



Wabwire & another (Administrators of the Estate of Thadeous Wabwire) v Origi (Environment & Land Case 112 of 2017) [2022] KEELC 15707 (KLR) (19 December 2022) (Judgment)

Neutral citation: [2022] KEELC 15707 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 112 OF 2017
BN OLAO, J
DECEMBER 19, 2022**

BETWEEN

ANN NEKESA WABWIRE 1ST PLAINTIFF

PETRONILLA BARASA WABWIRE 2ND PLAINTIFF

ADMINISTRATORS OF THE ESTATE OF THADEOUS WABWIRE

AND

PHILIP JUMA ORIGI DEFENDANT

JUDGMENT

1. Ann Nekesa Wabwire and Petronila Barasa Wabwire (the plaintiffs herein) are co-wives and the administrators, to the estate of their late husband Thadeous Wabiwre (the deceased) who, prior to his demise, was the registered proprietor of the land parcel No Bukhayo/matayos/2481 measuring 1.6 hectares (the suit land). It has since been registered in the joint names of several beneficiaries including the plaintiffs as per the certificate of search filed herein.
2. Philip Juma Origi (the defendant) is the registered proprietor of the land parcel No Bukhayo/matayos/4683. The certificate of search shows that he acquired ownership thereof on December 19, 2016 but a restriction was registered against the title on January 7, 2017 until a dispute involving the suit land is determined.
3. The plaintiffs moved to this court *vide* their plaint dated June 5, 2017 and filed on June 6, 2017 seeking judgment against the defendant in the following terms:
 1. An order of demolition and eviction.
 2. Damages for trespass.



3. Injunction barring the defendant, his family members and those claiming through him permanently from entering, residing, developing or in any way dealing with the suit land.
4. Costs.
4. The basis of the plaintiffs' case is that the suit land was previously registered in the names of the deceased whose estate they are now the administrators following orders issued in Busia High Court succession cause No 376 of 2010. That the defendant has unlawfully moved into part of the suit land and evicted a structure thereon and despite notice of demand, has failed to vacate. That necessitated the filing of this suit.
5. Together with the plaint, the plaintiffs filed their joint statement and that of their witness namely Conrad Wabwire (PW4). During the plenary hearing, they also called as their witness Nicholas Oriero (PW1) who, being a Deputy Land Registrar Busia and therefore an expert witness, did not record any statement as provided under the provisions of order 3 rule 3 (c) of the *Civil Procedure Rules*. They also filed a list of their documentary evidence dated June 5, 2017 to which was annexed the following documents:
 1. Minutes of the chiefs baraza held on December 19, 2016.
 2. Letter from the assistant chief Liliba sub-location dated November 30, 2016 addressed to the land Registrar Busia.
 3. Minutes of the boundary dispute hearing held on January 3, 2017 with respect to the land parcels No Bukhayo/matayos/2481 and 4683.
 4. Certificate of confirmation of grant in respect to the estate of the deceased.
 5. Certificate of official search in respect to the land parcel No Bukhayo/matayos/2481.
 6. Demand letter dated May 9, 2017 addressed to the defendant.
6. In their joint statement dated June 5, 2017 the plaintiffs Ann Nekesa Wabwire (PW2) and Petronila Barasa Wabwire (PW3) state that they are the administrators of the estate of the deceased who, prior to his demise, was the registered proprietor of the suit land measuring 1.6 hectares. That the defendant took advantage of the death of the deceased to move into a portion of the suit land where he has erected same structures despite pleas from his own family members to vacate.
7. The dispute was therefore reported to the Land Registrar Busia who visited the site on January 3, 2017 and prepared a report showing that the defendant had indeed erected structures on the suit land and gave him 14 days to remove them. The defendant neither appealed the decision of the Land Registrar nor removed the illegal structure as directed. That the suit land is to be distributed to the beneficiaries of the estate of the deceased but that cannot take place unless the illegal structures thereon are removed.
8. In his statement dated October 23, 2019, Conrad Wabwire Ngware (PW3) states that the suit land was purchased by deceased who was his late father in 1996. That the same has been utilized by the deceased's wives until the defendant suddenly moved into it. The matter was reported to the assistant chief who directed that nobody should move into the suit land until the dispute is determined by the Land Registrar. However, the defendant proceeded to put up a temporary structure thereon and when the matter was reported to the chief and the defendant was summoned, he failed to turn up.
9. The Land Registrar and District Surveyor later visited the land and after hearing all the parties, they ordered the defendant to remove the illegal structures within 14 days having found that the suit land belonged to the deceased's family.



10. The defendant filed a defence dated October 17, 2017 in which he denied any knowledge of the suit land adding that he was only aware about the land parcel No Bukhayo/matayos/4683 which he had purchased from a third party. He denied having trespassed onto the suit land and erecting any illegal structures thereon adding that he had only constructed his residential home on the Land Parcel No Bukhayo/matayos/4683 for which he holds a valid title issued to him on December 30, 2016. He stated further that he would be applying to enjoin one Emily Milkwambo in these proceedings. He denied the plaintiffs' claim and sought the dismissal of their suit with costs.
11. The defendant filed neither a statement nor a list of documents and he admitted as much during the plenary hearing. The only document he filed was a supporting affidavit in support of his application dated October 1, 2017 seeking to serve a third party notice upon one Emily Milkwambo. That application was allowed by Kaniaru J On January 16, 2018. The said Emily Milkwambo subsequently filed a statement dated June 15, 2018 in which she confirmed that she was the proprietor of the Land Parcel No Bukhayo/matayos/2954 measuring 1.4 hectares purchased from one George Ibrahim Sebastian In 2007. She later sold a portion thereof measuring 0.25 hectares to the defendant being parcel No Bukhayo/matayos/4683. That the defendant allowed his relatives to construct a home on that portion. She confirms in that statement that the plaintiffs are the proprietors of the suit land that is adjacent to her land but denies that the defendant has unlawfully moved into the suit land. Rather she states that this is a boundary dispute and requests the court to refer it to the Land Registrar and County Surveyor Busia for determination.
12. The hearing commenced on October 31, 2022 with Nicholas Obiero (PW1) the Deputy Land Registrar testifying. He told the court that having received a court order to determine the boundary between the suit land and the land parcel No Bukhayo/matayos/4683, he and his boss Wilfred N. Nyaberi conducted the exercise and prepared a report dated June 8, 2021. He produced the said report as part of the plaintiffs' evidence.
13. The plaintiffs and their witness also testified and adopted as their evidence their statements contents of which I have already summarized above. They also produced their documentary evidence as per the list dated June 5, 2017.
14. The defendant also testified and adopted as his evidence his affidavit filed in support of his application dated October 17, 2017 which was basically in support of his application for a third party notice to issue in respect of one Emily Milkwambo and which cannot be deemed as a response to the plaintiffs' claims. In that affidavit, the defendant basically states that he seeks indemnity from the said Emily Milkwambo who sold to him the land parcel No Bukhayo/matayos/4683 and for which he paid the full purchase price and holds the title thereto having followed due procedure.
15. Neither the plaintiffs' counsel Mr Juma nor defendant filed any submissions at the end of the hearing. Indeed The defendant's counsel Mr Luchivya did not turn up for the hearing though duly served.
16. I have considered the evidence by both parties.
17. The only issue for my determination is whether the defendant has trespassed onto the suit land and if so, whether the plaintiffs are entitled to the ordered sought.
18. There is no doubt that the plaintiffs and others jointly own the suit land which they hold in trust for minors as per the certificate of search dated November 22, 2016. The defendant on the other hand is the registered proprietor of the land parcel No Bukhayo/matayos/4683 which, as per his defence, he says he purchased from Emily Milkwambo and he denies having trespassed onto the suit land. He did not serve the said Emily Milkwambo with any hearing notice.



19. As the registered proprietor of the suit land, the plaintiffs are the absolute owners thereof and, as provided under section 24 (a) of the [Land Registration Act](#), are entitled to “all rights and privileges belonging or appurtenant thereto” These rights and privileges include the right to eject trespassers therefrom and which is the first remedy they seek against the defendant.
20. In an effort to demonstrate that he has in fact constructed his house on his land and has not trespassed onto the suit land, the defendant moved to this court *vide* his notice of motion dated July 9, 2018 in which he sought the following main orders:
 - a. That the land surveyor busia county be ordered to re-survey and determine the boundaries between LR No Bukhayo/matayos/4683 and 2481.”
 - b. “Upon such determination, the Land Surveyor Busia County to file his report before this honourable court.”
 - c. “The applicant and respondent during the re-survey exercise above mentioned on (a) are entitled to employ their own private surveyors to oversee the exercise.”

That application was not opposed by the plaintiffs and was allowed by Kaniaru J on July 17, 2018. A re-survey of the boundary between the land parcels No Bukhayo/matayos/4683 and 2481 was conducted by the Land Registrar Busia Mr Wilfred N. Nyaberi who prepared a report dated June 8, 2021 and which was produced by his deputy Nicholas Obiero (PW1) during the hearing. The report itself is not clear as to who between the plaintiffs and the defendant was the applicant. indeed the plaintiffs themselves were not present during the survey exercise but were represented by their son Conrad Wabwire (PW4). Notwithstanding that confusion, the report commences by stating that this is not – boundary dispute but rather, a claim to land. It states in paragraph 2 that:

“On this hearing, we established that this was not a boundary dispute, but rather, a land claim. The applicant posited that one Philip Juma Origi had encroached into their land and created a new parcel inside it. On the other hand, Philip argued that we (sic) bought the land parcel No 4683 from Emily Milikwambo.”

In paragraph 5 of the report, the Land Registrar states that: “we believe that parcel 4683 cannot be said to be legitimately acquired.” The report goes on to add that: “This finding has been corroborated by the finding in the first registrar’s report which confirmed that parcel No 2481 covers the entire area including the one claimed by the applicant.”

It then makes the following conclusion:

“Parcel No 2481 covers the entire area including the position (sic) claimed by the applicant. As such, the applicant does not have any legitimate claim for boundary dispute as the piece he purports to be his part is part of the respondent’s land.”

Any confusion as to who between the plaintiffs and the defendant were the applicant and the respondent was however put to rest by Nicholas Obiero (PW1) who said as follows when cross-examined by the defendant:

“My report is very clear. The land parcel No Bukhayo/matayos/4683 exists but it is not situated at the site which we visited. It is true that the land parcel No Bukhayo/matayos/4683 exists and is registered in your name. However, it is not true that the said land is the one we visited. That land is very far from the site we visited. You are the one who took



us to the site and on the ground, we told you that the land was No Bukhayo/matayos/2481 and not Bukhayo/matayos/4683 as you claimed. We had also visited the land previously in 2017. The land which you claim to be yours belongs to the plaintiffs in this case.”

There is also another report dated January 3, 2017 and prepared by another Land Registrar Busia by the name Tom M. Chepkwesi and which was filed by the plaintiffs. This report was among the documents filed and produced by the plaintiffs. It contains the proceedings that were held to resolve a boundary dispute relating to the land parcels No Bukhayo/matayos/2481 and 4683 in which Conrad Wabwire (PW 4) was the complainant and the defendant was named as the accused. Having heard both Conrad Wabwire (PW4) and the defendant, the Land Registrar made the following order:

“After survey, it is established that complainant’s land of 1.6 hectares covers all that area claimed by the accused. Accused is hereby given 14 days to remove the hut illegally constructed on complainant’s land and cease cultivation of the complainant’s land.

Tom M Chepkwesi

Land Registrar Busia.”

This report corroborates the findings of the other Land Registrar Mr Wilfred N. Nyaberi dated June 8, 2021 and which, as is now clear, was prepared at the request of the defendant. Those two land registrars fall within the category of expert witnesses whose evidence cannot be lightly ignored unless for cogent reasons. The role of such witnesses has been set out in many cases. In *Ndolo v Ndolo* 1995 KLR 390, the Court of Appeal stated thus:

“The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held, the evidence of experts must be considered along with all available evidence and it is the duty of the trial court to decide whether or not it believes the expert and give reasons for its decisionof course where the expert who is properly qualified in his field gives an opinion and gives reasons upon which his opinion is based and there is no other evidence in conflict with such opinion, we cannot see any basis upon which such opinion could ever be rejected.”

21. Courts must of course give proper respect to the evidence of expert witnesses although the final decision on whether or not to accept it rests with the court itself especially where there is a conflict of such expert evidence. In this case, not only are there two concurrent findings by the two Land Registrars but also, their expertise has not been doubted by either of the parties and further, there was no other evidence led to rebut their findings that the land which the defendant claims to be his land parcel No Bukhayo/matayos/4683 and on which he has put up his house is infact the plaintiffs’ land parcel No Bukhayo/matayos/2481. There is then the evidence of the plaintiffs themselves, which I found to be credible, that indeed the defendant trespassed into the suit land and the matter was reported to the Chief who called a Baraza on December 19, 2016 and resolved, rightly so, that the dispute should be determined by the Land Registrar. That has been captured in the minutes of the Chief’s Baraza also produced as part of the plaintiffs’ documentary evidence. Then there is the demand



letter dated May 9, 2017 addressed to the defendant by the plaintiffs' counsel and at paragraphs 2 and 3 thereof, he was informed as follows with respect to the suit land:

“The above parcel of land was previously owned by the late Thadeous Warwire and on his death was inherited by some of his family. You took advantage of the death of Thadeous Wabwire to move into part of the above named parcel of land. You became a trespasser.”

The defendant appears not to have bothered to respond to those very serious allegations. If he did, he has not shown the court what his response, if any, was to that letter. A trespass, as defined in [*Black's Law Dictionary*](#) 10th Edition is:

“An unlawful act committed against the person or property of another; esp, wrongful entry on another's real property.”

In addition to that, when the assistant chief Luliba sub-location wrote to the Land Registrar Busia County vide his letter dated November 30, 2016, he made it clear that the defendant had encroached onto the suit land which is within his area of jurisdiction. This is how he addressed the Land Registrar Busia County as per paragraphs 3 of the said letter which is part of the plaintiffs' documentary evidence:

“To make matters worse, Mr Philip Juma has encroached the land and has registered his portion as Bukhayo/matayos/4386 and Mrs Emily Too has Bukhayo/matayos/4385. I convened a sitting to know what happened but it's Philip who came and agreed that was given the portion by Emily who never attended”

22. There is no doubt in my mind, having considered the totality of the evidence herein, that the defendant has indeed trespassed onto the suit land and constructed a structure or home thereon. The report of Mr Wilfred N. Nyaberi the land registrar Busia and produced by his Deputy Mr Nicholas Obiero (PW1) leaves no doubt that the suit land on which the defendant has trespassed is the property of the plaintiffs and is not the land parcel No Bukhayo/matayos/4683 which is rightfully registered in the name of the defendant. It is worth noting that the said report was in fact prepared at the request of the defendant and I did not hear him cast any aspersions on the integrity of either Mr Wilfred N. Nyaberi the maker of the report or that of Mr Nicholas Obiero (PW1) who produced it. The report not only corroborates the evidence of the plaintiffs that indeed the defendant has trespassed onto the suit land, but it is also in agreement with an earlier report dated January 3, 2017 and prepared by another Land Registrar Tom M. Chepkwesi and which was produced without objection as part of the plaintiffs' documentary evidence during the trial. In light of that very cogent and credible evidence both documentary and oral, the only inevitable conclusion which this court can arrive at is that the plaintiffs have proved their case that the defendant has trespassed onto the suit land and erected a structure thereon.
23. With regard to the remedies sought by the plaintiffs, the first order sought is that the defendant demolishes the illegal structure and be evicted from the suit land. This court has already found that the defendant trespassed onto the suit land. A trespass is defined in [*Black's Law Dictionary*](#) 10th Edition and which I have already cited above, to mean a “wrongful entry on another's real property”. This court is therefore enjoined, by virtue of the provisions of article 40 of the [*Constitution*](#), to protect the plaintiffs' property rights in respect to the suit land. This court must therefore grant the orders directing the defendant to demolish the illegal structures on the suit land and be evicted therefrom.
24. And with regard to the prayer for damages for trespass, it is an accepted principle of law that trespass is actionable per se. A party need not prove any actual loss or damage. In the circumstances of this case, there is evidence showing that the defendant purchased his land parcel No Bukhayo/matayos/4683



from a third party in good faith. He also voluntarily submitted to the exercise by the Land Registrar to determine whether or not he had trespassed onto the suit land. Indeed it was upon his application that the exercise was conducted. The trespass does not appear to me to have been a deliberate act conducted with impunity as happens in some cases. This court is minded not to award any damages for trespass given that background.

25. The prayer for injunction is well merited to ensure that neither the defendant nor those acting through him including his family members will interfere with the plaintiffs use and occupation of the suit land.
26. Costs follow the event and I see no good reason to deny the plaintiffs the costs of this suit.
27. The up-shot of all the above is that having considered the evidence by all the parties herein, there shall be judgment for the plaintiffs against the defendant in the following terms:
 1. The defendant shall within six (6) months of this judgment demolish and remove any structure evicted on the land parcel No Bukhayo/matayos/2481 and vacate therefrom.
 2. In default of the above, the plaintiffs shall be at liberty to evict the defendant from the land parcel No Bukhayo/matayos/2481 in accordance with the law.
 3. Thereafter, the defendant his family members, agents, servants or any other person acting through him shall be permanently enjoined from interfering with the plaintiffs use and occupation of the land parcel No Bukhayo/mataoyos/2481.
 4. The defendant shall meet the plaintiffs' costs.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT BUSIA ON THIS 19TH DAY OF DECEMBER 2022.

BOAZ N. OLAO

JUDGE

19TH DECEMBER 2022

Mr. Juma for plaintiffs

Mr. Luchivya for defendant

Anyasi/Ajwang Court Assistants

