



**Gathaga & another v Mureithi & 2 others (Environment & Land Case 86 of 2016) [2022] KEELC 15395 (KLR) (19 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15395 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT & LAND CASE 86 OF 2016  
FO NYAGAKA, J  
DECEMBER 19, 2022**

**BETWEEN**

**EUNICE WANGARE GATHAGA ..... 1<sup>ST</sup> PLAINTIFF**

**JOHN ANONO MUNDIA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**JOSEPH MUREITHI ..... 1<sup>ST</sup> DEFENDANT**

**ALFRED OBAT ..... 2<sup>ND</sup> DEFENDANT**

**HELLEN ONYANGO OFINYO ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. Vide a Complaint dated 23/05/2016 and filed on even day, the Plaintiffs sued the 1<sup>st</sup> and 2<sup>nd</sup> Defendants seeking the following reliefs:
  - (a) A declaration that the lower original Settlement Fund Trustee (SFT) water way boundary established in 1991 is the correct boundary between parcel Nos. Trans Nzoia/Suwerwa/431, 429, 394 and 382 and that the same ought not to be altered.
  - (b) A permanent injunction restraining the Defendants from interfering and/or altering the original waterway boundary.
  - (c) Costs.
  - (d) Any other relief the Court deems fit and just to grant.
2. The Defendants entered appearance and filed their joint Statement of Defence and Counterclaim dated 04/07/2016 on 05/07/2016. They urged this court to dismiss the suit and allow the Counterclaim in the following terms:



- a) A declaration be made that the Plaintiff's act of blocking and/or cultivating on the original water way as established by the Settlement Fund Trustee of Suwerwa Settlement Scheme is illegal and therefore the County Surveyor be directed to open the said waterway as per the original map in order to create the correct boundaries of land title numbers Trans Nzoia Suwerwa/382, 387, 668 and 471;
  - b) A permanent injunction restraining the Plaintiffs and or their servants or any other person from interfering with and/or altering the original waterway boundary as opened;
  - c) Costs of the suit.
3. The Plaintiffs filed their Reply to Defence dated 04/08/2016 in response thereto on 05/08/2016. Thereafter, the 3<sup>rd</sup> Defendant, successfully joined the proceedings. She filed a Defence and Counterclaim dated 27/08/2016 on 29/08/2016 seeking:
- a) A declaration that the Plaintiffs have no proprietary rights over that land known as Trans Nzoia/Suwerwa/422 and have no right whatsoever to continue remaining thereon and utilizing the same and/or to interfere with the 3<sup>rd</sup> Defendant's quiet user and possession of the same hence an order of eviction from the said land be issued against the Plaintiffs, their servant or any other person claiming through.
  - b) A permanent injunction restraining the Plaintiffs, their agents, servants or any other person from encroaching on and/or in any matter interfering with the Plaintiff's interest over the suit land title number Trans Nzoia/Suwerwa/422.
  - c) Damages for trespass.
  - d) Costs of this suit and interest.
4. The suit proceeded to hearing. A number of witnesses testified. I now restate their evidence in the next paragraphs of this judgment.

### **Plaintiffs' Case**

5. The Plaintiffs' opening testimony emanated from the County Surveyor, Ezekiel Khatili and PW1. He filed his report dated 28/03/2018 which was produced as P. Exhibit 2 on 23/05/2018 pursuant to the court's orders of 29/01/2018. It attached three (3) sketch maps, A, B & C. He spelt out his mandate as that of ascertaining the actual boundaries of plot Nos. Trans Nzoia/Surwerwa/429 and Trans Nzoia/Surwerwa/431. He intended to establish the proper position of the waterway.
6. The survey exercise was conducted in the presence of inter alia, the parties herein. The surveyor relied on the Registry Index Maps, scale rule, tape measure and a handheld GPS as the tools he used.
7. His methodology adopted actual ground picking of parcel Nos. 429, 431, 382, 668, 669 and the existing waterway. Thereafter, it was incorporated in the computer using the AutoCAD software. A drawing deciphered his final analysis. These drawings were captured in the attached sketch maps A and B attached to or part of P. Exhibit 2.
8. His analysis and findings were that the owner of parcel No. 429 encroached and closed part of the waterway by 0.045 Ha. The owner has also encroached on plot Nos. 471 and 382 by 0.029 Ha and 0.02 Ha respectively. The owner of parcel No. 431 similarly encroached on the part of the waterway by 0.29 Ha and on plot Nos. 382 and 668 by 1.157 Ha and 0.025 Ha respectively. The owner of parcel No. 668 encroached onto and closed the waterway by 0.029 Ha. The true position of the waterway was



- illustrious from the sketch maps A and B attached to his report in blue and red color. The red shaded part of the waterway existed on the ground but the blue shaded part had been closed as prescribed.
9. On map C, extracted from the current Registry Index Map (RIM), he noted the subdivisions that were done on parcel No. 387, namely, plots 422 - 432, were not in conformity with the boundaries on the ground. Plot No. 422 for instance did not exist on the ground albeit being shown that it bordered the river and was featured in the mutation form dated 10/05/1991. Out of this, plot Nos. 429 and 431 were forced to cross the waterway. He produced the Registry Index Map (RIM) copy marked P. Exhibit 1. He found that the amendments, done on to the Map as not proper irrespective of the information provided in the mutation form.
  10. The Surveyor recommended that since plot Nos. 429 and 431 accrued after subdivision of plot No. 387 and their positions on the ground were not in conformity with the map, there was need to revisit the survey of parcel No. 387 in the event of this exercise and the waterway will be placed as its rightful position. He further observed that plot No. 429 had expanded its land by approximately 0.0094 Ha.
  11. When cross examined, PW1 stated that PMF1-3 was a faulty document. The morphed properties evolving from the subdivision of plot No. 387 in 1991 were not placed into the map until the initiation of an amendment process that took place on 27/02/2017. He maintained that the amendments did not alter the waterway. However, after going through the map, he discovered that the amendments were improper. PW1 added that the waterway is an access to the river. He pointed out that Ann Chetambe, the owner of plot No. 422, was present during the exercise with her brother in law.
  12. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs are the registered owners of all those parcels of land namely Trans Nzoia/Surwerwa/431 measuring 2.43 Ha and Trans Nzoia/Surwerwa/429 measuring 1.21 Ha whose titles deeds were produced as P. Exhibit 6 (a) and (b) respectively. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants' parcels of land namely Trans Nzoia/Surwerwa/394 and Trans Nzoia/Surwerwa/382 respectively, are situated beyond a waterway separating their parcels with those of the Plaintiffs. The 2<sup>nd</sup> Defendant's plot neighbour's that of PW2.
  13. The Plaintiff's plots were from a resultant subdivision of plot No. Trans Nzoia/Surwerwa/387 owned by Edwin Habil Onyango into eleven (11) parcels. Following the sale of these parcels, a mutation form produced as P. Exhibit 7 (a) and subdivision plan produced as P. Exhibit 7 (b) were generated to reflect the subdivision and transfer of ownership.
  14. His further evidence was that the waterway boundaries were defined in 1968 following demarcation of the parcels and final survey confirmed in 1991. PW2 continued that the waterway is located outside their land parcels. Parties respected the boundary for over thirty (30) years until January 2016. It all started with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants complaints to the County Commissioner that the boundary had been interfered with by the Plaintiffs.
  15. Following that complaint, the County Commissioner referred the matter to the County Surveyor who visited the suit properties on 26/01/2016 and 01/03/2016. During those visits, the County Surveyor was improperly shown a different boundary by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
  16. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants utterances, found believable then by the County Surveyor, caused a ripple effect. As a result, the County Surveyor moved the boundary into the Plaintiffs' land hiving off 200 metres by 150 metres of their land. As a result, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants benefitted since their acreage was increased. This also altered the waterway.
  17. Dissatisfied with the findings of the Surveyor, the Plaintiffs wrote protest letters dated 27/01/2016 and 03/03/2016, produced as P. Exhibit 8 (a) and (b) respectively. In turn the County Surveyor wrote to



the Chief on 19/05/2016, a letter produced as P. Exhibit 9 with an indication that he would visit the land on 24/05/2016.

18. It was testified that the outcome of the site visit was recorded in a report dated 08/06/2016. The Plaintiffs' claim is that the Surveyor misplaced the position of the waterway. They disagreed with the entire contents of PW1's report, together with the sketch maps, accusing him of failing to take the views of the affected members. That report has not been implemented. This was clarified in the Surveyor's report produced as P. Exhibit 4. They sought declaratory orders to effectuate the boundaries delineated in 1991 as the proper boundaries which corresponds with the SFT map of 1968. They sued the 1<sup>st</sup> and 2<sup>nd</sup> Defendants for acting unlawfully, maliciously and intentionally with a view to acquiring the Plaintiffs' suit land forcefully.
19. The 2<sup>nd</sup> Plaintiff testified that he did not resist fixing his boundary. He concurred, when cross examined, that the waterway must be re-opened. The waterway does not connect the main road to Nzoia River. It has a marshy water and drains the upper lands into River Nzoia. He was emphatic that they haven't fenced off the waterway.

### **The 1st and 2nd Defendants' Case**

20. The Defendants' position was that the 1<sup>st</sup> Defendant, DW1 resides on plot No. Trans Nzoia Surwerwa/471, registered in the name of the 1<sup>st</sup> Defendant's deceased mother (D. Exhibit 1) while the 2<sup>nd</sup> Defendant and DW2, is the registered owner of Trans Nzoia/Surwerwa/382 which in 2005 was subdivided into several plots including Trans Nzoia/Surwerwa/864 whose title was produced as D. Exhibit 2(b). Other plots that mutated from that subdivision, as captured in the mutation form produced as D. Exhibit 3 were plot Nos. Trans Nzoia/Surwerwa/865, 866, 867, 868, 869, 870, 871 and 872.
21. Plot No. 864 in turn subdivided in the same year, to Trans Nzoia/Surwerwa/1485 (D. Exhibit 2(a) and plot No. 1486 and RD. The Defendants and Plaintiffs are neighbours. They attached the area map produced as D. Exhibit 4 demonstrate this.
22. The 1<sup>st</sup> Defendant's plot is separated from the Plaintiffs by River Nzoia while that of the 2<sup>nd</sup> Defendant is segregated from those of the Plaintiffs by the waterway, the subject of this suit. Nzoia River splits plot Nos. 472 and 471 on one side and plots 387 and 382 on the other. DW1's land does not border any of the Plaintiffs' portions.
23. They stated that the Plaintiffs' titles, obtained from subdivision of plot No. 387, border the waterway on one side and River Nzoia on the other. DW1 relied on D. Exhibit 4 to demonstrate. The plots, he continued, have not been included in the area map because of their non-conformity with map measurements.
24. The waterway, the subject of the dispute was established in 1968 and indicated on the map. DW1 urged that it remains that way. It connects the main road to River Nzoia from their side by way of a bridge. However, the bridge was removed by the Plaintiffs to pave way for cultivation activities. He identified the waterway from the RIM which was produced as D. Exhibit 4. However, it does not appear on the ground as it has been fenced off and cultivated on by the Plaintiffs. DW2 relied on D. Exhibit 5(a) - (j) in supporting his assertions. DW2 further accused the Plaintiffs of encroaching on his land.
25. In light of the allegations on encroachment onto DW2's land and the waterway, the Defendants lodged a complaint against the Plaintiffs. The following trail of events occurred sequentially:
  - (i) On 25/09/2015, in a letter produced as D. Exhibit 6, the 2<sup>nd</sup> Defendant through his Counsel complained about the blocked waterway owing to the change of Nzoia River cause. The letter



accused the Plaintiff of trespass and blocking the road leading up to the river. It asked the Plaintiff to desist from the trespass.

- (ii) The letter was responded to by Jane Chemaiyo Shialo, on 07/09/2015 in a letter produced as D. Exhibit 7, who acceded to hand back the said road on condition that the same be surveyed by a qualified Surveyor. Similar sentiments were tabled by the 2<sup>nd</sup> Plaintiff vide his letter dated 07/10/2016, produced as D. Exhibit 8.
  - (iii) On 15/09/2015 vide a letter produced as D. Exhibit 9, the matter was referred to the Area Chief and then the lands office and Assistant County Commissioner Trans Nzoia East offices.
  - (iv) Summons were issued by the Assistant County Commissioner on 23/11/2015 produced as D. Exhibit 10 directing all parties but the 3<sup>rd</sup> Defendant to appear before him on 26/11/2015.
  - (v) The letter of the Assistant County Commissioner dated 27/11/2015, produced as D. Exhibit 11, requested the County Surveyor to confirm the waterway as it was interfered. This request was made pursuant to an amicable agreement by all affected members had agreed;
  - (vi) On 12/01/2016, a letter produced as D. Exhibit 12, the County Surveyor scheduled a site visit for 26/01/2016. During that visit, the Defendants averred that the waterway was opened up to plot No. 668 but disagreements arose as to its exact position. This prematurely halted the Surveyor's exercise who left to compile his findings.
  - (vii) The Surveyor in his letter dated 02/02/2016 produced as D. Exhibit 13 invited all affected members to a site visit scheduled for 01/03/2016. He confirmed that he had visited the site on 26/01/2016 and was compiling his findings. The purpose of the visit of 01/03/2016 was to conduct implementation.
  - (viii) The Defendant stated that the waterway was opened on account of visibility problems. This is because the Plaintiffs had planted crops. That regardless, the Surveyor marked the points the waterway joined River Nzoia as originally demarcated and placed beacons that exist to date.
  - (ix) The 1<sup>st</sup> and 2<sup>nd</sup> Defendants in their letter dated 14/03/2016, produced as D. Exhibit 14, complained that the survey was not done in the interest of the public. They were concerned that it didn't interpret the map and reduced plot No. 382 and 383.
  - (x) Thereafter, the Plaintiffs moved this court thereby impeding any further exercise since injunctive orders stayed the process.
26. All the Defendants sought was for the County Surveyor to confirm and open the waterway that had since been blocked, fenced off and cultivated on by the Plaintiffs. They added that it was for the benefit of the public that the waterway be opened. Supporting this assertion, DW2 testified that children need access to the school. They produced a list of school going children produced as D. Exhibit 16.
27. The Defendants agreed with the surveyor's report dated 08/06/2016 produced as D. Exhibit 15. The Defendants accused the Plaintiffs of taking advantage of the change of Nzoia River cause that occurred once; bringing some of the land on the other. They thus trespassed on the 2<sup>nd</sup> Defendant's portion and furthermore blocked the waterway leading up to the river and into the 1<sup>st</sup> Defendant's portion. They also accused the Plaintiffs of destroying the bridge that connects the other side of the river to the waterway the subject of this suit. It is for these reasons that they sought the reliefs as embedded in their Counterclaim.



### The 3rd Defendant's Case

28. The 3<sup>rd</sup> Defendant and DW3's Counterclaim against the Plaintiffs is premised on ownership of all those parcels of land, namely, Trans Nzoia/Suwerwa/422 whose certificates of search were produced as 3<sup>rd</sup> D. Exhibit 3 & 3<sup>rd</sup> D. Exhibit 13, Trans Nzoia/Suwerwa/428 whose certificate of official search was produced as 3<sup>rd</sup> D. Exhibit 4 and Trans Nzoia/Suwerwa/430 whose certificate of official search was produced as 3<sup>rd</sup> D. Exhibit 5, properties of the estate of Eliud Habel Onyango (deceased), in respect of whom a Death Certificate of the 3<sup>rd</sup> Defendant's late husband was produced as 3<sup>rd</sup> D. Exhibit 2. She produced the Limited Grant as 3<sup>rd</sup> D. Exhibit 1.
29. She stated that the Plaintiffs obtained their titles following the subdivision of plot no. Trans Nzoia/Suwerwa/387 from her deceased husband. The subdivision yielded several plots as seen in the mutation form. Plot Nos. 422, 428 and 430 remained in the deceased's name while plot Nos. 421 and 429 were purchased by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs respectively.
30. Following subdivision, the Plaintiff's suit lands border Trans Nzoia Suwerwa/422 on the upper side as well as the waterway on one side and River Nzoia on the other. On the ground, the Plaintiffs have extended their plots to include the 3<sup>rd</sup> Defendant's plot yet that said plot was never sold to them.
31. George Chetambe, prior to his death in 2009 evidenced from his death certificate 3<sup>rd</sup> D. Exhibit 8 and letter from the chief marked 3<sup>rd</sup> D. Exhibit 9, purchased four (4) acres as shown in 3<sup>rd</sup> D. Exhibit 7 sale agreement of plot No. 422. He had built on this portion. His wife continues to occupy the permanent structure built therein.
32. DW3 accused the Plaintiff of subdividing her land and putting it in George Chetambe's name. They annexed two (2) letters 21/11/2016 produced as 3<sup>rd</sup> D. Exhibit 10 and 24/1/2017 produced as 3<sup>rd</sup> D. Exhibit 11 that they relied on complaining on these assertions to the Land Registrar. They paid fees (Receipt dated 02/02/2017) produced as 3<sup>rd</sup> D. Exhibit 12 having lodged a boundary dispute. The Plaintiffs then proceeded to farm on the land. She added that she could not access her parcels as the Plaintiffs proceeded to close the way to her land.
33. The 3<sup>rd</sup> Defendant's case against the Plaintiffs was that the Plaintiffs lacked proprietary rights over Trans Nzoia/Suwerwa/422 since the same belongs to the 3<sup>rd</sup> Defendant's deceased husband's estate. She accused them of trespassing and interfering with the 3<sup>rd</sup> Defendant's right to quiet user and possession of the same. Her case was for eviction and resurvey.
34. The 3<sup>rd</sup> Defendant accused the Plaintiffs of blocking the waterway. She observed that the 1<sup>st</sup> Defendant's plot is separated from those of the Plaintiffs by River Nzoia while that of the 2<sup>nd</sup> Defendant's is separated from the Plaintiffs by the waterway connecting the main road to River Nzoia and inter alia, the 1<sup>st</sup> Defendant's suit land. River Nzoia borders plot Nos. 472 and 471 on one side and 387 and 382 on the other side.
35. The 3<sup>rd</sup> Defendant cited that the waterway was created in 1968 and which waterway was depicted in the map. However, the waterway does not appear on the ground as it has been fenced off and cultivated on by the Plaintiffs. She thus concurred with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' position. The 3<sup>rd</sup> Defendant welcomed the survey exercised stating that the intended demarcation was for the public good. She relied on other documents captured in the Defendants' further list of documents dated 24/03/2017 and filed on 29/03/2017 produced as 3<sup>rd</sup> D. Exhibit 6, 3<sup>rd</sup> D. Exhibit 14-26 respectively.



## Submissions

36. The parties filed their respective rival submissions. Plaintiffs submissions dated 19/07/2021 were filed on 21/07/2021. They urged this court to allow the suit. The Defendants jointly filed their submissions dated 27/06/2022 on even date. They challenged that the suit was incompetent for violating the provisions set out in Order 1, Rule 13 and Order 4, Rule 1(3) of the *Civil Procedure Rules* since the Plaintiff failed to file an Affidavit verifying the contents in the Plaint. They urged this court to allow their Counterclaims and dismiss the Plaintiffs' suit.

## Analysis and Disposition

37. I have carefully analyzed the pleadings and the documents relied on. I have also considered the rival submissions and authorities relied on. Before delving further, I need to decide on an issue raised on technicality.
38. The Defendants stated that the suit offended Order 1, Rule 13 and Order 4, Rule 1(3) of the Civil Procedure Rules since the 1<sup>st</sup> Plaintiff did not file her verifying Affidavit. The Defendants further contended that she did not donate authority to the 2<sup>nd</sup> Plaintiff. These allegations are only being introduced at submissions stage. Time and again, I remind parties that submissions are not pleadings. If the Defendants did indeed feel so, nothing impeded them from pleading as such. I will thus not consider that argument particularly given the fact that the Plaintiff bore no right to reply at such late stage of the proceedings. Be that as it may, accompanying their pleadings, the 1<sup>st</sup> Plaintiff filed an authority to plead giving the 2<sup>nd</sup> Plaintiff authorization. In any event, Article 159(2)(c) of *the Constitution* of Kenya 2010 is sufficient to cure the technicality. At any rate, the Plaintiffs gave sworn testimony which would in itself go into verifying on oath their assertions in the Plaint. It is too late in the day for the defendants to raise such a technicality when the facts and pleadings have been confirmed on oath by the Plaintiffs' sworn evidence. That argument is thus dismissed.
39. That said, the following facts are not disputed:
- a. The 3<sup>rd</sup> Defendant's husband was the original registered proprietor of all that parcel of land namely Trans Nzoia/Suwerwa/387.
  - b. The deceased person later subdivided the said parcel of land namely into eleven (11) plots as follows: 422, 423, 424, 425, 426, 427, 428, 429, 430, 431 & 432. Their acreages were also identified.
  - c. The Plaintiffs purchased their parcels of land from that mutation of title from the deceased. Subsequently, the 1<sup>st</sup> Plaintiff became the registered proprietor of Trans Nzoia/Surwerwa/431 measuring 2.43 Ha and the 2<sup>nd</sup> Plaintiff became the registered proprietor of Trans Nzoia/Surwerwa/429 measuring 1.21 Ha while the deceased retained ownership of Trans Nzoia/Suwerwa/422, Trans Nzoia/Suwerwa/428 & Trans Nzoia/Suwerwa/430.
  - d. The 1<sup>st</sup> Defendant is the surviving child of the proprietor of all that parcel of land namely Trans Nzoia Surwerwa/471 and resides there.
  - e. The 2<sup>nd</sup> Defendant is the registered proprietor of all that parcel of land namely Trans Nzoia/Surwerwa/382 which in 2005 subdivided to 864 of which he remained the registered owner of parcels numbers 865, 866, 867, 868, 869, 870, 871 and 872. Subsequently, plot No. 864 was subdivided to inter alia, Trans Nzoia/Surwerwa/1485 whose title was produced as D. Exhibit 2(a) that he owns.



- f. The Defendants own adjoining plots.
  - g. The Plaintiffs suit properties boarder River Nzoia and are split from that of the 2<sup>nd</sup> Defendant by the waterway.
  - h. There is a waterway within the suit lands which waterway boundaries were defined in 1968 following demarcation of the parcels and final survey in 1991.
40. On 25/09/2015, the 2<sup>nd</sup> Defendant complained to the Plaintiffs that by virtue of the change of Nzoia River cause, the Plaintiffs took advantage of the act by blocking the waterway and road leading up to the river. This complaint instigated a series of events that culminated into the present suit.
  41. In response on 07/09/2015 and 07/10/2016 by Jane Chemaiyo Shialo and the 2<sup>nd</sup> Plaintiff respectively conceded to hand back the road on condition that it be done by a qualified Surveyor.
  42. A dispute arose. The matter was referred to the Area Chief and the Lands Office as well as the Assistant County Commissioner Trans Nzoia East on 15/09/2015. Parties, except the 3<sup>rd</sup> Defendant, were on 23/11/2015 summoned to appear before the Assistant County Commissioner on 26/11/2015. In the meantime, the Assistant County Commissioner requested the County Surveyor on 27/11/2015 to confirm whether the waterway as it was, had been interfered with.
  43. The County Surveyor visited the site in the presence of parties on 26/01/2016. He later in his letter dated 02/02/2016 invited all affected members to a site visit scheduled for 01/03/2016 to implement his findings from 26/01/2016.
  44. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants on 14/03/2016 complained that the survey was not done in the interest of the public. They were concerned that it didn't interpret the map and reduced plot Nos. 382 and 383. The Plaintiffs then filed the present suit on 23/05/2016. However, a report dated 08/06/2016 was still prepared.
  45. According to that report, which both parties made references to but produced by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, the County Surveyor made reference to the exercise carried out on 26/01/2016 in the present of all parties herein. The deceased's plot No. 387 was represented by Tom Opondi Onyango. It laid out the tools used. It indicated that the exercise was carried out in two (2) phases.
  46. During the 1<sup>st</sup> phase, a physical survey was conducted by the surveyor to compare and contrast the boundaries mapped on the ground against those depicted on the map. He attached to his report a sketch map bearing points A, B, C, D and E. He found that the stretch between A and B tallied with the map. There was a straight line from B to D via E on the map which was different from their findings that the line was created from B to D via C. He found that the angle created on B was less than the one generated from the map. The road width was larger by five (5) meters. The area between the two (2) roads was approximately 0.5 acres gained by parcel No. 387 from 668 and 382. He further noted that plot No. 387 had further been subdivided into sub parcels that had not been amended on the map due to non-conformity of the measurements. In other words, the new parcels did not tally with the map measurements.
  47. The 2<sup>nd</sup> phase was referred to as the implementation exercise from the data gathered on 01/03/2016. He observed that since the current waterway position had been in use for over ten (10) years, the position was adopted up to C. A line was generated to D which was marked by an outstanding doom curve of a river cause. A consent of the parties was obtained before adopting this position.



48. Thereafter parties complained on 03/03/2016 and 14/03/2016 expressing dissatisfaction. Resultantly, a site revisit was rescheduled for 24/05/2016 but could not take place due to the injunctive orders in force.
49. I take note that the Plaintiffs jointly with others lodged a complaint on 03/03/2016 while the 2<sup>nd</sup> Defendant complained on 14/03/2016. I therefore find that it is untrue for the Plaintiffs to allege, on that account, that the Surveyor adopted the proposals of the 2<sup>nd</sup> Defendant. I further note that the all parties were present in the implementation process. As stated in the report, all parties consented that since the current waterway position had been in use for over ten (10) years, the position was adopted up to C. A line was generated to D which was marked by an outstanding doom curve of a river cause. I observe that had the exercise been conducted as scheduled, perhaps the parties' concerns would have been addressed. However, the pending litigation in this matter put the Surveyor's mind in abeyance. This did not last much longer as in 2018 the County Surveyor PW1 visited the suit properties and filed the following report:
- 1) The owner of parcel No. 429 encroached and closed part of the waterway by 0.045 Ha as well as plot Nos. 471 and 382 by 0.029 Ha and 0.02 Ha respectively.
  - 2) The owner of parcel No. 431 encroached on the part of the waterway by 0.29 Ha and on plot Nos. 382 and 668 by 1.157 Ha and 0.025 Ha respectively.
  - 3) The owner of parcel No. 668 encroached onto and closed the waterway by 0.029 Ha.
  - 4) The subdivisions on parcel No. 387 were not in conformity with the boundaries on the grounds. Plot No. 422 for instance did not exist on the ground albeit bordered the river and was featured in the mutation form dated 10/05/1991. Plot No. 429 had expanded its land by approximately 0.0094 Ha.
  - 5) Plot Nos. 429 and 431 were forced to cross the waterway.
  - 6) The amendments, done on to the map as not proper irrespective of the information provided in the mutation form.
  - 7) He recommended that since plot Nos. 429 and 431 accrued after subdivision of plot No. 387 and their positions on the ground were not in conformity with the map, there was need to revisit the survey of parcel No. 387 in the event of this exercise and the waterway will be placed as its rightful position.
50. An amendment process was initiated on 27/02/2017. PW1 maintained that the amendments did not alter the waterway. However, after going through the map, he discovered that the amendments were improper.
51. I have carefully analyzed the two (2) survey reports in evidence. I find that they are both in consonance with each other necessitating and emphasizing that a survey needs to be carried out to establish the waterway and proper boundaries since there is a distinct difference between what is generated on the map and what is on the ground.
52. On one hand, the Plaintiffs deny that they have encroached on any persons land. They urged this court to adopt the findings of the Settlement Fund Trust regarding the waterway boundary established in 1991. Regrettably, that decision was not attached in evidence. They have also asked this court to injunct the Defendants from altering the boundaries as delineated by the SFT.



53. It appears from the facts and circumstances of this suit, a change of River Nzoia cause occurred in 2015. This led to the 2<sup>nd</sup> Defendant's protest that the 2<sup>nd</sup> Plaintiff and another had trespassed on his land and blocked the road leading up to the river. In their response, Jane Chemaiyo and the Plaintiff acceded release the road on condition that the same be conducted in accordance with the map of a Surveyor. All along, it appears the Plaintiffs were amenable to ascertain the waterway as long as it was done by a technocrat.
54. It is not clear why the Plaintiffs appear to now change tact. They were emphatic that the waterway on the ground tallies with the depiction on the map. In fact, PW2 testified that the boundary is out of his suit land. They denied that the waterway connects to the main road and that they fenced off the waterway. The Plaintiffs relied on the sole testimony of PW2. However, they did not establish that what was on the map was the ground position by way of corroboration or other supporting documents to raise the probative value of their evidence.
55. Turning to the evidence of the Defendants, I am satisfied to conclude that the waterway connects to the river. While the waterway is shown from the Registry Index Map, it is not on the ground due to cultivation and fencing off by the Plaintiffs' actions. There is overwhelming evidence from two (2) expert witnesses sensitizing on the importance of tallying what is on the map with that which should be on the ground. I am persuaded to conclude that what is on the Map (RIM) is not what is on the ground.
56. What is evident looking at the circumstances in totality is that a resurvey of the subdivided original plot No. 387 is obliged to establish proper boundaries and demarcations. It is also necessary for the waterway to be ascertained. That would resolve all the issues before me. In any event it should be recalled by all parties herein that the waterway consists of riparian land, and it is public land. It should not be claimed by any party as his/her land. The fact that one's parcel of land stretches to the waterway does not entitle him/her to lay claim over it. Any activities thereon by the parties should be subject to the directions by the relevant public authority. The high and low watermark levels should be respected. All the parties herein would do well to seek proper expert advice and boundary markings respecting the principle of and riparian land.

### **Orders and Disposition**

57. I do find that indeed the Plaintiffs have not made out a case against the Defendants. At the same time, I have also established that the Plaintiffs may not have encroached on other parties' land intentionally. It was contingently their honest belief that they had acquired the subdivision and survey legitimately. I hold as much since the issue of encroachment on other suit lands arose extensively during the surveyor's site visit in 2018. Consequently, the following are my orders:
- (a) The County Surveyor be and is hereby directed resurvey the respective parcels of land, to establish the waterway, the high and low water marks, and to open the waterway as per the original map to create the correct boundaries of land title numbers Trans Nzoia Suwerwa/382, 387, 668 and 471.
  - (b) The County Survey be and is hereby directed to resurvey at the proprietors' cost all that parcel of land originally namely Trans Nzoia Suwerwa/387 to ascertain the proper boundaries over the eleven (11) plots mutating from the said parcel of land.
  - (c) A permanent injunction be and is hereby issued restraining all parties from interfering and/or altering the positions on the ground as will be established through the findings of the Survey report.



- (d) The Defendants' counterclaim dated 04/07/2016 is allowed with costs as follows: A declaration be made that the Plaintiff's act of blocking and/or cultivating on the original water way as established by the Settlement Fund Trustee of Suwerwa Settlement Scheme is illegal and therefore the County Surveyor be directed to open the said waterway as per the original map in order to create the correct boundaries of land title numbers Trans Nzoia Suwerwa/382, 387, 668 and 471; and a permanent injunction restraining the Plaintiffs and or their servants or any other person from interfering with and/or altering the original waterway boundary as opened.
- (e) The Plaintiffs' suit is dismissed with costs.
- () The 3<sup>rd</sup> Defendants' Counterclaim is hereby dismissed with costs to the Plaintiffs.

58. Orders accordingly.

**JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS  
19<sup>TH</sup> DAY OF DECEMBER, 2022.**

**HON. DR. IUR FRED NYAGAKA**

**JUDGE, ELC KITALE**

