



**Gesanda & 9 others v School Committtee Nyamwetureko Primary School & 2 others
(Environment & Land Case 34 of 2021) [2023] KEELC 15907 (KLR) (2 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 15907 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT & LAND CASE 34 OF 2021**

**JM KAMAU, J
MARCH 2, 2023**

BETWEEN

- NYAKWEBA GESANDA 1ST PLAINTIFF**
- JAPHET MAYAKA MONG'ARE 2ND PLAINTIFF**
- WILLIAM MWASI OCHARO 3RD PLAINTIFF**
- NYACHIRO OBANYI 4TH PLAINTIFF**
- PETER MOSOMI ONDIEKI 5TH PLAINTIFF**
- ANDREW NYAMORA OBANYI 6TH PLAINTIFF**
- NYACHIRO KIBWOGO 7TH PLAINTIFF**
- BENSON OMOGA KIBWOGO 8TH PLAINTIFF**
- MWAMIYOGO SELF HELP GROUP 9TH PLAINTIFF**
- SEVENTH DAY ADVENTIST CHURCH EA LTD 10TH PLAINTIFF**

AND

- THE SCHOOL COMMITTEE NYAMWETUREKO PRIMARY
SCHOOL 1ST DEFENDANT**
- THE COUNTY LAND REGISTRAR, NYAMIRA 2ND DEFENDANT**
- THE COUNTY SURVEYOR 3RD DEFENDANT**

(Formerly in the Environment & Land Court at Kisii Case No. 1280 of 2016)



JUDGMENT

1. The said parcels of land border parcel number West Mugirango/ Siamani / 1101 belonging to the 1st Defendant herein, a Public Primary School Institution established under the *Basic Education Act*. The 2nd Defendant is the Land Registrar, Nyamira and the 3rd Defendant the County Surveyor.
2. It is the Plaintiff's case that there has been a long-standing boundary dispute between the 1st Defendant on one hand and the respective Plaintiffs on the other and the 2nd and 3rd Defendants have failed to resolve the same hence neglecting their duties under the law. The Plaintiffs therefore pray that this court compels the 2nd and 3rd Defendants to determine the boundary dispute between parcel numbers West Mugirango/Siamani/1101 on one hand and LR West Mugirango/ Siamani/779, 807, 1538, 1540, 2371, 3417, 3733, 3978, 4657 and 5515 on the other. And in case there is any encroachment by the 1st Defendant, an eviction order be issued. The 1st Plaintiff's written statement accompanying the Plaintiff repeats these averments while all the other Plaintiffs echo the same.
3. On its part, the 1st Defendant, by a statement of Defence dated July 16, 2019 denied any encroachment and averred that the 2nd and 3rd Defendants visited the locus in quo and filed a Report that vindicated the school. She therefore asks the court to dismiss the claim. In his statement Mr Samuel Maosa, the Chairman of the 1st Defendant claimed that the 5th Plaintiff who used to be a teacher in the school and who bought a piece of land adjacent to the school and later incited his Co-Plaintiffs that there is encroachment. He also instigated the other Plaintiffs to demolish the school fence hence compromising the security of the school community and that the Plaintiffs among other things have been misusing the school toilets, which has put the learners' hygiene in jeopardy. Zablon Osano, the Vice Chairman of the school reiterated the same statement.
4. The Hearing of the suit commenced with Mr Solomon Njoga, a private Surveyor, with Prime Surveyors, based in Kisii Town testifying that on February 14, 2022 with the Plaintiffs' instructions he visited the boundary in dispute to establish whether the 1st Defendant had encroached onto the Plaintiffs' parcels of land. He compared the boundaries on the ground with the Preliminary Index Diagram Maps (PIDs) and the mutation forms both from Survey of Kenya. He made the following observations: -
 - a. On paper the Preliminary Index Diagram (PID) and the mutation records accurately tallied.
 - b. However, on the ground, there were anomalies.
5. He listed the anomalies and produced the Report he made dated October 12, 2022 in court. He concluded his testimony by saying that the 1st Defendant had encroached onto the Plaintiffs' parcels of land. The Private Surveyor says that:-

The physical ground measurement differs from the scaled measurement of both Preliminary Index Diagram (PID) Map and certified mutation forms from survey records as follows: -



Names	Parcel No.	Size	Acreage
NyAkweba Gesanda	2371	16 X 10	0.016ha
Josphat Mayaka Mong'are	1540	24 X 12	0.029ha
William Mwasi Ocharo	807	74 X 6	0.044ha
Nyachiro Obanyi	3733	10 X 16	0.016ha
Peter Mosomi Ondieki	5515	6 X 30	0.018ha
Andrew Nyamora Obanyi	771	16 X 49	0.078ha
Nyachiro Kibwogo Survey Help Group	779	24 X 14	0.031ha
Benson Omboga Kibwogo	893	25 X 17	0.042ha
Mwamiyogo Self Help Group	1538	9 X 50	0.045ha
Seventh Day Adventist Church Ea Ltd	4657	28 X 12	0.033ha
Total 0.352Ha			

6. Columns 3 and 4 of the table above do not indicate what the acreage shown refers to and the court cannot speculate.



7. Curiously though, the Report does not indicate by what measurements the encroachment is. We cannot speculate. The private Surveyor even made the work of the court more difficult by giving an incomplete report which states that:

'Due to the nature of work, there was need to cover so many plots for the accuracy of the job.'

8. I find this to be very unfair to the private surveyor's clients.

9. It is noteworthy to indicate that this report was the second one that replaced an earlier one dated February 14, 2022 which was withdrawn in favour of the latter. There was enough time to do the survey work since February 2022 and compile a thorough report before the hearing of the case on November 22, 2022 and the question of there being no time to cover so many plots for the accuracy of the job does not arise. In any case the witness is admitting that he didn't do an accurate job and his Report is therefore quite unreliable. This is so disturbing when you put into consideration that when the matter came up for hearing first on October 6, 2022 the surveyor was given more time to bring some documents that he had not supplied to the Defendants i.e the sketch diagrams. When he came back on October 27, 2022 he came with another Report other than the one he had produced earlier on dated February 14, 2022. He withdrew the earlier one and replaced it with the one dated October 12, 2022. He therefore had enough time to do the work he was instructed to do, having visited the locus in quo in February 2022, more than 7 years earlier.

10. Although the Report does not indicate so, Mr Njoga told the court that the last column shows the size of the encroachment. The same is not substantiated. How did he arrive at those figures? The private surveyor also admitted that he did not know the acreage of the Defendant's land. He justified his Report by claiming that what was in the mutation forms is what informed his calculation of the Plaintiffs' acreage. The said mutation forms were prepared by a private surveyor who never came to court to explain how he arrived at the acreages.

11. On his part, the Nyamira County Surveyor Mr Francis Oganda said that he visited the parcels of land on May 23, 2022 in the presence of all the respective parties as well as Nyamira Land Registrar Mr Martin Osano. He also failed the court because he testified that he did not take measurements of the Plaintiffs' parcels of land. In his Report dated June 9, 2022 Mr Oganda said that with the help of the Registry Index Map (RIM) and the GPS machine and measuring tape he found out that the boundaries of the Defendant's school were intact and that there was no encroachment into the Plaintiffs' parcels of land and that there is an undisputed road around the school. Mr Oganda also produced in court a sketch of the school and the Plaintiffs' parcels of land which he would want the court to find in favour of. He testified that the surrounding road was done by the County Government of Nyamira.

12. The last witness in this case, Mr Martin Osano, Land Registrar, Nyamira produced his Report dated May 23, 2022. He said that he relied on the County Surveyor's Report dated May 23, 2022 to conclude that there was no encroachment and that he believed this because there was a road surrounding the 1st Defendant school.

13. The burden of proof in this case squarely lies with the Plaintiffs. It would never shift. They relied on their private surveyor to carry out the survey work on the ground and then write a Report to show that there was encroachment of their parcels of land by the 1st Defendant school. The said surveyor, Mr Njoga did not discharge this burden in spite of all the time he had. On her part, the 1st Defendant was able to produce a sketch map in court to prove that the 1st Defendant's land has not encroached onto the Plaintiffs'.



14. The Plaintiffs did not aver nor does their Surveyor's Report indicate that the road between their parcels and the 1st Defendant's land had encroached onto their lands. Nor did they claim that their parcels of land have gone beyond the road. If the road does not encroach onto their parcels of land, how then could the 1st Defendant's land, further away have done so?

Consequently, I dismiss the case with costs.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 2ND DAY OF MARCH 2023.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Sibota

Plaintiffs: Mr. Soire

Defendants: Mr. Nderitu

