



**Oyaro v Oisebe & another (Environment & Land Case 399 of 2015)
[2024] KEELC 5976 (KLR) (17 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 5976 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 399 OF 2015**

**M SILA, J
SEPTEMBER 17, 2024**

BETWEEN

JOSEPH OGEKA OYARO PLAINTIFF

AND

NELSON OMWENGA OISEBE 1ST DEFENDANT

OSOSI VINCENT OISEBE 2ND DEFENDANT

JUDGMENT

(Suit by plaintiff claiming that the defendants have encroached into his land and built on it; defendants owning the neighbouring parcel; plaintiff claiming that his land should measure 0.15Ha but occupying 0.05 Ha on the ground; defendants' land being 0.05 though its mutation showing that it should measure 0.04 Ha; court not able to reconcile the difference in acreage of the defendants' land as Land Registrar was not called as a witness; whatever the case the discrepancy of 0.01 cannot be the cause of the fact that on the ground the plaintiff's land does not add up to 0.15 Ha; plaintiff not adducing sufficient evidence that the defendants have strayed outside the parameters of their land and into his land; plaintiff's suit dismissed with costs)

1. This suit was commenced through a plaint filed on 7 July 2015. The plaintiff pleaded that he is the registered owner of the land parcel Wanjare/Bomorenda/1434 measuring 0.15 ha while the defendants own the land parcel Wanjare/Bomorenda/1515. He contended that the defendants in the course of erecting a structure on their land trespassed into a portion of his and excavated holes for the foundation of pillars to support the structures they intended to build. In the suit the plaintiff has asked for the following orders (slightly paraphrased for brevity) :
 - a. A permanent injunction restraining both defendants from entering, digging any foundation, or interfering with the land parcel Wanjare/Bomorenda/1434.



- b. An order of eviction against both defendants from the land parcel Wanjare/Bommorenda/1434.
 - c. Costs of the suit.
 - d. Any other relief the court may deem fit to grant.
2. The defendants filed defence. They did not contest the ownership of the plaintiff of the land parcel Wanjare/Bommorenda/1434 (parcel No. 1434) but denied that its actual measurement on the ground is 0.15 ha. It was pleaded that the 1st defendant is the owner of the land parcel Wanjare/Bommorenda/1515 (parcel No. 1515) . It was pleaded that the disputed land parcels are town plots and it was most unlikely that they would be more than 0.0450 Ha or thereabouts. It was contended that the issue was a boundary dispute which the court had no jurisdiction to handle.
3. On 29 July 2015 the parties recorded a consent to have the Land Registrar and Surveyor visit the disputed site and file a report. I can see on record two reports filed by the officers. Despite the report the parties could not agree and the matter proceeded for hearing.
4. PW – 1 was the plaintiff. His evidence was that his title No. 1434 reads 0.15 Ha but the ground area is 0.05 Ha. On the 1st defendant’s title he testified that it should measure 0.04 Ha and not the 0.05 Ha shown in the register. He testified that this land previously belonged to one Zacharia Okero Simbe who sold it to the 1st defendant in 1983/1984 while measuring 0.04 Ha and that this acreage of the land is shown in the mutation form which created it. He thought the encroachment to his land was because of this change in acreage in the 1st defendant’s title from 0.04 Ha to 0.05 Ha. Cross-examined, he acknowledged that even if he was to be given the extra acreage of 0.01 Ha, his land would still be short of what is indicated in his title (i.e it cannot reach 0.15 Ha) . He believed that from the records this land of the 1st defendant should be about half the size of his land. He could see that his title emanated from subdivision of the parcel No. 1311 which was subdivided into the parcels No. 1433 – 1436. He stated that he purchased his plot in the year 2012 while the 1st defendant had bought his about the years 1983/1984. The person who sold this land to the plaintiff was his (plaintiff’s) brother, one John Oyaro and he claimed that he informed him that the 1st defendant has encroached onto his land. His brother owned the land from 10 December 1999 and before that the land was owned by one Reuben Oyondi from 1981. His brother never filed a case against the defendants when he owned the land. Questioned by the court, he offered that his plot only has a temporary structure made of timber which is used as a carpentry workshop. On his neighbour’s plot, which belongs to the defendants, is a permanent construction that has gone up to 2nd floor and on the ground floor is a hardware business.
5. With the above evidence the plaintiff closed his case.
6. DW – 1 was the 1st defendant. He testified that he first purchased the Plot No. 1435 in 1983 and later bought the parcel No. 1515 in 1984. The two plots are side by side. He elaborated that the plaintiff subsequently came and bought his plot and that what he bought had three previous owners, that is one Simbe, then Reuben Oyondi, then John Oyaro, the plaintiff’s brother. He testified that after John Oyaro had purchased the land he brought a dispute as there were some landlocked persons behind who claimed



a road of access through the parcel No. 1434. He stated that he was informed by the Land Registrar that his claim is baseless as there may have been errors when the land was subdivided. He pointed out that even if the plaintiff is given the whole of his land it will still not measure up to what he wants. Cross-examined, he could see that the plot No. 1435, which he had purchased earlier, arose from the same mutation which also brought forth the plaintiff's land parcel No. 1434. It was a mutation of the parcel No. 1311. The parcel No. 1515 arose from subdivision of the parcel No. 1484 which was subdivided into the parcels No. 1515 and 1516. In the mutation form the proposed parcel No. 1515 measured 0.04 Ha. He acknowledged that the register shows his land as measuring 0.05 Ha and not 0.04 Ha indicated in the mutation form. He claimed that there was some additional acreage that was received from the parcel No. 1435 which he also owns hence the disparity.

7. DW – 2 was David Lemaiyan a surveyor working with the Ministry of Lands at Kisii. He is the surveyor who visited the site when the court issued an order for a site inspection. It was his opinion that there was no encroachment from either parcel of land. He however stated that the plaintiff's parcel No. 1434 has a computational error as its ground measurement does not reflect what is in the title. Cross-examined, he acknowledged that the mutation form of the parcel No. 1484, which mutation brought forth the 1st defendant's parcel No. 1515, indicates that the plot was to measure 0.04 Ha but its title reads 0.05 Ha. He also observed that the search for the parcel No. 1515 shows its acreage as 0.04 Ha. The ground areas is thus bigger by 0.01 Ha as compared to what is in the register. He stated that he can only explain discrepancy with the ground which is that these are approximate areas. In his view the margin of error is minimal and within the allowed margin of error for general surveys. He did state that there are existing boundaries on the ground. Re-examined he elaborated that there is an allowable 20% margin of error in general boundaries. His view was that the margin of error for the plaintiff's parcel No. 1434 was beyond what is permissible. In his view, there was no encroachment as there were already existing boundaries on the ground. He noted existence of a wall which defined the boundaries of the two parcels of land.
8. With that evidence the defence closed its case.
9. I invited counsel to file submissions and I have taken note of the submissions filed by both counsel for the plaintiff and defendants and I have taken the same into account before arriving at my decision.
10. Before I delve deeply into the issues, there was a point raised in the defence that what is before court is a boundary dispute for which the court has no jurisdiction. I disagree, as what I construe to be before court is a dispute of trespass, and the court would have jurisdiction to entertain such dispute. I see no need to belabour the point.
11. On the merits, the plaintiff of course complains that the defendants have encroached into his land and built on part of it. The defendants refute this, asserting that they have only developed their plot. In such cases the evidence of experts is critical. I observe that the plaintiff brought no surveyor and did not file any survey report to support his assertion that the defendants have encroached on his plot. The defendants on the other hand relied on the survey report of the District Surveyor. The conclusion in that report is that there is no encroachment by either party onto the land of the other. The



report further elaborates that each party is on his land and that there are clear defined boundaries that are on site.

12. It would appear that the plaintiff's case is solely hinged on the mutation form for the parcel No. 1484 which was the plot subdivided to bring forth the plots No. 1514 and 1515 (the latter being of the defendants) and a search. The mutation form does indicate that upon subdivision of the parcel No.1484, the plot No. 1515 would measure 0.04 Ha. There is also a search which shows the plot measuring 0.04 Ha. The title however reads 0.05 Ha. I am unable to reconcile this discrepancy. This would have needed the evidence of the Land Registrar to state what transpired during registration and whether indeed the plot No. 1515 was registered to be a plot measuring 0.04 Ha or a plot measuring 0.05 Ha. It was the onus of the plaintiff to prove and it was his job to call the Land Registrar to explain this bit of evidence but the plaintiff opted not to call him. In absence of that evidence I cannot speculate that the mutation form was indeed registered as drawn or whether there were further amendments. What I have is a title measuring 0.05 Ha and I will go by that.
13. The plaintiff of course is adamant that his plot ought to measure 0.15 Ha and not the 0.05 Ha that it occupies on the ground. He believes that the shortfall is because of this unexplained 0.01 Ha i.e the discrepancy between the 0.04 Ha in the mutation and the 0.05 Ha in the defendants' title. That cannot be. It cannot be so, because even if you add 0.01 Ha to the plaintiff's 0.05 Ha, what you will end up with is a plot measuring 0.06 Ha, and not one measuring 0.15 Ha. Secondly, even if you consume the whole of the defendants' plot No. 1515 and add it to the plaintiff's plot No. 1434 what you will end up with is still not 0.15 Ha but a plot measuring 0.1 Ha. That is why I say, it cannot be because of the discrepancy of 0.01 Ha, that the plaintiff's plot measures 0.05 Ha on the ground while its title reads 0.15 Ha.
14. The problem must be with the plaintiff's title and not the defendants' title. There must have been a confusion when the plaintiff's plot was created from a subdivision of the parcel No. 134. The plaintiff did not come with the register or title of this parent plot No. 134 so that we can ascertain its size. The defendants however brought its mutation form but there is no evidence that this mutation form was actually accepted and registered as drawn. I observe that it does not have a date of registration and no presentation book number. I am unable to vouch for it. Be that as it may, these two plots have been in existence since the 1980s with the previous owners having no issue with the ground occupation as it is at the moment. The plaintiff's title was opened on 16 February 1981 whereas the defendants' title was opened on 25 May 1984. The predecessors of the plaintiff's title had no issue with the ground measurement of 0.05 Ha and never pressed any neighbour for additional land to reach the 0.15 Ha shown in its title. I think they were aware that it was their title that had an issue, not any of the neighbours', and that is why no dispute ensued between them.
15. This position is supported by the County Surveyor, and his opinion, that the correct boundary is that indicated by the ground measurement and occupation, cannot be taken lightly. I will adopt that conclusion. That means that the defendants' plot remains as one measuring 0.05 Ha. The plaintiff's plot on the other hand ought to measure 0.05 Ha as well and not 0.15 Ha as indicated in the title. The plaintiff needs to hand over his title to the Land Registrar for rectification so that the confusion is cleared once and for all. The ground positions remain as occupied by both parties. Each party



occupies their plot as depicted by their respective ground occupation. In the end my finding must be, and is, that there is no encroachment by the defendants into the plot No. 1434 belonging to the plaintiff.

16. The plaintiff has failed to prove his case to the required standard and his case is hereby dismissed with costs.
17. Judgment accordingly.

DATED AND DELIVERED THIS 17 DAY OF SEPTEMBER 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in presence of :

Mr. Soire for the plaintiff

N/A on part of Mr. Gichaba for the defendants

Court Assistant – David Ochieng’

