



REPUBLIC OF KENYA



**KENYA LAW**  
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**Obwoye v Nyakundi & 6 others (Environment & Land Case  
89 of 2017) [2022] KEELC 4746 (KLR) (25 August 2022) (Ruling)**

Neutral citation: [2022] KEELC 4746 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND CASE 89 OF 2017**

**JM ONYANGO, J  
AUGUST 25, 2022**

**BETWEEN**

**DANIEL OGARO OBWOGE ..... PLAINTIFF**

**AND**

**JAMES BARARE NYAKUNDI ..... 1<sup>ST</sup> DEFENDANT**

**JOHNSON MAGUBO ONDIMU ..... 2<sup>ND</sup> DEFENDANT**

**PAUL OMOCHE OKIAMBA ..... 3<sup>RD</sup> DEFENDANT**

**JAMES MOGIRE ..... 4<sup>TH</sup> DEFENDANT**

**SAMUEL M. ORUTA ..... 5<sup>TH</sup> DEFENDANT**

**PAUL G. MOKAYA ..... 6<sup>TH</sup> DEFENDANT**

**EVANS BUONDA ..... 7<sup>TH</sup> DEFENDANT**

**RULING**

**Introduction**

1. The Plaintiff instituted this suit against the Defendants by way of a plaint dated 12<sup>th</sup> April, 2017 which was later amended on 25<sup>th</sup> May, 2017 pursuant to leave of court granted on 3<sup>rd</sup> May 2017. In his amended plaint, the Plaintiff seeks the following reliefs:
  - a) A declaration that parcel L.R No. Wanjare/Bogiakumu/4969 is separate and distinct from parcels L.R No. Wanjare/Bogiakumu/8095, 8790 and 8791.
  - b) An order of eviction from the suit land.



- c) A permanent injunction restraining the Defendants either by themselves, their servants, employees and/or agents from in any manner interfering with the Plaintiff's quiet possession of the suit land.
  - d) Costs of this suit
2. Contemporaneously with the Plaint, the Plaintiff filed an application seeking an order of temporary injunction to restrain the Defendants from interfering with the suit property.
  3. When the matter came up for mention on 20<sup>th</sup> June 2017, the both parties agreed that the dispute related to encroachment on the Plaintiff's land and that it was therefore a boundary dispute. The court therefore noted as follows:

“There is general agreement between the parties that the dispute touches on the location and extent of the land parcels on the ground and there is therefore need to identify the parcels' boundaries on the ground. Accordingly, the court orders and directs the Land Registrar, Kisii and the County Surveyor to visit the land parcels Numbers Wanjare/Bogiakumu/4969, 8790 and 8791 to establish their physical location on the ground and to delineate their boundaries. The Land Registrar to file his report within the next 90 days.”

4. Pursuant to the said Court order, the Land Registrar and County Surveyor visited the aforementioned parcels of land in the presence of the parties and filed a report dated 7<sup>th</sup> June, 2019 in which they observed as follows:

“Observations/Findings”

It was observed that the Plaintiff's parcel Wanjare/Bogiakumu/4969 has intact boundaries on the lower side bordering parcel 4791 up to a road passing midway through the land.

But on the upper side, there is overlap by sub-divisions of parcels Wanjare/Bogiakumu/8764 to 8790 and 8791. And further sub-division of 8790 to 8829 and 8830 (see copy of mutation attached)

From the delineated boundaries of parcel 4969 *vis a vis* 8791 and 8830 and 8829 (since 8790 has been closed on sub-division) it was established that the Defendants' portions were blown in proportion to overlap into the adjacent parcel of the applicant and houses built with perimeter wall surrounding them.”

5. When the matter came up for mention on 26<sup>th</sup> June 2019, Miss Sagwa learned counsel for the Plaintiff submitted that the report had resolved the matter in dispute as it had established that the Defendants had encroached onto the Plaintiff's parcel of land.
6. On the other hand, Mr. Nyamurongi learned counsel for the Defendants submitted that the report by the Land Registrar and County Surveyor did not resolve the issues in dispute in the suit.
7. Noting the divergent views of the parties on the report, the court invited the parties to file their comments on the report within 30 days to enable the court make a ruling.
8. During the next mention date on 31<sup>st</sup> July 2019, Mr. Nyamurongi informed the court that he had not filed his comments on the report as he felt that there was need for the Land Registrar to attend court to give clarification on the report. He therefore requested that the Land Registrar be summoned to attend court for that purpose and the court granted his request. In the meantime, both parties filed their comments on the report.



9. The Defendants also filed their Defence and Counterclaim dated 2<sup>nd</sup> May 2019. In their Defence, the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants denied the Plaintiff's claim and stated that it was impossible for them to trespass on the Plaintiff's parcel no. 4969 as it was physically located far away from their land parcels.
10. In the Counterclaim the Defendants claimed that the parcel no. 4969 was a sub-division of parcel 1191 which was registered in the name of the Defendant's father one Ezekiel Obwoye, now deceased. Ezekiel's family had occupied the said parcel for over 40 years. It is their contention that the said Ezekiel had during his lifetime, leased a portion of the Plaintiff's father's land parcel no. 1192 but he later started laying claim to a portion thereof and this was the genesis of the dispute herein. The Defendants thus claim that the Plaintiff's suit is a device crafted with the sole intention of depriving them of their parcels of land. They therefore prayed that the County Surveyor do undertake a survey and amend the area Registry Index Map to reflect the correct position on the ground.
11. Thereafter, the court summoned the Land Registrar to attend court and explain their report. The Land Registrar attended court on 20<sup>th</sup> May 2021 but he informed the court that Mr. Wafula, the County Surveyor who visited the suit property was best suited to explain their report. However, the said Mr. Wafula had been transferred to Wajir County. After several adjournments which were occasioned by Mr. Wafula's unavailability, he finally attended court virtually on 21<sup>st</sup> March, 2022.  
  
In his testimony, he told the court that when he visited parcels Wanjare/Bogiakumu/4969/8790 and 8791 he observed that the boundaries of parcels 4969 were intact on the lower side bordering parcel 4971. However, on the upper side of parcel 4969, there was encroachment by parcels 8790 and 8791 which belong to the Defendants. He pointed out that the extent of encroachment was captured in the sketch plan which he drew after the site visit. He also stated that he had attached mutation forms which depicted the sub-division of parcel 8790.
12. Upon being cross-examined by Mr Nyamurongi, he explained that it is the Land Registrar who hears and determines boundary disputes after establishing the facts on the ground. He explained that his role was to accompany the Land Registrar during site visits and work under his direction. He admitted that the Land Registrar was not present during the site visit and therefore he did not get the historical background relating to the parcels he visited. He confirmed that what was before the court was a land claim and not a boundary dispute. He was therefore of the view that it was necessary to get the facts relating to the Defendants' occupation of their parcels and portions of the Plaintiff's land so as know when they constructed their structures thereon and whether they had a valid claim to the suit property.
13. Upon re-examination by Ms Sagwa, he stated that he had indicated in the report that the Defendants had encroached on parcel 4969 and this was demonstrated in the mutation forms which indicated that the Defendants' parcels had overlapped parcel 4969. He explained that this was erroneous as parcels 8791 and 8790 were in a different location and they were separated from parcel 4969 by a road which was not visible on the ground. He stated that the perimeter wall was partially on the said road and it crosses into parcel 4969. He confirmed that the position on the sketch map and the ground tally and that the problem was the occupation. He explained that the Defendants were occupying part of the Plaintiff's land in that they had gone beyond their parcels numbers 8790 and 8791 and occupied part of parcel 4969.
14. He was of the view that the Defendants' occupation of parcel 4969 required a hearing in order to understand its origins and that it might be necessary to amend the map.



### **Issues for Determination**

15. Having considered the Land Registrar and County Surveyors' report and the submissions filed by both parties, the singular issue for determination is whether the said report resolves the issues in dispute and whether it should be adopted as the judgment of the court.

### **Analysis and Determination**

16. It is not in dispute that the Plaintiff and the Defendants have had a long-standing dispute over land parcel no. 1191 from which parcel 4969 was derived. It is also common ground that the Defendants have erected structures on a portion of parcel 4969 and have been occupying the same for many years. The Plaintiff's claim of trespass is therefore not a recent one. The report by the County Surveyor and his testimony in court does not capture the historical background of the dispute between the Plaintiff and the Defendants. The County Surveyor admitted that the Land Registrar was not present when the site visit was conducted and a critical aspect of the visit which involved capturing the history with regard to occupation of the suit property was therefore missing from the report.
17. That being the position, it is my considered view that the report does not resolve all the issues in dispute and cannot therefore be adopted as the judgment of the court. However, the same shall form part of the court record and both the report and the County Surveyor's evidence shall be relied on by the court. The case shall be set down for hearing in order for the parties to give their evidence before the court can render its judgment.

**DATED, SIGNED AND DELIVERED AT KISII THIS 25<sup>TH</sup> DAY OF AUGUST, 2022.**

**J.M ONYANGO**

**JUDGE**

