



Magina & another v Osodio & 4 others (Environment and Land Case 120 of 2016) [2025] KEELC 5156 (KLR) (10 July 2025) (Judgment)

Neutral citation: [2025] KEELC 5156 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT AND LAND CASE 120 OF 2016**

**BN OLAO, J
JULY 10, 2025**

BETWEEN

CHRISPINUS OPAMO MAGINA 1ST PLAINTIFF

CLIFFORD OTIENO MAGINA 2ND PLAINTIFF

AND

FRANCIS OSODIO 1ST DEFENDANT

RAPHAEL EKISA 2ND DEFENDANT

THE LAND REGISTRAR 3RD DEFENDANT

THE COUNTY SURVEYOR BUSIA 4TH DEFENDANT

THE HON ATTORNEY GENERAL 5TH DEFENDANT

JUDGMENT

1. Chrispinus Opamo Magina And Clifford Otieno Magina (the 1st and 2nd Plaintiffs respectively and suing as the legal Representatives to the Estate of Charles Joseph Oduor Magina – deceased), first approached this Court vide their plaint dated 19th September 2016 and later amended on 31st January 2018. They impleaded Francis Osodio, Raphael Ekisa, The Land Registrar, The County Surveyor Busia And The Attorney General (the 1st, 2nd, 3rd, 4th and 5th Defendants respectively) and sought judgment against them in the following terms:

1. Eviction of the 1st and 2nd Defendants from the land parcels No South Teso/Angoromo/1915 and 1916 and an order that the 3rd Defendant avails the records of the said parcels of land.
2. An order that the County Surveyor Busia do survey and determine the actual ground position of the land parcels No South Teso/Angoromo/1915, 1916, 6486 and 6487.
3. Costs of the suit.



4. Interest.
2. The basis of the Plaintiffs case is that they are the Administrators to the Estate of Charles Joseph Oduor Magina pursuant to orders obtained in Busia High Court Succession Cause No 254 of 2013 through which the land parcels No South Teso/Angoromo 1915 and 1916 were allocated to one Valentine Adhiambo Magina And Brenda Atieno Magina respectively. However, in the process of executing the transfer documents, the Land Registrar was unable to find the records in respect to the land parcels No South Teso/Angoromo/1915 and 1916. It later transpired that the 1st Defendant is in occupation of the land parcel No South Teso/Angoromo/1915 where he has constructed rental houses instead of the land parcel No South Teso/Angoromo/6486 while the 2nd Defendant is in occupation of the land parcel No South Teso/Angoromo/6487 where he has built a residential house. Demand notices were therefore issued to the 1st and 2nd Defendants.
3. In support of the Plaintiffs' case, the 1st Plaintiff filed his statement dated 19th September 2016. The said statement is basically a rehash of what is contained in the plaint and which I have already summarized above. The same is replicated in the statement of the 2nd Plaintiff of even date although he did not testify during the plenary hearing.
4. The Plaintiffs also filed their list of documents dated 19th September 2016 to which were annexed the following documents:
 1. Copy of title deed for the land parcel No South Teso/Angoromo/1915.
 2. Copy of title deed for the land parcel No South Teso/Angoromo/1916.
 3. Copy of certificate of search for the land parcel No South Teso/Angoromo/1915.
 4. Copy of certificate of search for the land parcel No South Teso/Angoromo/1916.
 5. Certificate of Confirmation of Grant in respect to the Estate of CHARLES Joseph Oduor Magina issued to the Plaintiffs in Busia High Court Succession Cause No 254 of 2013.
 6. Copy of letter dated 23rd June 2014 addressed to the 1st Defendant in respect of the land parcel No South Teso/Angoromo/1915.
 7. Copy of Mutation Form for the land parcel of South Teso/Angoromo/1011.
 8. Copy of certificate of death for Charles Joseph Oduor Magina.

Though not originally filed by any of the parties herein, during the hearing the 1st Plaintiff produced as part of the Plaintiffs' documentary evidence the report by the Regional Surveyor Kakamega dated 4th February 2021 on the land parcels No South Teso/Angoromo/1915, 1916, 6486 and 6487. I shall revert to it in detail later in this judgment.
5. The 1st and 2nd Defendants filed a joint defence dated 18th January 2017 in which they pleaded that they are strangers to the averments in the plaint and put the Plaintiffs to strict proof thereof. They pleaded that they are not aware about the whereabouts of the land parcels No South Teso/Angoromo/1915 and 1916 adding that they are the registered proprietors of the land parcels No South Teso/Angoromo/6487 and 6486 which they have extensively developed by constructing residential and rental houses. Therefore, if there is any duplicity on the ground with regard to the position of the land parcels No South Teso/Angoromo/1915, 1916, 6486 and 6487, they that is a technical issue and cannot be the basis of this claim by the Plaintiffs. The 1st and 2nd Defendants added that the Plaintiffs are not entitled to the reliefs sought and their suit should be dismissed with costs.



6. The Defendants filed a joint statement dated 18th January 2017 in which they stated that on 6th January 2005, they purchased from Andrea Omanyo Ekulo the land parcels No South Teso/Angoromo/6485, 6486 and 6487 which were sub-divided from the land parcel No South Teso/Angoromo/5486. That the land parcel No South Teso/Angoromo/6486 was registered in the names of the 1st Defendant and the land parcel No South Teso/Angoromo/6487 was registered in the name of the 2nd Defendant. The relevant legal procedures were followed and they developed their respective portions which they have been in peaceful occupation since 2005. They have no idea about the relationship of the land parcels No South Teso/Angoromo/1915, 1916, 6486 and 6487 and if there is any duplicity, it should be resolved by the 3rd and 4th Defendants.
7. By a list of documents dated 18th January 2017, the 1st and 2nd Defendants filed the following as their documentary evidence:
 1. Copy of title deed to land parcel No South Teso/Angoromo/6486.
 2. Copy of title deed to land parcel No South Teso/Angoromo/6487.
 3. Copy of register for the land parcel No South Teso/Angoromo/6486.
 4. Copy of register for the land parcel No South Teso/Angoromo/6487.
 5. Copy of Mutation for sub-division for land parcel No South Teso/Angoromo/5468.
 6. Copy of transfer form for the land parcel No South Teso/Angoromo/6486.
 7. Copy of Land Control Board Consent for the land parcel No South Teso/Angoromo/6486.
 8. Copy of Land Control Board Consent for the land parcel No South Teso/Angoromo/6487.
 9. Copy of transfer form for the land parcel No South Teso/Angoromo/6487.
 10. Copy of land sale agreement dated 29th April 2005 for portion out of No South Teso/Angoromo/5468 measuring 50 x 100 feet.
 11. Copy of land sale agreement dated 6th January 2005 for a portion out of land parcel No South Teso/Angoromo measuring $\frac{3}{4}$.
8. The 3rd and 4th Defendants also filed a defence. It is un-dated but filed on 21st December 2021. They pleaded that they are not privy to the allegation of untraced records with respect to the land parcels the subject of this suit and that at the appropriate time, they would seek the Court's directions to carry out the ground status and prepare a report. They pleaded however, that they had established the following from their records;
 - i. That the land parcels No South Teso/Angoromo/1915 and 1916 emanated from the sub-division of the land parcel No South Teso/Angoromo/1011.
 - ii. That the land parcel No South Teso/Angoromo/1011 was a sub-division of the land parcel No South Teso/Angoromo/85.
 - iii. That on 14th October 1975, the land parcel No South Teso/Angoromo/85 was sub-divided to create land parcels No South Teso/Angoromo/1010 measuring 0.6Ha and South Teso/Angoromo/1011 measuring 1.3Ha respectively.
 - iv. That on 13th October 1975, the land parcel No South Teso/Angoromo/1011 was transferred to one Washington Wafula And One Gregory Wafula.



- v. On 16th April 1987, the land parcel No South Teso/Angoromo/1011 was sub-divided to create parcels NO 1906-1919 what land parcels No South Teso/Angoromo/1915 and 1916 fall and on 15th January 1988, the land parcel No South Teso/Angoromo/1010 was transferred to one Andera Omanyo Ekulo and later sub-divided to create land parcels No South Teso/Angoromo/2001 and 2002.
- vi. On 12th September 1988, the land parcel No South Teso/Angoromo/2001 was sub-divided to create parcels No South Teso/Angoromo/2406, 2407 and 2408.
- vii. On 25th April 1989, the land parcel No South Teso/Angoromo/2406 was sub-divided to create parcels No South Teso/Angoromo/2527 and 2528.
- viii. On 20th November 1992, the land parcel No South Teso/Angoromo/2527 was sub-divided to create the land parcels No South Teso/Angoromo/4002 and 4003.
- ix. On 30th May 1997, the land parcel No South Teso/Angoromo/4002 was sub-divided to create parcels No South Teso/Angoromo/5281 and 5282.
- x. On 11th January 1999, the land parcel No South Teso/Angoromo/5281 was sub-divided to create parcels No South Teso/Angoromo/5468 and 5469.
- xi. On 30th September 2005 the land parcel No South Teso/Angoromo/5468 was sub-divided to create parcels No South Teso/Angoromo/6486 and 6487.
- xii. On 24th June 2010, the land parcel No South Teso/Angoromo/6487 was transferred to Raphael Ekisa Okwany the 2nd Defendant.
- xiii. On 22nd February 2006, the land parcel No South Teso/Angoromo/6486 was transferred to Francis Asodio Ekapolon the 1st Defendant.

That from the above, it is clear that the land parcels No South Teso/Angoromo/1915 and 1916 were a result of the sub-division of the land parcel No South Teso/Angoromo/1011 while the land parcels No South Teso/Angoromo/6486 and 6487 were as a result of the sub-division of the land parcel No South Teso/Angoromo/1010. The 3rd and 4th Defendants pleaded therefore that from the above chronology, this matter falls within the provisions of Section 18 of the Land Registration Act touching on the ground position and boundary and hence requires the intervention of the 3rd Defendant in the first instance. They therefore pleaded that this suit is premature and should be struck out or referred to the 3rd Defendant.

9. Other than filing the defence, the 3rd and 4th Defendants did not file any witness statements nor participate in the trial.
10. The plenary hearing was conducted on 11th October 2023 and the 1st Plaintiff and 1st Defendant were the only witnesses who testified in support of their respective cases. They adopted as their testimony their respective written statements whose contents I have already summarized above. They also produced as their documentary evidence the documents annexed to their lists of documents filed herein.
11. Prior to the plenary hearing, the parties had vide a consent order dated 19th December 2019 and filed herein on 6th March 2020 agreed as follows:
 - 1: “By consent of both parties and their counsels on record the Regional Surveyor Kakamega do visit the disputed parcels of land to wit; Land Parcel No South Teso/Angoromo/1915, South



Teso/Angoromo/1916, South Teso/Angoromo/6486 and South Teso/Angoromo/6487 with a view of determining the following;

- a. The actual location of the parcels on the ground.
 - b. To ascertain whether there is any encroachment of land parcels South Teso/Angoromo/1915 and South Teso/Angoromo/1916.
- 2: That upon determination of (a) and (b) herein above, the Regional Surveyor Kakamega to prepare and file a report in Court within thirty (30) days.
 - 3: Both parties to share the cost of the survey equally.”

Pursuant to that consent order, the Regional Surveyor Kakamega prepared a report dated 4th February 2021. The same was filed in Court on 15th March 2021 and was produced by the 1st Plaintiff as part of the Plaintiffs’ documents during the hearing on 11th October 2023. I shall revert to it shortly in this judgment.

12. At the close of the testimony by the 1st Plaintiff and the 1st Defendant who were the only witnesses who testified in this case, submissions were filed by Mr Murunga instructed by the firm of Chengasia Murunga & Company Advocates for the Plaintiffs and by Mr Ouma instructed by the firm of B. M. Ouma & Company Advocates for the 1st and 2nd Defendants.
13. I have considered the evidence by the Plaintiffs and the 1st and 2nd Defendants as well as the submissions by counsel.
14. Before I determine the merits or otherwise of the Plaintiffs’ claim, I must first consider the issue of whether or not this Court has the requisite jurisdiction to determine this dispute. Although the 1st and 2nd Defendants did not specifically plead the issue of jurisdiction in their defence, they raised it in their submission at page 4 as follows:

“Let this Court also consider the next issue which is whether the Courts jurisdiction was properly invoked. Since the instant suit relates to a boundary dispute Section 18(2) of the [Land Registration Act](#) NO 3 of 2012 provides that ...”

After citing the said Section and the decision of KEME J in the case of George Kamau Machari -v- Dexka Limited 2019 eKLR, counsel for the 1st and 2nd Defendants continues to submit further that:

“Section 18(2) of the [Land Registration Act](#) makes it clear that the Court lacks the jurisdiction to entertain boundary disputes until the boundaries have been determined by the Land Registrar. Since the Appellant in his pleadings acknowledged that the Land Registrar had not determined the boundaries, the Court lacks the jurisdiction to deal with the matter and there is justification for interfering with the trial magistrate’s decision in that regard.

The Plaintiffs ignored the offices of the Land Registrar and went to the regional surveyor who never engaged the services of the County Land Registrar thus leaving the report relied on by the Plaintiff as wanting.

There is nowhere the law say that the issue of boundaries should be established by the regional surveyor.”

The 3rd and 4th Defendants, on their part, were very clear in their pleadings and at paragraph 7 of their defence stated thus:



7: “That the 3rd and 4th Defendants further reiterates the contents of paragraph *para_5 5* foregoing that given the chronological events, this matter falls squarely within the provision of Section 18 of *Land Registration Act* touching on dispute on ground position and boundary and hence requires intervention and report by the 3rd Defendant in the first instance.”

On his part, counsel for the Plaintiffs made the following submission on that issue at paragraph *para_8 8*:

8: “Your Lordship the Plaintiffs claim against the 3rd, 4th and 5th Defendants to survey and determine the actual ground position of South Teso/Angoromo/1915, South Teso/Angoromo/1916, South Teso/Angoromo/6486 and South Teso/Angoromo/6487 which was compromised by the consent order dated 19th day of December 2019 and the Regional Surveyor’s report dated 4th day of February 2021. The aforesaid report resolves the Plaintiffs’ claim against the 3rd, 4th and 5th Defendants. What now remains for determination by this Honourable Court is whether this Honourable Court should grant an order of eviction against the 1st and 2nd Defendants from land parcels No South Teso/Angoromo/1915 and South Teso/Angoromo/1916.”

There is no doubt that under Section 18(1) and (2) of *Land Registration Act*, no Court shall determine a dispute as to boundaries of registered land. However, from the Plaintiffs pleadings and which I referred to at the commencement of this judgment, what was sought is the eviction of the 1st and 2nd Defendants from the land parcels No South Teso/Angoromo/1915 and 1916 and an order that the County Surveyor “do determine actual ground position South Teso/Angoromo/1915 and 1916 and South Teso/Angoromo/6486 and 6487.” I do not consider that pleading to be one relating to a boundary dispute. Rather it is a claim to evict the 1st and 2nd Defendants from the land parcels No South Teso/Angoromo/1915 and 1916 and also to determine the position on the ground between those two parcels of land and the land parcels No South Teso/Angoromo/6486 and 6487. It is also instructive to note that other than the mere pleadings that this dispute should have been referred to them, the 3rd and 5th Defendants did not lead any evidence nor file any submissions to support their claims that this dispute should be resolved by the Land Registrar. On the other hand, the 1st and 2nd Defendants were in fact party to the consent order dated 19th December 2019 and adopted by this Court by which this dispute was referred to the Regional Surveyor Kakamega for resolution. The 1st and 2nd Defendants cannot approbate and reprobate.

15. It is also clear from precedents that where the boundaries are fixed, the Land Surveyor has jurisdiction to determine any dispute arising therefrom. There is nothing to suggest that this was a dispute over general boundaries as opposed to fixed boundaries. In the case of *Azzuri Ltd -v- Pink Properties Ltd C.a. Civil Appeal No 93 of 2017 [2018 eKLR]*, the Court of Appeal addressed this issue in paragraphs 21 and 22 of its judgment thus:

20: “On our part, looking at the impugned judgment, it is clear to us that the decision of the trial Court was primarily based not only on the weight of the evidence, but on the failure by the appellant to follow the laid down grievance handling mechanism; namely referral of the dispute to the Land Registrar as per Section 18 of the *Land Registration Act*. It is common ground that the suit land is in a general boundary area (as opposed to a fixed boundary area). Resolution of disputes in a general boundary area is provided for under Section 18 (supra) which states ...”



After citing the provisions of Section 18(1) (2) and (3) of the [Land Registration Act](#), the Court went on to state at paragraph 22 as follows:

“ This means that under the aforesaid provisions, boundary disputes pertaining to land falling within general boundary areas must be referred to the Land Registrar for resolution; while disputes pertaining to lands with fixed boundaries may be investigated and possibly resolved simply through a Surveyor.” Emphasis added.

Parties obviously know their cases better than any other person particularly on the issue pertaining to the relevant facts. This Court must therefore conclude that the Plaintiffs and the 1st and 2nd Defendants having consented to the Regional Surveyor visiting the land parcels in dispute and filing a report which was admitted by this Court as evidence, it can only be an affirmation that they were satisfied that the said Regional Surveyor had the requisite jurisdiction to carry out the exercise assigned to him. It is also instructive to note that no appeal was filed against that report.

16. Having dispensed with the issue of jurisdiction I shall now consider the main remedy sought by the Plaintiffs and which is the eviction of the 1st and 2nd Defendants from the land parcels No South Teso/Angoromo/1915 and 1916.
17. It is common ground that Charles Joseph Oduor Magina whose Estate the Plaintiffs represent has been the registered proprietor of the land parcels No South Teso/Angoromo/1915 and 1916 since 2nd September 1987. It is also not in dispute that the 1st Defendant was registered as the proprietor of the land parcel No South Teso/Angoromo/6486 since 31st May 2006 while the 2nd Defendant was registered as the proprietor of the land parcel No South Teso/Angoromo/6487 since 25th June 2010.
18. As the registered proprietors of the land parcels No South Teso/Angoromo/1915 and 1916, the Plaintiffs are entitled to all the rights and privileges belonging or appurtenant thereto as protected by the provisions of Sections 24 and 25 of the [Land Registration Act](#) subject only to the liabilities and interests protected by the land. Such rights include the eviction of trespassers from their land. That is the main remedy which the Plaintiffs seek.
19. The answer to that claim is found in the report by the Regional Surveyor Kakamega dated 4th February 2021 and filed on 15th March 2021. I shall cite the relevant parts thereof:

“ Re: Report On Implementation Of Court Order Environment And Land Court Case No 120 Of 2016 South Teso/Angoromo/1915, 1916, 6486 and 6487.

A site visit was done on 27.01.2021 –

Approach:

Using registry index map we were able to identify parcels South Teso/Angoromo 1915 and 1916. Measurements were taken from points a-b and h-g so as to identify the boundary b-g which defines the common boundary between South Teso/Angoromo 1914 and 1915.

The boundary c-f separating South Teso/Angoromo/1915 and 1916 was found to be intact.

Measurements were also taken from points c-d and f-e and the boundary e-d which separating parcel South Teso/Angoromo 1916 and 1917 also found to be in the correct position.

Observations



The 1st Defendant (Francis Osodio) resides on parcel South Teso/Angoromo/1915 but according to lands records he is the registered proprietor of parcel South Teso/Angoromo/6486.

The 2nd Defendant (Raphael Ekisa) resides on parcel South Teso/Angoromo/1916 but according to lands records, he is the registered proprietor of parcel South Teso/Angoromo/6487.

Parcel number South Teso/Angoromo/1914 has slightly encroached into parcels South Teso/Angoromo/1915 as shown on the diagram (shaded part).

For your ease of reference see the attached diagram.

Note: Parcels number South Teso/Angoromo/6486 and 6487 could not be identified on the ground because they were not appearing on the map that was provided by the client.

Recommendation

The client to provide an amended map so that we can issue another date for completion of the exercise.

Geoffrey Edasi

For Regional Surveyor Kakamega.”

The 1st and 2nd Defendants pleaded in paragraph 4 of their defence that they are not aware of the whereabouts of the “purported” land parcels No South Teso/Angoromo/1915 and 1916. They then went on to plead in paragraph 9 of their defence that if there is any duplicity on the ground position of the land parcels No South Teso/Angoromo/1915, 1916, 6486 and 6487, that is “a technically (sic) issue” to be addressed by the 3rd and 4th Defendants and cannot be the basis of this claim. It must be clear to the 1st and 2nd Defendants from the above report and the title deeds produced herein that the land parcels No South Teso/Angoromo/1915 and 1916 actually exist in fact and that the said parcels are the properties of the late Charles Joseph Oduor Magina’s Estate represented by the Plaintiffs herein. Those parcels cannot be said to be “purported”. Their existence and ownership is real. It is not a mirage as suggested by the 1st and 2nd Defendants. It is also a fact that the 1st and 2nd Defendants, though registered as the proprietors of the land parcels No South Teso/Angoromo/6486 and 6487, they actually occupy the land parcels No South Teso/Angoromo/1915 and 1916. The technical issue which the 1st and 2nd Defendants urge to be determined by the 3rd and 4th Defendants has now been determined by the Regional Surveyor Kakamega with their consent. There is nothing to show that the Plaintiffs have allowed the 1st and 2nd Defendants to occupy the land parcels No South Teso/Angoromo/1915 and 1916. They must therefore give way or be evicted therefrom.

20. The up-shot of the above is that having considered the evidence by all the parties herein, this Court makes the following disposal orders:
1. The 1st and 2nd Defendants shall within 90 days of the delivery of this judgment remove all their structures from the land parcels No South Teso/Angoromo/1915 and 1916 and vacate the same.
 2. In default of (1) above, the 1st and 2nd Defendants, their families, servants and all those claiming under them shall be evicted from the said land parcels No South Teso/Angoromo/1915 and 1916 as provided for in the law.



3. Given the circumstances of this case, I find that the most prudent order to make is for the parties to meet their own costs.

JUDGMENT DATED, SIGNED AND DELIVERED ON THIS 10TH DAY OF JULY 2025 BY WAY OF ELECTRONIC MAIL AND WITH NOTICE TO THE PARTIES.

BOAZ N. OLAO

JUDGE

10TH JULY 2025

Right of Appeal.

