



Otieng (Suing for himself and as Legal Representative of the Estate of Mukonia Otiengi Odama (Deceased)) v Adera & 4 others (Environment & Land Case 52 of 2018) [2024] KEELC 4083 (KLR) (9 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4083 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 52 OF 2018**

**BN OLAO, J
MAY 9, 2024**

BETWEEN

**WILLIAM MUNYEKENYE OTIENG PLAINTIFF
SUING FOR HIMSELF AND AS LEGAL REPRESENTATIVE OF THE ESTATE
OF MUKONIA OTIENGI ODAMA (DECEASED)**

AND

**WILLIAM CHARLES ADERA 1ST DEFENDANT
EVANS NGONGA ANTONY WEBEKA BOI 2ND DEFENDANT
VITALIS NGONGA 3RD DEFENDANT
ANTONY WEBEKA BOI 4TH DEFENDANT
FRANCIS WABWOBA WANGALWA 5TH DEFENDANT**

RULING

1. William Munyekenye Otieng (the Applicant) filed the suit herein on June 8, 2018 against William Charles Adera, Evans Wanyonyi, Vitalis Ngonga, Antony Webeka Boi and Francis Wabwoba Wangalwa (the 1st to 5th Respondents respectively). He sought judgment against the said Respondents in the following terms:
 1. An order for the re-establishment and re-planting of the boundary and removal of trees which the 1st Respondent had planted on the Applicant's land and on the road of access.
 2. Eviction of the Respondents from the Applicant's land being land parcel No South Teso/ Angoromo/566.



3. An order of permanent injunction restraining the Respondents jointly and severally, their families, agents, servants and/or persons working under them restraining them from up-rooting and/or in any other manner interfering with the re-planted boundary, encroaching, trespassing onto and/or in any manner using illegally, occupying and/or in any other manner dealing with the land parcel No South Teso/Angoromo/566 and the road of access.
4. Costs,
5. Interest.
6. Any other further relief this Honourable Court may deem fit and just to grant.

The Applicant's case was that he is the proprietor of the land parcel No South Teso/Angoromo/566 while the 1st Respondent is the proprietor of the land parcel No South Teso/Angoromo/565 which has since been sub-divided to give rise to the land parcels No South Teso/Angoromo/2740 (in his plaint he erroneously pleads that the 1st Respondent is the owner of parcel No South Teso/Angoromo/566). That the dispute between the parties involves a boundary dispute touching on the land parcels No South Teso/Angoromo/565 and 566 which was resolved by the District Surveyor by planting trees. However, the 1st Respondent up-rooted the said trees and blocked the road of access to the Applicant's land hence this suit.

2. Only the 1st Respondent appears to have filed a defence dated August 20, 2018 although the firm of Ashioya & Company Advocates entered appearance for all of them. The 1st Respondent in his defence pleaded, inter alia, that this suit is *res judicata* and should be struck out as between himself and the Applicant as there was a previous suit being Busia HC JR Application No 215 of 2013. Further, that the land parcel No South Teso/Angoromo/565 no longer exists.

3. By a consent order dated June 15, 2020, the parties agreed as follows:

1. The District Court Land Registrar and Surveyor Busia do visit the land parcels South Teso/Angoromo/566 to determine the boundary and if there is any encroachment by either plot and the extent thereof.
2. That the Land Registrar/Land Surveyor to prepare the report within 14 days of such visit.
3. That both parties to share the cost of the exercise.
4. That this matter be mentioned on 28th September 2020 to confirm if the report has been filed.

Both the Busia Land Registrar and Surveyor prepared their reports as directed. The Land Registrar's report is dated May 31, 2022 and that of the surveyor June 9, 2022.

4. With the consent of the parties vide their letter dated February 6, 2023, those reports were adopted on April 25, 2023 as judgment of this Court. The Land Registrar and Surveyor were to re-visit the land parcels South Teso/Angoromo/565 (now 2739 and 2740) and South Teso/Angoromo/566 and plant the boundary within three (3) months and file a report after the conclusion of the exercise. The Officer Commanding Busia Police Station was to provide security and the parties and their families, agents or workers were required to respect the said boundary.

5. Thereafter, the matter has been mentioned severally ostensibly to give the Land Surveyor time to visit the land in dispute and demarcate the boundary. It would appear that the parties have hit some deadlock because by a Notice of Motion dated October 25, 2023, the Applicant citing the provisions of Articles 40, 50(1), 64, 159(2) and 259 of the Constitution, Sections 24, 25 and 26 of the Land



Registration Act, Sections 1, 1B & 3A of the Civil Procedure Act and Order 40 Rule 1, 2, 3, 4 and 5 of the Civil Procedure Rules seeks the following orders:

1. Spent
2. Spent
3. Spent
4. That the planting of the boundary by the County Land Registrar and County Surveyor Busia on 11/10/2023 be nullified and a new boundary be planted by the surveyor who went to the ground and did the survey on 31st of May 2022 and the same be planted totally in compliance with the Busia County Land Registrar and County Surveyor's reports dated 21/6/2022 and 9/6/2022 respectively as per the sketch – plan attached.
5. That this Honourable Court be pleased to visit the scene during the survey exercise to ensure that justice is done.
6. That the Officer Commanding Adungosi Police Station [OCS] to provide sufficient security during the survey exercise.
6. The application is supported by the Applicant's affidavit and is premised on the grounds set out therein.
7. The gist of the application is that pursuant to the said consent judgment, Mr Obiero and Mr Onyinkwa the Busia Land Registrar and Surveyor respectively visited the suit land in the presence of the parties to carry out the exercise of survey and prepared reports. Those reports were signed by their bosses Mr Nyaberi and MR Kamadi and were filed in Court. Pursuant to those reports, the Land Registrar summoned the parties to appear on the suit land on October 2, 2023 to open the access road and re-plant the boundary. That exercise was facilitated by the Applicant and the Land Registrar that Mr Onyinkwa who had done the initial report should do the boundary demarcation. However, the Respondent became hostile when the Land Registrar and Mr Onyinkwa visited the land for the exercise. It is the Applicant's case that the Respondent only became hostile because Mr Onyinkwa had confirmed, as other surveyors had previously done, that the Respondent had encroached the road of access and onto the Applicant's land and thereby frustrating the implementation of the Court order. The Applicant directed his counsel to write to the Deputy Registrar accordingly.
8. Another survey exercise was planned for October 11, 2023 but on that day, it was Mr Kamadi the County Surveyor who attended rather than Mr Onyinkwa. And to the Applicant's surprise, Mr Kamadi proceeded to plant the boundary without regard to the registry map and the two survey reports already filed herein. That the exercise has caused him an injustice and further loss of his land. He therefore seeks orders as per his application.
9. The following documents are annexed to the application:
 1. Complaint dated May 25, 2018.
 2. Order dated January 21, 2009 and issued in Busia Principal Magistrate's Court Land Dispute No 133 of 2009 involving the parties herein.
 3. Another order dated 30th September 2013 and issued in the same land case No 133 of 2009 involving the same parties.



4. A letter dated November 15, 2011 by the District Surveyor Busia and addressed to the Magistrate's Court Busia over the land boundary dispute involving land parcels No South Teso/Angoromo/566, 2739 and 2740.
5. Ruling delivered on February 28, 2018 by Kaniaru J In Busia ELC Misc Application No 215 of 2013.
6. Consent letter dated February 6, 2023 signed by counsel for both parties.
7. Consent order issued on March 1, 2023.
8. Report by Mr Wilfred Nyaberi dated June 21, 2022 on the determination of the boundary and road of access between the land parcels No South Teso/Angoromo/566 and 565.
9. Report by Mr Geoffrey Kamadi County Surveyor dated June 9, 2022 on determination of boundary dispute between the land parcels No South Teso/Angoromo/565 (2739 and 2740) and 566.
10. Photographs.
10. The application is opposed and William Charles Adera the 1st Respondent has deposed in his replying affidavit dated November 15, 2023 that the application is frivolous and without merits since it seeks to set aside an exercise entered into with the consent of the parties and at the instance of the Applicant. That is not possible to implement the Court order dated January 21, 2009 the same having been overtaken by the Limitation of Actions Act and has also been superseded by the latter orders dated April 25, 2023. The application should therefore be dismissed with costs for being an afterthought, ambiguous and without merits.
11. The following documents are annexed to the replying affidavit:
 1. Order dated January 21, 2009 issued in Busia Principal Magistrates Court Land Dispute No 133 of 2009 involving the parties herein.
 2. Consent order issued herein on March 1, 2023.
 3. Report dated October 2, 2023 by V. K. Lamu Land Registrar on the implementation of the Court order on the land parcels No South Teso/Angoromo/566 and 565.

The Applicant filed a supplementary affidavit dated November 15, 2023 in which he reiterated that the purported planting of the boundary moved it into his land. That the Respondent has now destroyed the un-disputed boundary features and the new boundary has encroached onto his land as per the photographs annexed to the supplementary affidavit.
12. When the application was placed before me on October 26, 2023, I directed that it be canvassed by way of written submissions to be filed on or before November 16, 2023. However, it was not until 22nd January that all the parties had complied.
13. I have considered the application, the rival affidavits and annexures thereto. I have also considered the submissions by Mr Onsongo as instructed by the firm of Obwoye Onsongo & Company Advocates for the Applicant and by Mr Ashioya instructed by the firm of Ashioya & Company Advocates for the 1st Respondent.
14. The fulcrum upon which this application is hinged is of course prayer No 4 of the Notice of Motion dated October 25, 2023. I have already referred to it in the preceding paragraphs of this ruling but I shall cite it again in extenso due to its relevance – it reads:



4:

" That the planting of the boundary by the County Land Registrar and County Surveyor Busia on 11/10/2023 be nullified and a new boundary be planted by the surveyor who went to the ground and did the survey on 31st of May 2022 and the same be planted totally in compliance with the Busia County Land Registrar and County Surveyor's reports dated 21/6/2022 and 9/6/2022 respectively and as per the sketch plan attached."

It is on record that the parties filed a consent dated February 6, 2023. The same was adopted as a judgment of this Court on April 25, 2023. For purposes of this ruling, I shall highlight the relevant parts thereof:

"By consent of both counsel for the plaintiff/Applicant and defendant/Respondent, the Busia County Land Registrar's report and the County Surveyor's report dated 31/5/2022 and 9/6/2022 respectively and filed in Court be adopted a judgment of this Court.

The Busia County land Registrar and Busia County Surveyor are hereby ordered to revisit the two disputed parcels of land namely South Teso/Angoromo/565 (now 2739 & 2740) and South Teso/Angoromo/566 and plant the boundary as per their reports above within three (3) months from to-day and file a report in Court after the conclusion of that exercise within the said there (3) months."

It is clear that the above consent judgment had two limbs being:

- a. Consent judgment in terms of the County Land Registrar's report dated May 31, 2022 and the County Surveyor's report dated June 9, 2022.
- b. The County Land Registrar and Surveyor to re-visit the land in dispute, plant the boundary and file a report.

Both those limbs were complied with. The consent judgment was entered and a report dated October 2, 2023 signed by the new Land Registrar Ms V. K. Lamu was filed herein on October 31, 2023. The consent judgment did not say that the Land Registrar and Surveyor file separate reports. It only said the two officers revisit the suit land "and file a report in Court after the conclusion of the exercise." There is no doubt in my mind that the report filed by V K Lamu the Land Registrar is the result of the exercise as carried out by the Land Registrar and Surveyor as per the consent judgment. This is because the said report reads at page 2 thereof as follows:

"The Court orders dated April 25, 2023 directed Busia County Land Registrar and Busia County Surveyor to revisit land parcel No 565 (2740) and 566 and plant the boundary as per report their reports (*sic*) dated May 31, 2022 and dated June 9, 2022 as adopted by Court as judgment of the Court. The exercise was carried out on October 2, 2023 as from 2pm."

The Land Registrar V. K. Lamu then proceeds to summarize the recommendations by both the Land Registrar and the County Surveyor as well as the observations which I need not rehash because they are not what this Court has been asked to interrogate. Indeed, this Court would be acting out of its jurisdiction if it purported to do so. The Applicant seeks this Court to nullify the boundary planting exercise that took place on October 11, 2023. However, there is no evidence that any such exercise took place on that day. The exercise referred to by V K Lamu took place on October 2, 2023 at 2pm and it was pursuant to the reports dated May 31, 2022 and June 9, 2022 as per the consent judgment and



not June 21, 2022 as stated in the application. The purported Land Registrar's report dated June 21, 2022 and which the Applicant seeks to rely upon is in fact the letter forwarding the report dated May 31, 2022 and which is the report that the parties relied upon in their consent judgment.

15. Essentially, what the Applicant is seeking is to set aside or vary the consent judgment herein dated April 25, 2023. In the case of *Hirani -v- Kassam* 1952 19 EACA 131, the then Court of Appeal for East Africa cited the following passage from *Setton On Judgments and Orders* 7th Edition Vol. page 124:

“Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them ... and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the Court ... or if consent was given without sufficient material or facts, or in misapprehension or in ignorance of material facts or in general for a reason which would enable the Court to set aside an agreement.”

In *Flora N. Wasike v Destimo Wamboko* 1988 eKLR (CA Civil Appeal No 18 of 1984), the Court of Appeal stated thus:

“It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled which are not carried out.”

See also *J. M. Mwakio v Kenya Commercial Bank Ltd* CA Civil Appeal No 28 of 1982 and 69 of 1983.

16. The thread that runs through those cases is that a consent judgment is binding on the parties and can only be set aside or varied on grounds that can justify the rescinding of a contract such as fraud, collusion or if the same was obtained contrary to the policy of the Court – *Board of Trustees NSSF v Michael Mwalo* 2015 eKLR. I see nothing in this application to suggest that the above conditions have been met in this case. Counsel for the 1st Respondent is alive to the above authorities and has submitted that;

“... there is no allegation nor evidence that that consent was obtained by fraud, misrepresentation and/or through coercion or duress.”

Secondly, and as already stated above, the Applicant is inviting this Court to exercise a jurisdiction which it does not have. Paragraph 5 of the Notice of Motion seeks the following orders:

5:

“ That this Honourable Court be pleased to visit the scene during the survey exercise to ensure that justice is done.”

Section 18(2) of the *Land Registration Act* vests such jurisdiction in the Land Registrar and clearly divests this Court of any powers to determine a dispute relating to land boundaries. Although the Applicant is of the view that the involvement of the Court will “ensure that justice is done,” the law has reposed that authority in the Land Registrar. And whereas Courts of law are described as the temples of



justice, it has also been stated in the case of *Speaker of The National Assembly v James Njenga Karume* 1992 eKLR as follows:

“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed.”

The parties and their counsel were no doubt aware of the relevant provisions of the *Land Registration Act* and the above precedents when they recorded the consent judgment herein.

17. The view I take of the application is that there is no basis to grant the orders sought. Further, that to do so will amount to an un-warranted intrusion in the domain of another institution.
18. The up-shot of all the above is that the Notice of Motion dated October 25, 2023 is devoid of merit. It is accordingly dismissed with costs to the 1st Respondent.

RULING DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 9TH DAY OF MAY 2024 AND WITH NOTICE TO THE PARTIES.

BOAZ N. OLAO

JUDGE

Explanatory note:

This ruling was due on 5th March 2024. However, I was attending to my ailing stepmother who unfortunately passed away on 14th March 2024. That explains the delay which is regretted.

BOAZ N. OLAO

JUDGE

