



Mureithi & 2 others (Suing as administrators of the Estate of Ruth Muthoni Rudorot) v Rudorot (Land Case 128 of 2016) [2022] KEELC 15719 (KLR) (17 August 2022) (Judgment)

Neutral citation: [2022] KEELC 15719 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
LAND CASE 128 OF 2016
FM NJOROGE, J
AUGUST 17, 2022**

BETWEEN

**JOSEPH MUREITHI 1ST PLAINTIFF
ISAAC RODROT 2ND PLAINTIFF
JOSHUA GITAHI RODUROT 3RD PLAINTIFF
SUING AS ADMINISTRATORS OF THE ESTATE OF RUTH MUTHONI
RUDOROT**

AND

NANCY RUIRU RUDOROT DEFENDANT

JUDGMENT

Introduction

1. The plaintiffs in the instant case are administrators of the estate of their late mother who was a co-wife to the defendant. The dispute at hand arose out of the subdivision of parcel number Trans Nzoia/Suwerwa/394, land that formerly belonged to the plaintiff's father.

Pleadings

Amended Plaintiff

2. The plaintiffs filed their initial plaint dated 10/8/2016 on 7/2/2016 which they later amended on 8/9/2016. In the amended plaint, the plaintiffs allege that when their father's land parcel number Trans Nzoia/Suwerwa/394, was subdivided into smaller portions plots numbers 470 and 471 were created, but since the lower part of the parcels was swampy, the surveyor was unable to fix boundaries to the fullest extent of the subdivisions but deferred the exercise till the time when the swamp would be dry. The plaintiffs allege that the defendants fraudulently subdivided her land, parcel no 470 to create



two new parcels, 1356 and 1357 without involving the plaintiffs with full knowledge that the proper boundary between plot no 470 and 471 had not been fixed. The amended complaint seeks the following orders against the defendant:

- (a) A declaration that the defendant's actions of preventing the creation of a proper boundary between land Title Nos. Trans-Nzoia/Suwerwa/470 and Trans-Nzoia/Suwerwa/471 and of subdividing land title Nos. Trans-Nzoia/Suwerwa/470 into Trans-Nzoia/Suwerwa/1356 and 1357 and subsequently disposing of Trans-Nzoia/Suwerwa/1357 while knowing well that the boundary between title Nos. Trans-Nzoia/Suwerwa/470 and 471 is yet to be fixed and fraudulent, illegal and unjustified.
- (b) An order to direct the County Surveyor Trans-Nzoia County to visit the site and ascertain the boundaries of title No. Trans-Nzoia/Suwerwa/471 and the original land title No. Trans-Nzoia/Suwerwa/470 which has since been subdivided into Trans-Nzoia/Suwerwa/1356 and 1357.
- (c) A permanent injunction to issue restraining the defendant, her agents or any other person claiming through her from encroaching on and/or in any manner interfering with that land known as Trans-Nzoia/Suwerwa/471 as rectified.
- (d) Cost of this suit and interest.

The Amended Defence.

3. The defendant filed her defence on 6/9/2016. She later amended it on 1/11/2016. In her amended defence the defendant stated that subdivision of plot no 394 was conducted by her deceased husband in 1995 and boundaries were fixed. She stated that for 18 years the parties had observed the existing boundaries between plots nos 470 and 471, which ran up to the river and their common boundary was clearly marked with posts and shown to the parties. Titles had been issued in respect of the said plots. Those titles were transferred to the plaintiffs' mother and the defendants respectively by the plaintiffs' deceased father. The defendant states that the acreage of the two plots included the swampy area, and that her plot measures 16.5 acres and not 18.45 acres as alleged by the plaintiff, that the swampy area has not dried up and each plot has its own share of the swamp. The defendant's defendant's denied any ill motive or fraudulent intention in the subdivision and sale of part of her plot. The defendant denies there was any boundary dispute between her and the proprietor or plot no 469 which also emanated from the subdivision of plot no 394. The defendant therefore states that she has not encroached on 3 acres of plot no 471 as alleged by the plaintiffs. She states that the plaintiff's equalization theory is misconceived and lacking in legal basis since the two parcels in the dispute were created in 1995 and a mutation was registered and titles issued in 1998.

Reply to the Amended Defence

4. On 10/11/2016 the plaintiffs filed Reply to Amended Defence. The plaintiffs reiterate the contents of the amended complaint and aver that they were present when the boundary between the suit plots were being established; that the posts to the disputed boundary were unilaterally fixed by the defendants in 2016 and that that is when, after conducting a search at the land registry which revealed the subdivision, they discovered the "problem" and their request that a qualified surveyor be engaged to fix the boundary on the lower side of the two disputed plots was declined by the defendant; that though titles were issued, the boundary was never perfected as had been earlier intended by consensus between the two families, and therefore their plot (471) is not 16.5 acres as it ought to be; that the plaintiffs invited the surveyor to fix the boundaries of plot no 469 since it had eaten into the swampy portion that ought to be shared between plot no 470 and 471.



The Evidence of the Parties

The Plaintiffs' Evidence

5. PW1, Joseph Muriithi Githae, the 1st plaintiff testified on 28/2/2019, 8/10/2019, 11/11/2020 and on 27/1/2021. He stated that the 2nd and 3rd plaintiffs are his brothers and they have given him authority to testify on their behalf as per authority dated 21/7/2016. His evidence is that a surveyor from Arch surveys conducted the survey works; that parcels no 470 and 471 ought to be equal in size, measuring 16.5 acres each; that titles to the two plots had been issued in 1998; that on 2/3/2016 the owner of plot no 469 exceeded his boundary towards the river by ploughing but soon thereafter that boundary dispute was resolved; that soon thereafter in the same year, the defendant extended the boundary between her plot and the plaintiffs' plot to the river by erecting a barbed wire fence ostensibly to keep out cattle from her plot. PW1 then wrote to the County Surveyor asking him to fix the boundary between the plots and he declined. In the same year the plaintiffs discovered that the defendant had subdivided and sold part of plot no 470. PW1 stated that Plot no 471 does not measure 16.5 acres as originally intended.
6. While under cross-examination by Mr. Kiarie the 1st plaintiff agreed that the mutation shows that the boundary in dispute extends to the river and that the document has a certificate that the survey work has been carried out; he agreed that there is no statement on that document to show that there was any part of the survey that had not been carried out on the ground, and that measurements, including those of the grounds nearest to the river, were indicated thereon. He admitted that all the titles resulting from the subdivision of parcel no 394 were issued simultaneously on 14/7/1998 save for plot no 469 and title to any resultant subdivision had any restriction registered against it. He averred that there was no dispute regarding the boundary between plot no 471 and 472 yet plot no 472 had a marshy portion too. He further testified that the portion near the river had been used by everyone before the defendant erected the impugned fence.
7. Upon re-examination by Mr. Teti he stated that he, alongside his stepbrother Elijah who is the defendant's son, were involved in seeking a surveyor for the purpose of subdivision of plot No 394; that on the ground the boundaries did not extend to the river, that the defendant's plot is 18.5 acres while the plaintiffs' plot is 13.5 acres and that he was not present and he did not know who prepared the mutation for plot number 470.
8. PW2, Kenneth Nyabera, testified on 14/4/2021. He was a Land Surveyor. He adopted his written statement dated 25/5/2018 and filed in court on 29/5/2018 as his evidence-in-chief in this case. His evidence is that he is a land surveyor; that he knows the parties in the suit, having worked for them; that he was engaged in obtaining the consent to subdivide; that plot no 394 was to be subdivided into 5 portions of 6.62, 6.62, 4.85, 0.407, 5.6091 ha. He prepared the mutation (P. Exh 4) as per the plot sizes in the land board consent to subdivide; that while he was carrying out the subdivision; he found that he could not measure the swampy ground up to the river, and he did not therefore complete the survey work of fixing beacons between the two suit plots; that the proprietor, who was very old instructed him to implement the mutation and obtain the titles. In 2016, the family asked him to return to the land. He stated that the measurements on the ground do not tally with what is in the title, and that both measurements must be corrected.
9. Upon cross-examination by Mr Kiarie, PW2 stated that he first did the ground work and then made the mutation. The mutation was signed by the senior surveyor who owned the firm he worked for; that he indeed the senior surveyor that he had not completed the survey work on the ground; that the senior



surveyor nevertheless signed the mutation that the work was done. He admitted that in his mutation he had extended the boundary between the two plots up to the river.

10. Upon re-examination by Mr. Teti he stated that he never fixed the beacons on the lower side of the plots as it was swampy. The plaintiffs' case was marked closed after PW2 had given his evidence.

The Defendant's Defence

11. DW1, Nancy Ruiru Rudorot, the defendant, testified on 1/7/2021. She adopted her statement dated 16/10/2018 as her evidence-in chief. Her evidence is that her deceased husband who had 3 wives had his land subdivided into 5 portions as per the mutation (D. Exh 1); that a surveyor was involved in the subdivision of the land on the ground in the presence of all the widows in an exercise that took only one day; that the defendant obtained her title after the exercise; that one of the plaintiff's brothers, Moses, stayed on plot no 471 after the subdivision while others migrated to other towns; that each party used the area near the river freely; that during the resolution of the boundary dispute between her and the owner of plot no 469, the boundaries between her plot and the plaintiff's plot was not affected, and it has remained the same since the subdivision of plot no 394; that she later subdivided her land into two portions and sold the one on the upper side away from the river and that the acreage of both plots is 6.6 ha; that her sale of part of her land was innocent and no boundary dispute had arisen then; that the plaintiffs have also sold a portion of their land; that the river Nzoia changed course and cut off part of both the plaintiff's and the defendant's land, thus reducing both parcels; that the boundary on the ground between the two suit plots has been in existence for a long time, and it is marked by trees, posts and barbed wire.
12. Upon cross-examination by Mr. Teti, DW1 stated that the plaintiffs' family had been given 2 acres of land at Subukia which they sold; that it is correct that the lower side of plot no 394 was swampy before the subdivision; that it is correct that the two families were to get equal portions of land and that that is indeed what happened. She agreed with the plaintiffs' evidence that the 1st plaintiff was instrumental in bringing the surveyor to the land.
13. Upon re-examination by Mr Kiarie, DW1 stated that she was left with only 14.3 acres after sale of 2 acres. She denied that she holds any of the plaintiffs' land.
14. DW2, Moses Mburu Mukundi, testified on 17/5/2021. He adopted his statement dated 16/10/2018 as his evidence-in-chief. His evidence is that he was appointed a village elder in the local area between 1980 and 1992 and that his land parcel and parcel no 394 were separated by a road; that he knew the deceased and his 3 wives; that he as the chief and his assistant chief and village elders were present when plot no 394 was subdivided in 1992, and that the boundaries ran all the way to the river as shown in the mutation produced by the plaintiffs. DW2 stated that no portion, including the swampy areas; was left undemarcated. DW2 stated there was no other dispute between the parties.
15. Upon cross-examination by Mr. Teti, DW2 insisted that the survey work on plot no 394 was carried out in 1992 by a government surveyor and maintained that the common boundaries to the parcels ran up to the river Nzoia.
16. The defendant's case marked closed.

Submissions

17. On 15/7/2021 the court gave directions that the plaintiff shall file submissions within 14 days and the defendant shall respond thereto within 14 days of service. The plaintiffs' written submissions were filed on 19/10/2021. The defendant filed her submissions on 17/12/2021.



18. The plaintiffs' submission is that this dispute is about the equalization of parcel's no 470 and 471, whether the common boundary between plots nos 470 and 471 was perfected up to the river Nzoia. They submit that it is their father who applied for the land control board to subdivide the land as per the subdivisions shown in the mutation produced. It is stated that the plaintiffs' chief witness, Joseph Mureithi drew a sketch, P. Exh 5 which showed the 33 acres that were to be shared equally between their family and the defendant's family. It was submitted further that the plaintiffs' father passed on in 1996 before he could create proper boundaries to the plots he had created; that title deeds issued in 1998 indicated the measurements of plot no 470 and 471 to be 16.5 acres each; that the respective families, including the defendant, agreed not to have the boundaries on the lower marshy side fixed as the area was inaccessible; that both families shared the lower lands next to the river peacefully over the years until 2016 when the defendant sold part of her land before the common boundary was fixed; that when the plaintiffs approached the defendants to have that lower boundary fixed she declined; It is submitted that both parties agree that the two parcels ought to be equal, and indeed their respective titles give equal measurements, and that the titles are admitted to be genuine and to have originated from the same mutation and processed by the same surveyor. However the plaintiffs aver that the family patriarch allowed the processing of title deeds before the perfection of the common boundary so as to protect the ownership of each wife. The evidence of Kenneth Nyabera, PW2, the surveyor who allegedly did the survey work is cited in support of this argument. He wrote two letters dated 11/7/2017 and 15/8/2016. It is submitted that the two letters, which support the plaintiff's claim that the boundary was not perfected. P. Exh 10 alleges that the defendant's plot is larger by about 4.95 acres, and that the anomaly has to be corrected to equal the portions. P. Exh 11 states that on an unstated date the surveyor surveyed the two plots to establish how much land was swampy; that the survey found that the arable land on each plot was 10.50 acres; that the swampy land, which ought to have been shared out equally between plots no 470 and 471 measured 12.04 acres. It is averred that the evidence of the surveyor, PW2, was not challenged by way of a contradictory survey report; that no evidence of beacons placed on the lower lands was adduced. The plaintiff also submitted that the evidence of physical boundary markers such as trees and barbed wire were not of help to the defendant's case because in any event, firstly, that boundary was fixed by the defendant in 2016 and secondly, the photographs were not accompanied by certificates as required by Section 106B of the *Evidence Act*.
19. The plaintiffs cited the case of *Samuel Wangau v AG & 2 others* 2009 eKLR for the proposition that RIMs are not authorities on boundaries and the RIM in the instant case can not bar the administration of justice to the parties. The plaintiffs also relied on the case of *Cornel Bwire Ongenga v Julius Bwire Sioka* 2019 eKLR in which the court allowed the intervention of the survey office on the ground in order to create certainty as to the proper identification of the physical area or location represented by the titles held by each party.
20. Citing Section 18(2) of the *Land Registration Act*, the defendant submitted that this being a boundary dispute the court lacks jurisdiction to hear and determine it, and that the plaintiffs should have taken up the matter with the Land Registrar under Section 18(3) of the Act. Citing the case of *Reuben Kioko Mutyaene v Hellen Kiunga Miriti & 4 Others and Ntalala Eric Mutura & Another* eKLR which held that government departments vested with obligations and mandates should be allowed by court to meet those obligations, the defendant submits that the instant suit is premature. However, the defendant admits that jurisdiction was not raised in her defence.
21. The defendant submitted that the boundary between the two plots runs up to the river and that the fact that measurements were inserted in the mutation is evidence of that.
22. Further the defendant states that the mutation (PEXH 4) has a certificate bearing a certificate that the survey was carried out and that the RIM (DEXH 5(a) and 5(b) show that the boundary runs all the way



to the river. The defendant argues that any suspension by the family of the establishment of boundaries owing to swampy nature of the land would have affected all the subdivisions of plot no 394 save plot no 473, yet there is no averment by the plaintiffs that the other common boundaries between the subdivisions were not established all the way to the river. The defendant averred that Moses Gichuki, the plaintiffs' brother, who has been resident on plot 471 was not called as a witness as to whether the boundary to the land established in 1995 had been interfered with.

23. Regarding PW1's evidence, it was submitted that it did not accord with the claim in the plaint or the filed witness statement in that contrary to those documents, it intimated that the defendant had moved the boundary from one specific point (identified by PW1 on the map) to another point.
24. The defendant's further submission was that the subdivision of her parcel had no effect on the disputed boundary and that she had right to dispose of the resultant subdivision without consulting the plaintiffs. It is averred that the claim for equalization of the suit parcels lacks basis in view of the absence of any claim that the defendant has encroached on the plaintiffs' land.

Determination

25. I have considered the pleadings, the evidence tendered in support thereof as well as the submissions filed.

Issues for Determination

26. The main issues for determination in this matter are as follows:
 - (a) Whether this court lacks jurisdiction;
 - (b) Whether or not the boundary between the suit plots was established all the way to the river in 1995;
 - (c) What orders should issue?
27. The issues are analyzed as hereunder:
 - (a) Whether this court lacks jurisdiction;
28. The defendant relies on Section 18(2) and (3) of the *Land Registration Act* in support of her claim that this court lacks jurisdiction. Section 18 states as follows:
29. It is clear from the pleadings filed that the dispute between the parties lies in the exact location of the boundary between the two parcels. The plaintiffs' stated position is contrary to the drawings on the registry index map that shows the disputed common boundary as running all the way to the river; they claim that the boundary around the swampy area was never established at the time the mutation was made, which averment is supported by the surveyor who conducted the survey. As stated by the defendant the plaintiffs have not alleged that the defendant encroached into their land. This court also has jurisdiction to order that the county surveyor and the land registrar to visit the suit land and perform any tasks thereon regarding the boundaries as the situation may demand. For those reasons, I would not consider that section 18(3) of the *Land Registration Act* would negate the jurisdiction of this court in the instant case.
30. What appears to be the bone of contention in this matter is the use of what was an area that had all the hallmarks of riparian land some 15 years ago. Since the land was swampy, it was of very little use to the parties in this case. Now that the global phenomenon of climate change through atmospheric warming has occasioned the drying up of the swampy area, its utility has increased



hence the need to declare the rights of the parties. However before proceeding further in the instant judgment, the gravity of the environmental degradation in Kenya and indeed in the world prompts this court to observe that times are long gone by when surveys would describe boundaries as lying in the middle of the river, and interestingly enough, it would appear that rivers have taken to regularly changing their courses as happened to the River Nzoia in this case. This court also observes that ever since the enactment of the [Environmental Management and Co-Ordination Act](#) pursuant to Kenya's international obligations under the United Nations Framework Convention On Climate Change (UNFCCC) and other multilateral environmental conservation and protection instruments, there is no dearth of legal provisions in Kenya for the protection of water bodies, including rivers. Section 42 of the [Environmental Management and Co-Ordination Act](#) provides as follows:

“Protection of rivers, lakes, seas and wet lands

- (1) No person shall, without the prior written approval of the Authority given after an environmental impact assessment, in relation to a river, lake, sea or wetland in Kenya, carry out any of the following activities—
 - (a) erect, reconstruct, place, alter, extend, remove or demolish any structure or part of any structure in, or under the river, lake, sea or wetland;
 - (b) excavate, drill, tunnel or disturb the river, lake, sea or wetland;
 - (c) introduce any animal, whether alien or indigenous, dead or alive, in any river, lake, sea or wetland;
 - (d) introduce or plant any part of a plant specimen, whether alien or indigenous, dead or alive, in any river, lake, sea or wetland;
 - (e) deposit any substance in a lake, river or wetland or in, on or under its bed, if that substance would or is likely to have adverse environmental effects on the river, lake, sea or wetland;
 - (f) direct or block any river, lake, sea or wetland from its natural and normal course;
 - (g) drain any lake, river, sea or wetland; or
 - (h) any other matter prescribed by the Cabinet Secretary on the advice of the Authority.
- (2) The Cabinet Secretary may, by notice in the Gazette, declare a lake shore, wetland, coastal zone or river bank to be a protected area and impose such restrictions as he considers necessary, to protect the lake shore, wetland, coastal zone and river bank from environmental degradation and shall, in doing so, take into consideration the following factors—
 - (a) the geographical size of the lake shore, wetland, coastal zone or river bank; and
 - (b) the interests of the communities resident around the lake shore, wetland, coastal zone or river bank concerned.
- (3) The Cabinet Secretary may, by notice in the Gazette, issue general and specific orders, regulations or standards for the management of river basins, lake



basins, wetlands or coastal zones and such orders, regulations or standards may include management, protection, or conservation measures in respect of any area at risk of environmental degradation and shall provide for—

- (a) the development of an overall environmental management plan for a lake, river, wetland or coastal area, taking into account the relevant sectoral interest;
 - (b) measures for the prevention or control of coastal erosion;
 - (c) the conservation of mangrove and coral reef ecosystems;
 - (d) plans for the harvesting of minerals within the coastal zone, including strategies for the restoration of mineral sites;
 - (e) contingency plans for the prevention and control of all deliberate and accidental discharge of pollutions into the sea, lakes or rivers;
 - (f) plans for the protection of wetlands;
 - (g) the regulation of harvesting of aquatic living and non-living resources to ensure optimum sustainable yield;
 - (h) special guidelines for access to and exploitation of living and non-living resources in the continental shelf, territorial sea and the Exclusive Economic Zone;
 - (i) promotion of environmentally friendly tourism; and
 - (j) the management of biological resources.
- (4) The Authority shall, in consultation with the relevant lead agencies, issue guidelines for the management of the environment of lakes and rivers.
- (4A) The Cabinet Secretary may make Regulations prescribing for any interest in or over land in the interests of defence, public safety, public order, public morality, public health, or land use planning.
- (5) Any person who contravenes or fails to comply with any orders, regulations or standards issued under this section shall be guilty of an offence.

31. The *Environmental Management and Co-Ordination (Wetlands, River Banks, Lake Shores and Sea Shore Management) Regulations, 2009* [L.N. 19/2009] were also formulated to give guidance on the protection of water bodies in the country.
32. Under the cited regulations, the “high water mark” with regard to water bodies means “the historical recorded point of the highest level of contact between the water and the shore or bank, as the case may be” and “low water mark” means “the historical recorded point of the lowest level of contact between the water and the shore or the bank as the case may be.”
33. Under the cited regulations “river bank” means “the rising ground from the highest normal water mark, bordering or adjacent to a river in the form of rock, mud, gravel or sand and in cases of flood plains include the point where the water surface touches the land, that land not being the bed of the river” while “river” includes “a permanent and seasonal river.”



34. Under the regulations, “wetlands” means “areas permanently or seasonally flooded by water where plants and animals have become adapted; and include swamps, areas of marsh, peat land, mountain bogs, bank of rivers, vegetation, areas of impeded drainage or brackish, salt or alkaline; including areas of marine water the depth of which at low tide does not exceed 6 meters. It also incorporates riparian and coastal zones adjacent to the wetlands” and “riverine wetlands” includes “wetlands along rivers and streams.”
35. Still, under the same regulations, “drainage of wetlands” means “the removal or exclusion of water from a wetland by pumping, excavation of channels, planting of fast growing non-wetland trees or plants, abstraction of water from a river entering a wetland, channeling, or reclamation.”
36. It is instructive that the objective of the regulations include ensuring the sustainable use of wetlands for ecological and aesthetic purposes for the common good of all citizens. Indeed, under regulation 14 (1), every owner, occupier or user of land which is adjacent or contiguous to a wetland shall, with advice from the National Environmental Management Authority, have a duty to prevent the degradation or destruction of the wetland, and shall maintain the ecological and other functions of the wetland and any person who fails, neglects or refuses to protect a wetland under sub-regulation (1) commits an offence.
37. The starting point in finding the solution to this dispute is the observation that the family patriarch intended each of the two families to own 6.62 ha. as per the title deeds issued.
38. The next point is that the lower side being the marshy area, survey began from the higher and arable ground and proceeded down the incline towards the river. From the road fronting the higher ground of the farm, 6.62 acres were to be parceled out for each family towards the direction of the river, however far that boundary would go. Establishing the true extent of each parcel in that fashion appeals to this court to be the best way of resolving the issue. The rest of the land that would remain after the parceling out of 6.6 ha for each family would in my view be the riparian land attached to the River Nzoia, and no allocation can be made to any of the parties thereof even after it dries up, though the owners of parcels adjacent to it would have the advantage of use of the same in a manner that befits the environment in accordance with the law. In that event there would be no need for any party to fence their land up to the very banks of the river Nzoia as the defendant has done; they would limit the security fences of their plots to the beacons placed by the County Surveyor and no more.
39. However, perchance the titled land extends to the swampy area, then the parties are obliged to observe the strictures of the law cited above in order to conserve and protect the riverine wetlands, for one of the principles espoused by the regulation is that wetland resources shall be utilized in a sustainable manner compatible with the continued presence of wetlands and their hydrological, ecological, social and economic functions and services. It is observed that subject to the provisions of Section 42 of the Act, no person shall carry out any of the activities stipulated therein without a permit issued by the relevant lead agency and an Environmental Impact Assessment License issued by the Authority where applicable.
40. What is the import of the foregoing? It is that any survey exercise by the county surveyor without the participation of the relevant environmental authorities may ignore the salient environmental aspects of the dispute at hand. Consequently, under the provisions of Order 1 rule 10(2) I hereby order at this stage that the National Environmental Management Authority and the Trans Nzoia County Environment Officer are hereby joined to this suit as the as the 2nd defendant and 3rd defendants respectively for their participation in the implementation of this court’s final orders will be necessary for a final and conclusive adjudication of this matter.



41. Back to the survey, in conducting the beaconing and boundary adjustment exercise, it is observed that the county surveyor would not be limited to any straight boundary set in the mutation. He would only limit himself to the current position of that boundary if each parcel attained 6.6 ha. in addition, Since the parcel no 470 has already been subdivided and part of it disposed of, the county surveyor would, while carrying out the boundary adjustment exercise, apply the old boundaries it had before it was subdivided. That would be only for the purpose of resolving the plaintiffs' grievance and therefore the dimensions and boundaries of plot no Trans-Nzoia/Suwerwa/1356 would not be affected.
42. The upshot of the foregoing is that the plaintiffs' claim has merit. I therefore enter judgment in favour of the plaintiff and I hereby issue the following final orders:
- a. The National Environment Management Authority and the Trans Nzoia County Environment Officer are hereby joined to the instant suit as the 2nd defendant and 3rd defendants respectively in this suit;
 - b. The County Land Registrar and the County Surveyor Trans-Nzoia County as well as the trans Nzoia County Environment Officer shall by notice convene the parties at the site of the disputed boundary and County Land Registrar and the County Surveyor shall ascertain the correct boundaries of title No. Trans-Nzoia/Suwerwa/471 and the original land title No. Trans-Nzoia/Suwerwa/470 which has since been subdivided into Trans-Nzoia/Suwerwa/1356 and Trans-Nzoia/Suwerwa/1357 and affix the appropriate beacons thereto and the County Environment Officer shall advise the parties as appropriate regarding occupation and use of the River Nzoia wetlands for its proper protection under the law;
 - c. The survey exercise in order no (b) above by the County Land Registrar, the County Surveyor and the County Environment Officer shall commence from the higher and arable ground and proceed down the incline towards the river;
 - d. During the survey exercise, 6.62 acres shall be parceled out for each family from the upper boundary abutting road fronting the higher ground of the farm towards the direction of the river, while retaining the position of the current ground boundary, however far that boundary would go so as to accommodate the acreage stated on the respective title deeds;
 - e. In conducting the beaconing and boundary adjustment exercise, the County Surveyor and County Land Registrar shall not be limited to the straight boundary set in the mutation with regard to the swampy area, but they shall have greater regard for the accommodation of parcel acreages for plot nos Trans-Nzoia/Suwerwa/470 and Trans-Nzoia/Suwerwa/471;
 - f. No party shall thereafter fence their land up to the very banks of the river Nzoia or utilize the wetlands in a manner inconsistent with the law, and the parties shall otherwise limit the security fences of their plots to the advice by the County Environment Officer;
 - g. Since the parcel no Trans-Nzoia/Suwerwa/470 has already been subdivided and part of it disposed of, the County Surveyor and the County Land Registrar shall, while carrying out the boundary adjustment exercise, apply the old boundaries it had before it was subdivided and that application shall be only for the purpose of resolving the dispute between the plaintiffs and the defendant, and therefore the dimensions and boundaries of plot no Trans-Nzoia/Suwerwa/1356 would not be affected in the exercise;
 - h. A permanent injunction is hereby issued restraining the defendant, her agents or any other person claiming through her from encroaching on and/or in any manner interfering with



that land known as Trans-Nzoia/Suwerwa/471 with its boundaries as rectified under this judgment;

- i. The costs of fixing the boundaries shall be borne by both the plaintiffs and the 1st defendant in equal parts, save that where one party fails to pay the other may sponsor the exercise and such costs shall be recovered from the party in default of more than 14 days after a written demand has been served on him or her, by way of execution as would happen in respect of costs of a suit;
- j. As there are familial bonds to be protected and preserved between the plaintiffs and the 1st defendant, each party shall bear its own costs of the instant suit; however, no costs of the instant suit are awarded to the 2nd and 3rd defendants.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU BY WAY OF ELECTRONIC MAIL ON THIS 17TH DAY OF AUGUST, 2022.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

