberty to involve his own private surveyor in the exercise. The land was visited by the land registrar on 17/8/2021 and on 20/7/2022 the land Registrar Mr. Maina reported that his Report was now ready and the same was filed on 20/7/2022 after a Court ultimatum. The Land Registrar and county surveyor did state that the adopted boundary had been well marked by a trench which did not require any fixing but that the parties should respect the adopted boundary. A sketch was attached to the Report and I invited both parties to make their comments on the joint Report which I have carefully considered. Section 26 of the land Registration Act is now clear on the issue of the Land Registrar's Report on boundary disputes. Of course, any party favoured by the Land Registrar's Report is normally quick to ask the Court to adopt it as the Defendants have done here in their comments on the Reports. The Plaintiff urges the court that to fully adopt the Report and make a finding would be to rely on an inconclusive Report.
3. The Defendant on the other hand urges the court to amply make a finding based on the joint Reports by the 2 officers who visited the Locus in Quo and even would wish that the court do find that the Report is conclusive and that the same has determined all the concerns raised by the plaintiff in her Plaint and that the Land Registrar's Report ought to be adopted as the final Judgment of this Court.
4. Registrar's Report ought to be adopted on the final Judgment of this Court.
5. The joint Report by the Land Registrar and the County Surveyor dated 19/7/2022 was compiled after examining the relevant Registry Index Map (R.I.M). Parties explained to the Land Registrar that where the boundary was positioned was very messy. The 2 officers found various boundary lines on the ground and one of them being a trench dug by the 1st Defendant running from 4236 to 4216. They took the ground measurements using Global Positioning System (GPS) and after comparing the registered acreage of each of the suit properties against their respective actual ground acreage based on the adopted boundary, they decided to adopt and maintain the adopted boundary on the boundary separating the suit properties to which the parties have all along maintained and restricted themselves to their respective portions of land. Parties have been in occupation of their respective parcels for more than 10 years now. The Report is summed up by a statement that the adopted boundary is well marked by a trench. It does not require fixing. It is upon the parties to respect the adopted boundary. A field diagram is attached to the Report.
6. I am satisfied that the Land Registrar and the Surveyor duly exercised their mandate under the provisions of the Land Registration Act, 2012. Their Report is well supported and the markings of the new boundaries accepted by all the parties.
7. In the Case of Andrew Marigwa =Vrs= Josphat Ondieki Kebati ELC NO. 1163 of 2016 Justice Mutungi stated as follows: -

“Recognizing the instant suit related to a boundary dispute which definitely the court lacked the technical ability to deal with, the court made a reference of the matter to the Land Registrar and the County Surveyor who are the persons mandated under the Act



to deal with disputes relating to boundary. The Land Registrar is the custodian of the records relating to land, has the technical ability or capacity to determine, establish and fix boundaries of parcels of land as required under the Land Registration Act, 2012.”

8. What would the court achieve by proceeding to hear the case once the Land Registrar has established the boundaries on the ground?
9. Where there is a boundary dispute the Court is well advised to seek the expertise of the Land Registrar and having considered the Land Registrar’s Report which is backed by the input of the County Surveyor, the court invokes the Provisions of Section 18(2) of the Land Registration Act, 2012:

“The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.”
10. I accordingly accept the findings of the Land Registrar in confirming the boundary between the Parcels of land registration No. North Mugirango/ boisanga/ 232 and L.R. No. North Mugirango/ Boisanga/2535. The Report is hereby adopted and I give a determination on prayer No. (a) in the Plaint based on the same as the Judgment of the Court and I further direct that the same be implemented forthwith and the parties herein do comply with the Provisions of Section 20 (1) of the Land Registration Act, 2012 by maintaining in order any feature that demarcate the boundaries of the adjoining parcels of land. Failure to which the perpetrator will face the consequences of Sec. 21 (1) Land Registration Act 2012, and will be liable on conviction to imprisonment for a term not exceeding two (2) years or to a fine not exceeding two hundred thousand shillings or to both.
11. Prayers Nos. (a) and (c) of the Plaint dated 11/5/2010 have now been determined by the Land Registrar’s Report. As to prayers Nos. (b), (c), (d) and (e) in the Plaint, evidence has to be adduced in Court to prove the same and I invite the parties to lead evidence on the same.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 30TH DAY OF AUGUST 2022.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Sibota

Plaintiff: Mr. Ochoki

Defendants: Mr. Momanyi

