



**Sibwoga v Omenge & another (Environment & Land Case 371 of 2015)  
[2023] KEELC 21422 (KLR) (9 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21422 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND CASE 371 OF 2015**

**M SILA, J**

**NOVEMBER 9, 2023**

**BETWEEN**

**DAVID ORINA SIBWOGA ..... PLAINTIFF**

**AND**

**SALOME KWAMBOKA OMENGE ..... 1<sup>ST</sup> DEFENDANT**

**MONICA BARONGO OSORO ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

(Application by the plaintiff complaining that the respondents have failed to comply with the judgment; judgment having been entered in favour of the applicant for a portion of the suit land by dint of the doctrine of adverse possession; respondents filing a reply indicating that they have engaged a surveyor and have carved out the portion of land of the applicant; no merit in the application and the same is dismissed with costs)

1. The application before me is that dated 3 August 2023 filed by the plaintiff. He wants orders directing the County Surveyor to demarcate and carve out a portion of land measuring 58 X 118 feet out of the land parcel West Mugirango/Nyamaiya/2180 (the suit land) in accordance with the judgment delivered on 22 July 2021. He further seeks orders to have the 2<sup>nd</sup> defendant ordered to reopen a road of access measuring 5 feet going to his portion to be carved out of the suit land, which the plaintiff contends that she closed without any colour of right.
2. The application is opposed.
3. To put matters into perspective, the applicant commenced this suit through an Originating Summons dated 31 July 2015, vide which he sought to be declared owner, by way of adverse possession, of a portion measuring 58 X 118 feet out of the suit land. He claimed to have purchased this portion from the erstwhile proprietor who was husband and father of the respondents. The case was resisted by the respondents and the matter proceeded for hearing. Judgment was delivered on 22 July 2021 in favour of



the applicant. Within the judgment, the respondents were ordered to subdivide the suit land into two portions and cause the portion measuring 58 X 118 feet to be registered in the name of the applicant. They were ordered to execute all requisite documents in default of which the Deputy Registrar of this court was directed to do so. In this application, the applicant contends that the respondents have failed to comply with the above orders of the court. He adds that on 29 October 2022, the 2<sup>nd</sup> respondent deliberately closed the access road to his portion by erecting a permanent wall on a 5 feet road that was in his agreement dated 6 October 1993. He avers that the contents of that agreement are binding. He has added that he has already obtained consent to subdivide from the Land Control Board which he has annexed.

4. The respondents filed a replying affidavit sworn by Monica Barongo Osoro, the 2<sup>nd</sup> respondent. She acknowledges that the court did deliver judgment on 22 July 2021. She does not contest the judgment and has denied interfering with the land of the applicant. She deposes that the applicant still lives on the same portion that he claimed and he can freely access it without any inhibition. She has elaborated that while this case was pending, another dispute arose within her family over the same land and the suit Nyamira ELC No. E034 of 2021 was filed. She deposes that an injunction was issued in that case stopping any interference with the land and she could not thus proceed to subdivide the land. She proceeded to state that the dispute in Nyamira ELC No. E034 of 2021 was resolved through court annexed mediation and it was agreed that the land would be divided equally among the members of the family. She adds that despite the agreement, they proceeded on the understanding that the portion of land occupied by the applicant would not form part of what is to be subdivided among the family as they were fully aware of the judgment of this court. She deposes that to effect the judgment of this court and the mediation agreement, they instructed a surveyor to help with the subdivision and also invited the applicant to be present, but he failed to turn up during the survey process, and also refused to contribute towards the costs of the survey. She states that the surveyor concluded the subdivision process and identified the access roads. She has annexed the survey report and mutation forms. She avers that even in the absence of the applicant, they proceeded to ensure that the subdivision did not interfere with the applicant's portion of 58 X 118 feet. She denies closing any road of access and contends that the applicant is able to enter and exit the property he adversely possessed and which he is in occupation of. She believes that the applicant wants to dishonestly deprive them more land under the guise of an access road being created. She states that it is unlawful for the applicant to purport to create a road of access on private property yet there are clearly marked access roads. She continues to express that the applicant has access from his land right next to the main road and so it is inconceivable that he should complain about not accessing his property. They have no problem if another survey is done but asserts that this should be done at the applicant's cost since they have already paid for a survey that has been completed. They ask that this application be dismissed with costs.
5. I would have expected that the applicant would file a supplementary affidavit to challenge all the above but he filed nothing.
6. I have given due consideration to the application. It would appear that the respondents are actually complying with the judgment of the court given their explanation. Contrary to the allegation of the applicant that the respondents have not engaged a surveyor to comply with the judgment, there is a survey plan which has been annexed to the replying affidavit, and it does show that the respondents have set aside the land of the applicant. They have indeed explained that they have left undisturbed the area occupied by the applicant and they have even created a road of access for him to the main road. I have seen the survey plan they have attached and the applicant has not contended that it is not in conformity with the judgment. I wonder why the applicant is complaining. If indeed he had an issue, he ought to have pointed it out to the respondents who appear more than ready and willing to listen



and accommodate him. There was no purpose in filing such an application given the steps that the respondents have made towards satisfying the judgment.

7. I see no merit in this application and it is hereby dismissed with costs. I observe that the court in the judgment of 22 July 2021 directed each party to pay his/her own costs. Given that there will be no taxation of costs arising from the judgment, in my discretion, I straight away assess the costs payable to the respondents at Kshs. 10,000/= for this application.
8. Orders accordingly.

**DATED AND DELIVERED AT KISII THIS 9 DAY OF NOVEMBER 2023.**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT AT KISII**

