



Free Pentecostal Fellowship in Kenya Registered Trustees (Suing for and on behalf of Free Pentecostal Fellowship in Kenya) Magwagwa Esanige Church) v Marau & 2 others (Environment & Land Case 55 of 2021) [2022] KEELC 15277 (KLR) (8 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15277 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT & LAND CASE 55 OF 2021**

**JM KAMAU, J
DECEMBER 8, 2022**

BETWEEN

FREE PENTECOSTAL FELLOWSHIP IN KENYA REGISTERED TRUSTEES PLAINTIFF

SUING FOR AND ON BEHALF OF FREE PENTECOSTAL FELLOWSHIP IN KENYA) MAGWAGWA ESANIGE CHURCH

AND

ELIJAH NYAMWEYA MARAU 1ST DEFENDANT

SEVENTH DAY ADVENTIST REGISTERED TRUSTEES 2ND DEFENDANT

TOM MARAGA 3RD DEFENDANT

RULING

1. This suit was commenced by way of a Complaint dated December 19, 2017 where the plaintiff prays for the following orders: -
 - a. That the plaintiff is entitled to vacant possession and to enjoy all rights and interests appurtenant to land parcel title number North Mugirango/Magwagwa 1/2718.
 - b. That the defendants by themselves, tenants/servants and/or agents or any other occupants do forthwith deliver and give vacant possession to title number North Mugirango/Magwagwa 1/2718.
 - c. That the defendants, their servants, agents or any other occupants be forcefully evicted from the suit property should they fail to deliver vacant possession within 21 days from the date of the Order of this honourable court.



- d. That a permanent injunction to issue restraining the defendants by themselves, their agents and or servants from trespassing, from entering, from alienating and/or from erecting structures or buildings thereon or from committing acts of waste on the land known as title number North Mugirango/Magwagwa 1/2718 or any part thereof or from interfering with the plaintiff's title and interest over the said property.
 - e. That the officer commanding police station, Nyamira to assist towards peaceful and effective eviction in compliance with the court's eviction order.
 - f. Costs of this suit and interest thereon at the court rates.
 - g. Any other or further relief.
2. The plaintiff therefore claims That the defendants have trespassed on her property. The 1st & 2nd defendants admit That there is a boundary dispute and that the matter is prematurely in court and that the suit should be struck out with costs by dint of sections 18 (4) and 19 of the [Land Registration Act](#), no 3 of 2012.
 3. When the matter came up for mention before the honourable Mr Justice Mutungi on May 2, 2018, the judge ordered and directed the land registrar and county surveyor, Nyamira to visit the land parcel Numbers North Mugirango/Magwagwa/2718, 1465 and 3181 and delineate and fix their respective boundaries in accordance with sections 18 and 19 of the [Land Registration Act](#), 2012. The land registrar was also directed to confirm whether any of the parties has encroached and/or trespassed onto the other's land and if so, the surveyor to provide a sketch map in illustration. The 2 were ordered to file their reports within 90 Days. Unfortunately, this report was not filed in court until October 31, 2022 which report reads as follows: -

Your Lordship,

We visited the suit properties on October 17, 2022 with an aim of implementing the orders made on May 2, 2018. The following observations were made: -

1. The land on which the plaintiff and 2nd defendant have built their respective churches (2718) was alienated from a public playground belonging to the county government of Nyamira That was initially reserved for public playground which is also used as the playground for Esanige Primary School;
2. The churches are built on one edge of the playground and no fence or beacon or any other feature has ever been put to separate the respective portions claimed by the parties;
3. The land that the plaintiff claims (2718) overlap onto almost a quarter of the school's football pitch;
4. The plaintiff has never fenced the land they claim apparently because they are aware that the entire land is public land and that such demarcation would alienate part of the football pitch an inconvenience which the community would not entertain.
5. The community around is extremely hostile to the plaintiff accusing them if grabbing their playground.;



6. The 2nd and 3rd defendants acknowledged That the 2nd defendant is in wrongful occupation of a portion of the school's playground and they are willing to vacate.
4. I invited both parties to file their comments on the land registrar's report which I have gone through.
5. Section 18 of the [Land Registration Act](#), no 3 of 2012 on boundaries provides that: -
 18.
 - (1) Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.
 - (2) The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.
 - (3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary:

Provided that where all the boundaries are defined under section 19 (3), the determination of the position of any uncertain boundary shall be done as stipulated in the Survey Act, cap 299.
6. Where there is a boundary dispute the court is well advised to seek the expertise of the land registrar and the court invokes the provisions of section 18(2) of the [Land Registration Act](#), 2012:

The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.”
7. In the instant case, the county land registrar, Mr George Maina also prepared a sketch of the land in question. The said sketch map (diagram) was also attached to and made part of his report. He finalized his report with the following fears and recommendations as follows:

.....we regret to report that the demarcation could not proceed. Our conclusion and recommendations are as follows: -

 1. Esanige Primary School and the county government of Nyamira should have been enjoined in this matter before the orders could be issued since they are the borne fide owners of the subject playground;
 2. Apparently, the land that the plaintiffs claim (2718) falls under part 10 of the Ndung'u Report. It could not be prudent to demarcate the same before inviting the county government of Nyamira to confirm whether the alienation was proper.....”
8. Having carefully considered the report as well as counsel's comments on the same I come to the conclusion that the report does not conclusively resolve the case. The same is not a boundary dispute



per se under sec 18 of the *Land Registration Act*,no 3 of 2012 but actual ownership dispute and the parties will have their day in court to resolve the issue of ownership.

9. This matter will go for full hearing and this report will form part of the evidence during the hearing of this suit for any party who wishes to use it. Secondly, as rightly observed by the land registrar, for a fair hearing and determination of this suit it is important to have Esanige Primary School and the county government of Nyamira joined as parties in this matter. I therefore order the plaintiff to do so by amending the Plaint in order to add the aforesaid parties to the suit within the next 14 Days from the date hereof. The parties will then appear before the court on February 14, 2023 for purposes of taking directions in preparation for the Hearing of the suit.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 8TH DAY OF DECEMBER 2022.

MUGO KAMAU

JUDGE

In the presence of: -

Court assistant: Sibota

Plaintiff: Ms Khafafa

Defendants: N/A

