



**Otuke v Miroro (Environment & Land Case 478 of 2016)
[2024] KEELC 6481 (KLR) (3 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6481 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 478 OF 2016**

M SILA, J

OCTOBER 3, 2024

BETWEEN

MICHIRA OTUKE PLAINTIFF

AND

YUVENALIS MOSIOMA MIRORO DEFENDANT

RULING

1. The application subject for determination is that dated 6 June 2022 filed by the defendant. He wants orders that the County Land Surveyor be compelled to submit the mutation form for the land parcel Central Kitutu/Mwabundusi/1420 and for the plaintiff to be compelled to transfer to the applicant a portion measuring 50 x 100 feet as per the decree herein. In default he wants the Deputy Registrar to sign the requisite documents to transfer a portion of land measuring 50 x 100 feet from the land parcel No. 1420; that upon the orders above being granted, he be issued with a title deed. In the supporting affidavit, the applicant deposed that the court ordered that the land parcel Central Kitutu/Mwabundusi/1420 be resurveyed and he be granted land measuring 50 x 100 feet out of it and the remainder to revert to the respondent. He deposed that the County Surveyor has undertaken the survey but the respondent has declined to sign the mutation forms to pave way for execution of the decree.
2. The background is that through a plaint filed on 29 July 2011 the plaintiff/respondent pleaded that on 28 October 1998, he sold to the defendant/applicant a portion of land measuring 50 X 100 feet from the land parcel Central Kitutu/Mwabundusi/962 and he showed the applicant the portion sold. He contended that the applicant took possession of the portion and cultivated tea thereon. He pleaded that in April 2008 the applicant brought a surveyor so as to excise the portion sold and the land was subdivided with the applicant becoming proprietor of the land parcel Central Kitutu/Mwabundusi/1420. He complained that upon getting title the applicant strayed into the other portion of the respondent's land. On investigation, the respondent found that the title that the applicant had processed measured 0.26 ha and not the 0.05 ha sold to him. This is what led the respondent to sue the applicant seeking an order of cancellation of the title of the applicant to the land parcel No. 1420 and



- eviction. The applicant filed defence where he claimed that there were more than two transactions and that the respondent had sold to him additional land.
3. The case proceeded for hearing culminating in a judgment delivered by Onyango J on 23 April 2020. The good judge found that all that was sold was nothing more than land measuring 50 X 100 feet as asserted by the respondent. She directed the applicant's title be cancelled and the land to be resurveyed so that only a portion measuring 50 X 100 feet is granted to the applicant. The applicant was also to give vacant possession of the land in excess of 50 x 100 feet. I will come back to the orders made a little later.
 4. Unfortunately, the parties could not agree where this portion of 50 X 100 feet should be on the land. The applicant was adamant that what he purchased was on the lower side whereas the respondent insisted that what was sold was the upper part. It is this dispute which led to the filing of the subject application.
 5. I directed further affidavits be filed so that each party can justify where the portion of the applicant should be. I reasoned that given that the land parcel No. 962 was subdivided there must be a lower and upper portion. I also directed the District Surveyor and Land Registrar to proceed to the ground and identify the so called lower and upper portions wished by the applicant and respondent. A report was filed which the applicant had no problem with but the respondent rejected it. He wished to engage his own surveyor which I allowed him and one was filed.
 6. I have assessed the application and all material filed. Starting with the position of the respondent, he swore an affidavit insisting that after selling land to the applicant he showed it to him and the applicant took possession and planted tea. This he averred was on the upper portion and it has an access road. He deposed that the applicant went beyond the portion sold to him, planted tea and trees. He deposed that it was this encroachment which led him to file suit. He deposed that on 13 May 2021, the County Surveyor visited the land to implement the decree and excised a portion from the land parcel No.1338 which belongs to him so as to excise the portion of 50 x 100 feet and proposed a 4 metre wide road, which land is on the lower side and not the upper side. He asserts that this portion is the portion that the applicant had encroached on and was not a portion that was sold to him.
 7. The applicant filed an affidavit to justify why the land should be on the lower portion. It is a lengthy one that goes to irrelevant issues in my view. What I can see that is material is that he deposed that the respondent has colluded with the Land officers to nullify all subdivisions emanating from the parcel No. 962 instead of the parcel No. 1420 which was subject of the dispute in court. He avers that the portion he purchased now has old blue gum trees.
 8. In reply the respondent reiterated that what he sold was the upper portion and through disguise the applicant wants to review and/or vary the judgment. He argues that the instant application is a new suit in disguise.
 9. I have studied the report by the Land Registrar and District Land Surveyor, and also the report filed by the respondent's private surveyor. There are actually two reports of the District Land Registrar and District Surveyor. The first is dated 26 August 2021 and reveals the following:
 1. That the land parcel Central Kitutu/Mwabundusi/962 is an adjudication parcel registered in name of the respondent.
 2. On 23 December 2005, subdivision of the parcel No. 962 was done resulting into six parcels being the parcels Central Kitutu/Mwabundusi/1338-1343.
 3. Later, the parcel Central Kitutu/Mwabundusi/1420 was introduced purporting to originate from the parcel No. 962.



4. Upon cancellation, the acreage was to be reverted to parcel No. 1338 belonging to the plaintiff for proper subdivision.
5. On 13 May 2021 a portion measuring 50 x 100 feet was excised from the parcel No. 1338 belonging to the plaintiff for the interest of the defendant as was stated in the decree and marked on the ground.
6. Since the excised piece was on the lower side and could not be landlocked, a road of access measuring 4m wide was marked on the ground to serve the parcel. The plaintiff was against this as he never wanted an access road to be provided to the defendant.
7. The plaintiff later stopped the process of implementing the paper work on decree as marked on the ground and we could not file back to court since the case was marked as settled.
10. The second report is that dated 30 November 2023. It identifies both lower and upper portions as being on the land parcel No. 1338. The upper portion was largely abandoned. The lower portion had mature eucalyptus trees.
11. The report of the respondent's private surveyor is done by Land Systems Company. The report seems to suggest that the respondent has subdivided the land parcel No. 962 into nine parcels being the parcels No. 3123 – 3131. This insinuates that after the judgment the whole land was reverted to the parcel No. 962 and the respondent obtained consent to subdivide it into 9 portions and he has proceeded to do so. According to this survey report the lower side wished by the applicant falls under the parcel No. 3128 and the upper portion wished by the respondent falls in the new parcel No. 3130.
12. It is obvious that the parties cannot agree on how the decree is to be executed and there appears to be a change in the registration of the land. I am particularly intrigued by the report dated 26 August 2021 which insinuates that the parcel No. 1420 was superimposed as the correct subdivision of the parcel No. 962 was only the parcels No 1338 – 1343.
13. I have gone back to the proceedings and judgment to see how the two contrasting positions can be reconciled. I have taken particular interest in the evidence of the Land Registrar. He testified that the original parcel No. 962 was closed on subdivision on 9 August 2006 to create the parcels No. 1338-1343. Parcel No. 1338 was closed on 2 December 2014 to create the parcels No. 2130 and 2131. The other parcels No. 1339-1342 remained in the name of the respondent. Parcel No. 1342 was subsequently transferred to one Zablon Osoro on 17 August 2007 and he was issued with a title deed on 6 September 2007. He had no document in respect of the parcel No. 1420 in his records and he was categorical that such parcel could not have emanated from the parcel No. 962.
14. There was also the evidence of the County Surveyor. His evidence was that the parcel No. 962 was subdivided into the parcels No. 1338, 1340, 1341, 1343 and 1420. He did testify that the mutation form appears to have been manipulated as the sequence 1338-1343 was broken and the parcel No. 1420 appears to have been an addition. He concluded that it was an erroneous insertion.
15. In the judgment, the learned judge did find that the parcel No. 1420 was registered unprocedurally and unlawfully. She found that the same is liable to be cancelled. She held as follows:

Having made a finding that the title No. Central Kitutu/Mwabundusi/1420 was obtained unprocedurally and unlawfully, the same is liable to be cancelled. However, since the plaintiff admits that he sold a parcel of land measuring 50 ft by 100 feet to the defendant and put him in possession thereof, it will be necessary for the register to be rectified so that the defendant is issued with a title measuring 50 feet by 100 feet. The remaining 0.21 Ha shall



revert back to the plaintiff. I therefore find that the plaintiff has proved his case on a balance of probabilities. In order to meet the ends of justice, I enter judgment for the plaintiff and make the following final orders:

- a. A declaration is hereby issued that the inclusion of the portion of land measuring 0.21 Ha in LR No. Central Kitutu/Mwabundusi/1420 in favour of the defendant was unprocedural and unlawful.
- b. Title No. Cental Kitutu/Mwabundusi/1420 is hereby cancelled.
- c. The parcel of land which is currently occupied by the defendant and which was illegally registered as LR Central Kitutu/Mwabundusi/1420 be re-surveyed and a portion measuring 50 feet by 100 feet be registered in the name of Yuvenalis Mosioma Miroro (defendant) while the portion measuring 0.21 Ha be excised therefrom and the same do revert to the name of Michira Otuke (plaintiff).
- d. Upon prayer (d) being implemented, a permanent injunction is hereby granted restraining the defendant from entering upon, cultivating, occupying, encumbering and/or dealing with the plaintiff's portion of land measuring 0.21 Ha currently registered as part of LR Central Kitutu/Mwabundusi/1420 in such manner as is detrimental to the interest of the plaintiff.
- e. The defendant to give vacant possession of the portion measuring 0.21 Ha currently registered as part of Central Kitutu/Mwabundusi/1420 within 20 days failing which eviction shall issue upon application.
- f. The costs of this suit shall be borne by the defendant.

16. From the above, it will be seen that the court appreciated that the title to the land parcel No. 1420 was illegally created and proceeded to cancel it as shown in order (b). If it was illegally created and it was cancelled then it ceased to exist. I find the place of order (c) (d) and (e) difficult. If the evidence showed that the parcel No. 962 was already subdivided into the parcels No. 1338-1343 and the parcel No. 1420 illegally created and it had already been cancelled pursuant to order (b), then the purported parcel No. 1420 could not be resurveyed. There was nothing to survey regarding this title as it did not exist upon its cancellation. There could also be nothing to excise from it as whatever land it covered must have been covered by the correct subdivisions which were identified as Nos. 1338-1343. If you proceeded to curve out a portion of 0.21 Ha from the purported No. 1420, in reality, what you will end up doing is subdividing one of the parcels No. 1338-1343. In my opinion, there is an error apparent on the face of record as order (b) cannot be reconciled with orders (c) (d) and (e). It is this that has made it impossible to implement the judgment. I am moved to review orders (c) (d) and (e) of the judgment and rest the judgment on orders (a) (b) and (f).

17. In my opinion, upon cancellation of the title to parcel No. 1420, the applicant had no title. He would have to now demand whatever he bought from the one who sold to him. The particulars and details of what was sold was actually not an issue for trial and the trial court was ill equipped to pronounce what land was subject of the sale between the appellant and respondent. In my opinion, the issue of what land was sold is a new cause of action that cannot be determined in a post judgment application in this matter as it will require evidence through a hearing. This would be the best path to take especially considering that there is a possibility of further subdivisions having been undertaken by the respondent as displayed in the survey report of his surveyor. The possibility exists that the applicant may very well be demanding land from titles that are now owned by other people.



18. It is in light of the foregoing that it is my considered view that the applicant should proceed to file suit to demand what was sold to him. Evidence can be taken and a decision made on merits.
19. For the above reason, I will dismiss this application. I will however not make any orders as to costs.
20. Orders accordingly.

DATED AND DELIVERED THIS 3RD DAY OF OCTOBER 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT AT KISII

Delivered in presence of: -

Mr. Okemwa h/b for Mr. Nyambati for defendant/applicant

Mr. Mulisa present for the plaintiff/respondent

Court Assistant – David Ochieng’

