



**Wekesa v Keya & 6 others (Environment & Land Case 59 of 2015)
[2022] KEELC 12683 (KLR) (28 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12683 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 59 OF 2015
AA OMOLLO, J
SEPTEMBER 28, 2022**

BETWEEN

FLORENCE AUMA WEKESA PLAINTIFF

AND

PATRICK OMONDI KEYA 1ST DEFENDANT

JOSEPH ONYANGO KEYA 2ND DEFENDANT

PANCRAS OUMA 3RD DEFENDANT

PATRICK RAPENDA 4TH DEFENDANT

FRANCIS ODUORI 5TH DEFENDANT

KIZITO NDALAKU 6TH DEFENDANT

THE COUNTY GOVERNMENT OF BUSIA 7TH DEFENDANT

JUDGMENT

1. The plaintiff filed a suit against the defendants through an amended plaint dated July 15, 2016 and prayed for judgment as follows;
 - a) An order for eviction of the 1st defendant and 2nd defendant from LR Marachi/Elukongo/1293.
 - b) Permanent injunction restraining the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 8th defendants from trespassing, utilizing, possessing or in any way interfering with the plaintiff's quiet occupation and enjoyment of the suit land.
 - c) Survey of land parcel No Marachi/Elukongo/1293 and re-establishment of the boundary by the County Land Registrar and the County Land Surveyor as per the official map of Marachi



Location, Elukongo registration section and relocation of the Tingolo–Marachi Road passing through LR Marachi/Elukongo/1293.

- d) Any other relief this honourable court may deem just and fit to grant.
 - e) Costs of this suit.
2. The plaintiff impleaded as the administratrix of the estate of Situndo Otsieno who owned LR Marachi/Elikongo/1293 measuring 20 acres which the 1st and 2nd defendants have without any justifiable reason or colour of right, trespassed on and erected structures and where they live and unlawfully practise farming. She stated that the 3rd, 6th and 7th defendants destroyed the boundaries between LR Marachi/Elikongo/1293, and 1292 while the 4th and 5th defendants maliciously destroyed the boundary separating LR 1293 and 1294 hence trespassing into a portion curved out of LR 1293. She further pleaded that the 8th defendant through illegal and unlawful acts constructed a road through LR Marachi/Elikongo/1293.
 3. The 5th defendant entered appearance and filed his defence dated May 15, 2017 denying ever having destroyed any boundary between titles No Marachi/Elikongo/1292 and 1293 or ever trespassing, cultivating or erecting any structures on LR 1293 and put the plaintiff to strict proof.
 4. The 7th defendant entered appearance and filed a defence dated March 22, 2018. They denied that the plaintiff is the owner of LR Marachi/Elikongo/1293 and said that the parcel is owned by 2 other people hence it was impossible to know whose land if any has been interfered with. They averred that they only construct roads on areas that there exists roads and without encroaching on anybody's land and denied the jurisdiction of this court. They further said no notice of intention to sue had been served upon the 7th defendant and prayed the suit be dismissed with costs.
 5. The 1st, 2nd, 3rd and 4th defendants put in a joint defence statement dated May 10, 2019 and averred that LR Marachi/Elikongo/1293 was initially registered in the name of Situndo Otieno who was the brother to James Keya Otieno and he was holding the same in trust for them to share equally. They said that both Situndo and James Keya were buried on the suit land and the two families have been staying on the land since 1966. In their counterclaim, they stated that they have stayed on the suit land for more than 46 years thus should be declared to have acquired the said land by way of adverse possession. The 1st to 4th defendants prayed an order should be made to have the suit land shared equally with each party getting 10 acres and the defendants have the costs of the suit.
 6. The hearing of the suit began on February 8, 2021 with the plaintiff testifying as PW1. She relied on her amended plaint dated July 16, 2016 and sought the prayers therein. She said that she wanted the 1st and 2nd defendants ended because they are not beneficiaries of the suit land. She produced certificate of grant, searches for LRs number 1292, 1293 and 1294; together with the RIM for the area.
 7. In cross-examination by Mr Wambura learned counsel for the 8th defendant, the plaintiff said that she had initially sued the governor personally but later did a letter changing the claim to be against the county government. She stated that she sued the government of Busia because they made a road passing through the plot without her permission. She was aware of the order issued on April 7, 2021, for the surveyor to visit the ground to identify the boundaries of the suit land. That the county surveyor came to the property, they took their statements and said that they will return to complete the work but did not demarcate the boundaries. She denied abusing the surveyors as the reason they did not complete the work and said that this is not a family dispute only. She told the court that Tingolo –Marachi road was created in 2001 and according to the map sheet, the road passes through her land. She said she had produced uncertified pictures showing the road passes through her land. The witness alleged that the murrum put on the road had damaged the soil texture.



8. In further cross examination by Miss Gona learned counsel for the 5th defendant, the plaintiff stated that Francis is her cousin and she sued him for cultivating her land LR 1293. She reiterated that the surveyor came to the ground but they never completed the exercise. She stated that Francis lives in LR No 1292 and there is a boundary separating LR No 1292 and 1293. According to the ground, Francis is cultivating her land and she is ready to pay if it is found that Francis is not trespassing on her land.
9. The defence case began with the evidence of Francis Oduor testifying as DW1. He stated that the plaintiff is his cousin by virtue of their fathers being brothers. He said that he lives on LR No 1292 while the plaintiff lives on LR No 1293 and denied encroaching on LR 1293 by building or cultivating on it. When put to cross-examination by the plaintiff, DW1 reiterated that that he lives on and farms parcel number 1292. He confirmed that the suit land has always been registered in the plaintiff's father's name. That when the plaintiff returned, he was the one who welcomed her and built her a house on the land.
10. The 7th defendant (County Government) witness was Cyprian Oliko testified as DW2 and introduced himself as a civil engineer working with the 7th defendant. He informed the court that the road in dispute begins at Tingolo and ends at the boundary of Busia with Kakamega counties. He testified that the access road in issue herein has been in existence since the year 1976 and constitutes part of the whole of that piece of land earlier donated by the neighbouring local community and reserved for the purposes of putting up St Matthews Masendebale Primary School. That the donors of the said piece of land including the plaintiff's father had willingly and voluntarily donated the said piece of land to be used for putting up the school and to provide for access road to the school, following resolution by members of the local community to have the school moved from the land initially reserved for the school which was too small to accommodate the school.
11. Following the resolution by the members of the community, it was agreed that the land initially reserved for the school now be used for putting up Masendebale Dispensary. DW2 explained that the access road to the school stretches and runs directly beside and along the edge of the school fence up to the school gate and is the only available way of accessing the school. He told the court that ever since the said piece of land was donated by members of the local community in 1976, the road in issue has provided access to the school to date without any complaint or interference until the plaintiff laid the false claim. He said that the access road was not opened up by the 7th defendant as alleged and the plaintiff therefore has no right of claim on the land, otherwise a school access road.
12. On cross-examination by the plaintiff, DW2 said that Masendebale Primary School occupies several parcels and they can only know the owners of those parcels on doing a search. DW2 did not know the names of the community members who donated the land or the size of the land taken by the school and road from LR 1293. He said that it was up to the court to decide whether she should be compensated for the portion of land taken by the school or road. On re-examination, the witness reiterated that the road and school was done by the national government and the plaintiff's father was one among many community members who donated land.
13. The plaintiff filed her submissions on June 2, 2022 and submitted that it was her testimony that the 1st to 7th defendants have without any colour of right and with no justified reason trespassed into her aforesaid land parcel number Marachi/Elukongo/1293. She submitted that the 1st to 7th defendants tendered blatant lies in their testimony before court as indeed the boundaries separating her land LR Marachi/Elukongo/1293 and their respective land parcels LR Marachi/Elukongo/1292 and 1294 were destroyed by themselves. She said that the 7th defendant is not realistic when they claim that they opened the road where it is designated when it is not reflected on the official map which she produced in evidence that confirmed LR Marachi/Elukongo/1293 does not bear any road passing through it.



14. She submitted that it is clear from the surveyor's report that indeed the boundary between LR 1293 and 1292 was destroyed as per their finding during the site visit done on the September 28, 2021. She took issue with the surveyor's finding that the boundary separating LR 1293 and 1294 are intact and pointed out that no boundary between the LR 1292 and 1293 was resituated. She denied that part of LR 1293 was donated to Masendebale Primary School as at the time the said school encroached her land in 1976, her late father had passed on way back in 1970. She prayed that the court finds that she has proved her case on a balance of probability and the claim be allowed as presented.
15. The 6th defendant filed his submissions on August 19, 2022 and submitted that it was incumbent upon the plaintiff to place before the court clear evidence in support of her allegations against him but she has totally failed to provide relevant and specific evidence. He further submitted that the plaintiff acknowledged that the 6th defendant is one of the lawful beneficial owners of LR Marachi/Elukongo/1292, her claim being that the 6th defendant destroyed the common boundary separating LR 1292 and 1293 making the claim a boundary dispute. He said that the matter had not been determined as per section 18 of the Land Registration Act and was therefore prematurely and irregularly before the court. He submitted that although a Land Registrar's report dated September 28, 2021 was filed in court on October 7, 2021 it did not in any way support the plaintiff's allegations of trespass and use of any part of the plaintiff's parcel LR 1293 by the 6th defendant. He prayed that the suit against him be dismissed with costs. The rest of the defendants did not file any written submissions.
16. From the pleadings and the evidence adduced, I opine that the issues that come up for determination are as follows;
 - a) Whether the defendants have trespassed onto the plaintiff's land;
 - b) Whether the plaintiff is entitled to the prayers sought;
 - c) Whether or not the claim against the 7th defendant is time barred
 - d) Whether or not the plaintiff is entitled to compensation
17. The plaintiff has testified that she is the administratrix of the estate of Situndo Otsieno who owned LR Marachi/Elukongo/1293 measuring 20 acres and that she was issued with a grant to distribute the estate. She filed a copy of the said grant on April 13, 2016. She also produced a certificate of search issued on January 28, 2015 showing the plaintiff was registered on May 20, 2009 as jointly with two others as the owner of the suit land. The 5th defendant in cross examination stated that the suit land has always been registered in the plaintiff's father name. From the evidence, I find that the plaintiff's father is the registered proprietor of LR Marachi/Elukongo/1293 and the plaintiff got locus to bring the suit by virtue of her appointment as the administratrix.
18. On the issue of trespass, it is the plaintiff's evidence that the 1st to 7th defendants have trespassed onto LR Marachi/Elukongo/1293 with the 1st and 2nd defendants have erecting structures where they live and unlawfully practice farming. She said that the 3rd, 6th and 7th defendants have destroyed the boundary between LR Marachi/Elukongo/1293 and 1292 while the 4th and 5th defendant destroyed the boundary between LR Marachi/Elukongo/1293 and 1294. The plaintiff relied on the map and the survey report filed on October 7, 2021 in support of her case. The said report took statements from the plaintiff, the 1st, 3rd defendants and other family members. From the observations and findings of the Land Registrar, he noted that there are clear and definite boundaries between parcels number 1293 and 1294 which is identified by mostly euphorbia trees and other live hedges that seem to have existed for years. He stated that the surveyor used the map to determine the boundary between LR 1293 and 1292 which were marked and the parties planted euphorbia on the marked point. The plaintiff in her



submissions has stated that she disagrees with the findings of the report on the boundaries of LR 1292 and 1293 being restored.

19. The report does not state that the owners of parcel number 1292 and 1294 had trespassed on to the plaintiff's parcel LR 1293. Further, the 6th defendant (Francis Oduor) in his evidence denied trespassing onto the plaintiff's land parcel. The plaintiff submitted that the surveyor confirmed that the boundary between parcel number 1292 and 1293 had been destroyed. The Land Registrar commented thus in his report "there were no definite boundary marks between parcels 1292 and 1293, I therefore instructed the surveyor to fix it using the map" The surveyor fixed the boundary on November 28, 2020 and parties planted the euphorbia trees along the marked boundaries. Neither the Registrar nor the Surveyor indicated that the owner of parcel number 1292 had encroached on parcel 1293. The plaintiff did not specify the extent of the encroachment. In this court's view, the absence of boundary marks does not by itself constitute encroachment. Therefore, I find no proof of trespass alleged as against the owner of parcel number 1292.
20. Further, the registrar in the report observed that there existed live hedges between parcel Nos 1293 and 1294. The plaintiff faulted the surveyor's report that this boundary was intact, however, like the case of 1292, the plaintiff did not specify the extent of encroachment. She had the option of appealing the findings of the Land Registrar or calling a private surveyor as her witness. The photographs produced does not indicate the parcel of land where the crops were planted or where the boundary of 1294 ends and the boundary of 1293 begins. From the evidence presented, it is difficult to indict the owner of parcel number 1294 as there is nothing to demonstrate the acts of trespass
21. The plaintiff prayed for eviction orders as against the 1st and 2nd defendants who in their joint defence together with the 3rd and 4th defendants stated that the LR No 1293 is trust land and filed a counterclaim on adverse possession. However, they did not testify during the hearing of the suit and from the survey report, the 1st defendant is living on LR No 1293 and claimed to have been living there since he was born. He said that during adjudication the land was registered in the name of the plaintiff's father and the other two brothers passed on before the land could be subdivided. The plaintiff as the administratrix of LR Marachi/Elukongo/1293 is entitled to the exclusive use of the land as is envisioned by section 24 and 25 of the *Land Registration Act*. Since the 1st to 4th defendants did not give any evidence to support their trust claim, I find that the plaintiff and her co-owners are entitled to use parcel LR Marachi/Elukongo/1293 to the exclusion of all others and the order for eviction against the 1st and 2nd defendants is warranted.
22. The plaintiff's claim against the 7th defendant who is the Busia County Government is for the relocation of the road passing through LR Marachi/Elukongo/1293 as per the official map sheet. The 7th defendant on his part testified that at the time the road was developed, the county government was not in existence and it was therefore developed by the Ministry of Roads under the National Government. The plaintiff in her submissions has said that her father was deceased in 1976 when the road was being put up and therefore their permission was not sought as is required. Two issues emerge, first whether the claim to block the road is time barred and secondly, whether it is the 7th defendant that is to be held liable in compensation.
23. The plaintiff pleaded that paragraph 11 of the amended plaint that the 8th (7th) defendant constructed a road through parcel number 1293. The 7th defendant in rebuttal stated that the road was constructed by the national government in 1976. That the permission to put up this road was from the community owners who donated land to Masendebale Primary school and the road is used to access the school. According to the county government, the road runs through several plots and the plaintiff's land is one of them.



24. If the road was created in 1976 as alleged by the 7th defendant with the plaintiff stating that by then her father had died so he could have given consent. The right to reclaim the land back then started as soon as the road was done in 1976 so that by the time this suit was filed in 2015, approximately 38 years later, the time had lapsed. Section 7 of the Limitation of Actions Act cap 22 provides;

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

25. Having found that the claim is time barred, no order can issue in respect of the portion of land taken up by the road. However, in the event I am in error on this finding, is the plaintiff entitled to any compensation? She did not plead for compensation as all she wanted is her land back. The evidence on record introduce the Mansendebale primary school that is served by this road. It also turned out that part of the school sits on part of the suit land which the 7th defendant alludes to be a donation from the plaintiff's father. Therefore, any orders made in respect to the permanent injunction will affect the school more than the 7th defendant. The school was not joined to these proceedings. Issuing any orders without giving them a hearing goes against the tenets of natural injustice.

26. While it is true that county government did not exist when the Tingolo-Indangalasia Road was being put up in 1976, the Constitution 2010 in article 286(5) (a) (d) provides for the functions and powers of the county government in regards to county transport including county roads and public roads transport. The plaintiff has said that the acquisition happened after the death of his father and they had not been consulted on the land passing through their land. The process of land acquisition is provided for in section 107 of the Land Act that commences with submission of a request from the National or County Governments to the Commission for acquisition of land on its behalf. The plaintiff was under obligation to show that the process of acquisition was not followed as provided for by the law. She did not call any evidence to corroborate her assertion that the community which included her father never donated any land to lend credence to her claim. For the reasons given, I find her prayer for permanent injunction to be without merit

27. The upshot of the foregoing analysis is that the plaintiff's suit partially succeeds and partially fails. Consequently, I make the following orders;

- a. The suit as against the 1st and 2nd defendants for eviction is granted. The 1st and 2nd defendants are directed to vacate the land LR Marachi/Elukongo/1293 within 120 days from the date of service of this decree upon them. In default, an eviction order is hereby issued against the 1st and 2nd defendants to carried out in accordance with the law.
- b. The claim against the 3rd and 4th defendants is allowed in so far as parties respecting boundaries between parcel number 1292 and 1293 as planted by the County Land Registrar and the County Surveyor, Busia.
- c. The claim of trespass against the 3rd, 4th, and 5th and 7th defendants are hereby dismissed.
- d. Since the plaintiff brought the suit as a pauper, an order is made that each party shall bear their respective costs.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 28TH DAY OF SEPTEMBER 2022.

A. OMOLLO

JUDGE

