



**Njenga & another v Muchemi & another (Environment & Land Case
23 of 2017) [2022] KEELC 13620 (KLR) (13 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13620 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE 23 OF 2017**

**YM ANGIMA, J
OCTOBER 13, 2022**

BETWEEN

PETER NDUNG’U NJENGA 1ST PLAINTIFF

RACHAEL WANGECHI NDUNG’U 2ND PLAINTIFF

AND

JOSEPH WAHOME MUCHEMI 1ST DEFENDANT

ELIUD KARIUKI MUCHEMI 2ND DEFENDANT

JUDGMENT

A. The plaintiffs’ case

1. By a plaint dated October 17, 2005 the plaintiffs sued the defendants seeking the following reliefs:
 - (a) A declaration that the plaintiffs are the sole and legitimate owners of all that piece of land number Nyandarua/Simbara/2 measuring 15.5 Hectares or thereabouts in terms of the register index map for Shamata Settlement Scheme and further declaration that the defendants are in illegal and unlawful occupation of a portion of 20 acres or thereabouts of the plaintiffs’ land comprised in the aforesaid title which acts amount to trespass.
 - (b) A mandatory injunction compelling the defendants by themselves, their agents, servants, and or employees to vacate the plaintiffs’ parcel of land and in default and the court to order for their eviction.
 - (c) Costs of this suit.
 - (d) Any other or further relief that this Honourable court may deem fit and expedient to grant.
2. The plaintiffs pleaded that at all material times they were the registered owners of Nyandarua/ Simbara/2 (Parcel No 2) measuring 15.5 ha or thereabouts whereas the defendants were the



administrators of the estate of the late Muchemi Kabuu who was the allottee of Nyandarua/Simbara/3 (Parcel No 3) measuring 19.5 ha or thereabouts. The plaintiffs further pleaded that sometime between 2002 and 2003 the defendants wrongfully curved out and fenced a portion of 20 acres out of Parcel No 2 claiming it to be part and parcel of Parcel No 3. The plaintiffs further pleaded that when they sought the assistance of the Land Registrar Nyandarua he resolved the boundary dispute between the parties but the relevant report was quashed by the High Court in Nakuru High Court Misc. Application No 290 of 2005.

B. The respondents' response

3. The defendants filed a joint statement of defence dated December 5, 2005 denying liability for the plaintiffs' claim. The defendants admitted their ownership of Parcel No 3 and the plaintiffs' ownership of Parcel No 2 but denied that they had encroached upon a portion of 20 acres of the plaintiffs' land as alleged or at all.
4. The defendants contended that the disputed portion of land rightfully belonged to the estate of the late Muchemi Kabuu and that their use and occupation thereof was lawful and justified. It was the defendants' contention that the plaintiffs' action of seeking redress from the Land Registrar-Nyandarua was malicious and misconceived since the said dispute had been resolved on April 23, 2003 at the instance of the defendants. They therefore considered the instant suit an abuse of the court process and asked the court to dismiss it with costs.

C. Summary of evidence at the trial

(a) The plaintiffs' evidence

5. At the trial hereof the plaintiffs called 2 witnesses and closed their case. The 1st plaintiff was deceased by the time of trial so the 2nd plaintiff was the one who testified. Her evidence essentially mirrored the contents of her witness statement dated February 1, 2018. It was her evidence that the two parcels of land were separate and distinct and that the disputing parties had peacefully lived side by side until 2002 when the defendants with help of a government surveyor entered Parcel No 2 and curved out about 20 acres thereof claiming it to be part of Parcel No 3. It was her further testimony that the said surveyor, Mr Odero, was not accompanied by the Land Registrar at the material time and that he did not give her a copy of any report or verdict on the dispute.
6. The plaintiffs' further evidence was that upon lodging a complaint with the Land Registrar – Nyandarua a formal boundary dispute resolution was initiated which resulted in the Registrar's report in the plaintiffs' favour which was marked as exhibit P1. However, the said report was challenged by the defendants and the same was quashed by the High Court in Nakuru HC Misc Application No 290/2005.

(b) The defendants' evidence

7. The 1st defendant was deceased at the time of trial hence the 2nd defendant testified as the sole witness. The 2nd defendant adopted the contents of his witness statement dated January 22, 2019 as his evidence in-chief. It was his testimony that although there was a boundary dispute between the disputing parties, the same was resolved by a government surveyor in 2003. The 2nd defendant denied that he had grabbed any land from the plaintiffs and contended that their land had always been 74 acres.



D. Directions on submissions

8. Upon conclusion of the trial the parties were accorded an opportunity to file and exchange their respective submissions. The plaintiffs were granted 21 days to file and serve their submissions whereas the defendants were granted 21 days upon the lapse of the plaintiffs' period to do likewise. The record shows that the plaintiffs filed their submissions on May 24, 2022 whereas the defendants' submissions were filed on June 17, 2022.

E. The Issues for determination

9. The court has noted that the parties did not file an agreed statement of issues in this matter. Whereas the plaintiffs filed a list of 8 issue in their trial bundle the defendants filed a list of 3 issues for determination. The court has further noted that in their written submissions, the plaintiffs revised their issues and framed only 3 which were similar to the ones framed by the defendants.
10. The court is of the opinion that the following issues arise for determination herein:
 - a. Whether the boundary dispute amongst the parties was resolved by the Land Registrar.
 - b. Whether the defendants were in unlawful occupation of a portion of the plaintiffs' land.
 - c. Whether the plaintiffs are entitled to the reliefs sought in the plaint.
 - d. Who shall bear costs of the suit.

F. Analysis and determination

(a) Whether the boundary dispute amongst the parties was ever resolved by the land registrar

11. The court has considered the material and submissions on record on this issue. From the material on record it is clear that whereas the plaintiffs contended that they sought resolution of the boundary dispute and the same was resolved in their favour, the defendants similarly contended that they had requested the Registrar to resolve the dispute and it was resolved in their favour.
12. The defendants contended that they first reported the dispute to the Registrar in 2002 or thereabouts and paid a boundary resolution fee of Kshs 3,750/=. It was their evidence that a government surveyor called Odero visited the site in April, 2003 and altered the common boundary between Parcel No 2 and No 3 in consequence whereof they took possession and utilized the additional portion of land.
13. It is clear from the material on record that the resolution process initiated by a district surveyor called Elijah Odero were never concluded. The defendants' trial bundle contained copies of several invitation letters to the parties to attend boundary resolution meetings between October 29, 2002 and April 15, 2003 but there was no evidence to demonstrate that the Land Registrar ever attended any of the site visits as scheduled. There was no written record of the proceedings or even a report of the verdict reached by the Land Registrar. When the Land Registrar (PW2) testified at the hearing hereof she stated that she was not aware of any report or verdict prepared after the surveyor's visit in 2003. In the absence of any proceedings or report the court is unable to hold that the Land Registrar ever resolved the boundary dispute in favour of the defendants in 2003 as claimed by the defendants.
14. The court has also considered the evidence and submissions on the plaintiffs' contention that the boundary dispute was actually resolved in their favour by the Land Registrar in 2005. There is some evidence on record that the Land Registrar and the district surveyor visited the site on February 3, 2005 in consequence whereof a report or verdict was prepared. The same was produced as Exhibit P.1



by the Registrar who testified as PW2. It is, however, evident that the said report was quashed by the High Court in Nakuru Judicial Review Case No 290 of 2005. As such, the same is no legal or practical significance.

15. In view of the fact that there is no official verdict or report of the purported boundary resolution in 2003 and in view of the fact that the Registrar's report of 2005 was quashed by the High Court it would mean that there is no valid or subsisting verdict by the registrar on the dispute. The import of this is that that leaves the warring parties in the same position they were in before they reported the boundary dispute to the registrar.

(b) Whether the defendants were in unlawful occupation of a portion of the plaintiffs' land.

16. The court has considered the material and submissions on record on this issue. The plaintiffs testified that they had lived side by side with the defendants for so many years without any problem. It was only in 2002 or thereabouts that the defendants started claiming a portion of Parcel No 2. It was the plaintiffs' case that the defendants had wrongfully encroached into a portion of about 20 acres of their land with the help of a government surveyor called Mr. Odero who had no authority under the law to alter the boundaries or to resolve boundary disputes.
17. The defendants, on the other hand, contended that the portion of land they entered and occupied with effect from 2003 was rightfully the property of the estate of the deceased Muchemi Kabuu and that they did so after a government surveyor called Odero pointed out the new boundaries to them. The evidence of the 2nd defendant at the trial was that their land had always been 74 acres hence the plaintiffs had no legitimate claim against them.
18. In paragraph 4 of their plaint the plaintiffs pleaded that the defendants' land measured 19.5 ha or thereabouts which pleading was admitted by the defendants in paragraph 4 of their defence. If that be so then the same cannot translate into 74 acres at the conversion rate of 2.47 acres per ha. However, this is an issue which shall be conclusively resolved at the opportune time once the Land Registrar undertakes a boundary resolution in accordance with Sections 18 and 19 of the [Land Registration Act, 2012](#).
19. The evidence on record clearly indicates that it is the defendants who in 2003 or thereabouts encroached upon the land previously in the occupation of the plaintiffs. The defendants' explanation for the encroachment is not legally plausible. It is not enough for them to claim that they were shown new boundaries by a government surveyor in 2003. The said surveyor had no legal authority to alter the boundaries in dispute. He had no legal authority to resolve boundary disputes on his own. Resolution of boundary disputes was vested in the Land Registrar under the repealed [Registered Land Act](#) which was then in force. Moreover, there no record of proceedings of resolution of the boundary dispute in 2003 and there is no official on record of the verdict reached. In the premises, the court is satisfied on a balance of probabilities that the defendants are in wrongful occupation of a portion of the plaintiffs' land without any lawful justification or excuse.

(c) Whether the plaintiffs are entitled to the reliefs sought in the plaint

20. The court has considered the material on record vis a vis the prayers sought by the plaintiffs. The court has already found that there was no lawful and regular resolution of the boundary dispute between the parties by the Land Registrar under Section 21 of the repealed [Registered Land Act](#) (Cap. 300) which was in force at the material time. The court has further found that the government surveyor had no legal authority to alter the boundaries of the plaintiffs' Parcel No 2 hence the defendants had no right to enter upon and occupy any portion of Parcel No 2 as they did in 2003. The court is thus of the



opinion that the plaintiffs are entitled to be restored to the position they were in prior to the irregular and unlawful actions of the defendants and the government surveyor in 2003. In the premises, the court is inclined to grant the prayers sought by the plaintiffs.

21. The court is further of the opinion that upon the defendants vacating the portion of land they have been irregularly and wrongfully occupying the Land Registrar should move in to ascertain and fix the boundaries of the two parcels of land in accordance with the provisions of Section 19 of the [Land Registration Act, 2012](#). Upon such resolution, any party aggrieved by the resultant verdict or decision shall be at liberty to follow the appellate process set out under of the [Land Registration Act, 2012](#).

(d) Who shall bear costs of the suit

22. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the [Civil Procedure Act](#) (cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court is, however, of the opinion that each party should bear his own costs in view of the abortive steps which were taken by the district surveyor and the Land Registrar in resolving the boundary dispute. If the two government officials had diligently undertaken their duties this litigation may not have been rendered necessary.

G. Conclusion and disposal

23. The upshot of the foregoing is that the court is satisfied that the plaintiffs have proved their case against the defendants to the required standard. In view of the demise of the 1st plaintiff and the 1st defendant during the pendency of the suit, judgment be and is hereby entered for the 2nd plaintiff against the 2nd defendant in the following terms:
 - a. A declaration be and is hereby made that the plaintiffs are the legitimate owners of all that parcel of land known as Nyandarua Simbara/2.
 - b. A declaration be and is hereby made that the 2nd defendant is in illegal and unlawful occupation of a portion of the plaintiffs' said land which he entered in 2003 or thereabouts.
 - c. A mandatory injunction be and is hereby granted compelling the 2nd defendant by himself, his agents, servants or any other person claiming through him to vacate the plaintiffs' land Nyandarua/Simbara/2 within 21 days with effect from the date hereof in default of which they shall be forcibly evicted therefrom.
 - d. The Land Registrar - Nyandarua shall ascertain, mark and fix boundaries of Nyandarua/Simbara/2 and Nyandarua/Simbara/3 in accordance with the provisions of Sections 18 and 19 of the [Land Registration Act, 2012](#) within 60 days with effect from the date hereof and file a report in court to that effect within the same period. Any party aggrieved by the Registrar's Report in that regard shall be at liberty to pursue the appellate process stipulated under [Land Registration Act, 2012](#).
 - e. Each party shall bear his own costs.

It is so decided.

JUDGMENT DATED AND SIGNED AT NYAHURURU THIS 13TH DAY OF OCTOBER, 2022 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:



Ms. Ndegwa for the plaintiffs

N/A for the defendants

C/A - Carol

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Y. M. ANGIMA

JUDGE

