



**Opondo v Hainja & another (Environment & Land Case
28 of 2013) [2022] KEELC 2626 (KLR) (7 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2626 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 28 OF 2013**

**AA OMOLLO, J
JULY 7, 2022**

BETWEEN

PASCAL OKOTCH OPONDO PLAINTIFF

AND

LUCAS PETER HAINJA 1ST DEFENDANT

NICHOLAS OMBERE OBIBA 2ND DEFENDANT

JUDGMENT

1. Via a plaint dated 22nd April 2013, the plaintiff sued the defendants seeking for judgment as follows;
 - a) An order of permanent injunction to restrain the defendant for further acts of trespass into land Parcel No. Bunyala/Bukoma/306.
 - b) An order for compensation for the destroyed properties and for loss of user.
 - c) Costs of this suit and interests.
2. The plaintiff impleaded that he is the registered owner of L.R No. Bunyala/Bukoma/306 while the defendants reside on neighbouring parcel L.R. No. Bunyala/Bukoma/309 which they inherited from their grandparents/father and/or is their ancestral home. On or about 2nd October 2012, the defendants purportedly acting on strength of an eviction order against another person obtained from court in Busia Chief Magistrate Land case No. 45 of 2007 deliberately trespassed into the plaintiff's land and maliciously demolished a three-door semi-permanent rental house, carried away several truckloads of sand and building stones which the plaintiff had bought of construction, cut down and uprooted eucalyptus trees, cut down and destroyed a plantation of orange, mango and lemon trees.
3. The defendants entered appearance and filed a joint defence dated 21st June 2013. The defendants denied the allegations contained in the plaint and put the plaintiff to strict proof thereof. They stated that the suit is res judicata as the parties have been heard in Busia High Court JR No. 3 of 2012 and



- Busia PM Land Case no. 45 of 2007 over the same subject matter. They stated that the plaintiff's suit raises no reasonable cause of action, is scandalous, frivolous and an abuse of court process and ought to be dismissed with costs.
4. A consent Orders was issued on 2nd October 2013 consolidating this suit with BUSIA HCCC No. 50 of 2013 (O.S). However, the parties proceed to hearing without inclusion or mention of the pleadings in BUSIA ELC 50 of 2013. The order of consolidation was thus not effected.
 5. The matter proceeded for hearing on 30/6/2021 with the plaintiff testifying as PW1. He testified that he got to know the 1st defendant when he demolished his house on L.R. No. Bunyala/Bukoma/306 which is his land. He produced the title deed and copy of official search as PEX 1 and 2. The plaintiff stated that on 2/10/2012, he got surprised when Peter came with a court order and demolished his house destroying everything in it. That the order used to demolish his house was in respect of land case No. 45 of 2007 issued on 1/10/2012 which case, was between Peter Lucas against Zacharia and William. He added that the case concerned L.R. No. 1823 which is not his and produced the eviction order as PEX 3. The witness described the house demolished as comprised 3 doors, 2 doors of which were rented while he was using one door to sell porridge. He stated that the estimate cost of building the house was Kshs.88,000/= . He asked the court for compensation of the loss.
 6. Upon cross-examination by Mr Ashioya counsel for the defendant, PW1 stated that he is not a contractor but his fundi have him the estimate of materials required and he bought. He stated that the demolition was pursuant to a court order in land case No. 45 of 2007 adding that the land of Nicholas neighbours the land of Jacob Nandeke but he does not share a boundary with the defendant's land. That he brought the surveyor to identify the boundaries though he did not produce the survey report. He admitted that in paragraph 5 of his affidavit dated 9/5/2013 says L.R. No. 309 neighbouring his land on the south side. He stated that he knows his boundaries and that the order did not concern him. On re-examination, he said that his complaint is the demolition of his house without any cause.
 7. The plaintiff's second witness was Edwin Otieno Oduro- a valuer. PW2 stated that on 21st July 2020, he prepared a valuation report in respect of L.R. No. Bunyala/Bukoma/306 registered in the names of Okoch Opondo. On instructions received from the plaintiff he had visited the parcel to view the damages on the land which included a semi-permanent house and pit latrine with gal-sheet roofing. He returned a value of Kshs.3,190,000/= for the value of the land and the damaged buildings and produced his report as PEX 4.
 8. On cross examination, PW2 stated that he was not told when the buildings were damaged and at the time of writing his report, the buildings had been completely destroyed. What remained is what looked like a foundation which enabled him to estimate the size of the buildings but that he relied on information from the plaintiff as regards the materials used. and he was not told that the demolition was pursuant to a court order.
 9. The defendant's first witness was Peter Lucas Hainjawho adopted his witness statement dated 21/11/2013 as his evidence in chief. He testified that in the year 1961 during the perennial floods in Bunyala, the plaintiff's father, Opondo-deceased gave them a 70FT by 50FT compromised on L.R. No. Bunyala/Bukoma/306 measuring approximately 0.23HA to live thereon as their home. The said Opondo was a maternal relative to his uncle Obiba Ombere and such portion was only meant for them to build their home. DW1 said that although the plaintiff and him come from the same clan but they do not live within the same homestead. They then did land demarcation, slashing and cutting down of unnecessary trees to enable them create space for putting up their home.
 10. The 1st defendant continued in evidence that they planted thereon several species of trees to create a conducive atmosphere within which to put up their home on the 0.23HA comprised on L.R.



No. Bunyala/Bukoma/306 and they have been in peaceful, open and uninterrupted occupation and possession of the portion measuring 0.23 HA comprised on L.R. No. Bunyala/Bukoma/306 from the year 1961 until the time of death of the plaintiff's father Mr. Opondo who was the previous registered owner. They have buried members of their family amongst them their father, mother, grandchildren and Obiba Ombere on the portion that measures 0.23HA comprised on L.R. No. Bunyala/Bukoma/306. He asserted that they qualify by way of adverse possession to be in occupation of 0.23ha on L.R. 306. He indicated that L.R. No. Bunyala/Bulemia/306 does not border L.R. No. Bunyala/Bulemia/309 as alleged by the plaintiff. The witness mentioned their award from the Land Disputes Tribunal which was adopted as an order of the court and the plaintiff was present during the hearing. They were given an order for Zacharia Otieno to move out of the suit land. He denied that the plaintiff has lived on the suit portion and denied the houses that were removed belonged to the assistant chief Otieno Opere. He produced the order and proceedings in the lower court as DEX 1 and 2. He also produced the proceedings in Petition No. 3 of 2012 which was filed by Zacharia Otieno as DEX 3. He stated that the plaintiff's claim is misplaced as they have never lived with him in the same home since 1962.

11. Upon cross-examination by Mr Ipapu learned counsel for the plaintiff, DW1 affirmed that L.R. No. 306 is registered in the name of Okoch Opondi but he has sued the plaintiff claiming ½ acre being the portion they have lived on since 1962. He filed a case before the tribunal in 2005 claiming land parcels No. 306, 307 and 308. According to them, the Obiba homestead was built on land comprised of numbers 306, 307 and 308. That the plaintiff's participation was as a witness in the proceedings before the tribunal. That the order in no. 45 of 2007 was issued against Odiaga Mwoya who had sold the land to Zacharia Otieno Opere. He said that L.R. No. 1823, L.R. 306 and L.R. 308 are neighbouring each other. They executed the order of eviction by demolishing the houses of Zacharia Otieno Opere without the surveyor during the execution process. That the picture on the valuation report is of Okoch Opondo in his home. He stated there was no demolition of Okoch Opondo's house. On re-examination, he said that they demolished houses belonged to Zacharia Otieno and not the plaintiff.
12. The 2nd defendant Nicholas Ombere Obiba adopted the evidence DW1. On cross-examination, he stated that the plaintiff is their neighbour who lives on parcel No. Bunyala/Bukoma/306. They got an eviction order which they executed and they did not require the surveyor to demolish the houses of Otieno Opere which was built in their home. He stated that Mzee Obiba's home was built on 4 parcels numbers 306-309. The eviction order was directed to Odianga Omwoyo and his tenants and it was done in the presence of the OCS.
13. On re-examination, the witness stated that the order did not require them to carry out a survey before executing the order. They knew the houses which belonged to the assistant chief and they could not confuse the assistant chief's houses with the plaintiff's. He said that he did not live with the plaintiff in the same homestead and there is a tarmacked road separating their home and the plaintiff's home.
14. Parties exchanged written submissions. The plaintiff submitted that the defendants obtained an eviction order which they admitted on record was executed. He submitted that he has produced in evidence the valuation report which showed that the total loss occasioned was a total of Kshs.420,000/= and had therefore proved his case on the required balance of probability. The defendants on their part submitted that the contest between the parties is still alive before a competent court of jurisdiction and therefore Section 7 and 8 of the *Civil Procedure Act* mandates that this court has no jurisdiction to make a decision on the matter. They stated that the eviction was carried out in 2012 and the valuation was carried out in 2021 and the valuer admitted that he relied solely on the information given by the plaintiff since the houses had been flattened and the foundation of the houses if any on the ground had been overgrown by vegetation. Also, the valuer giving the estimate values to the structures beats



logic as the plaintiff has no particulars of special damages. On the prayer of permanent injunction, they stated that no evidence had been laid before court that the defendants are using the applicant's land and from the photographs in the valuation report, the land looks fallow and unused. They prayed for the dismissal of the suit with costs. They relied on the decision in Nairobi Hccc Case No. 4272 of 1992 *Mathew Mutua Mutio Versus Car General (k) Ltd.*

15. The court raises the following issues arising for determination;
 - a) Whether the plaintiff is entitled to a permanent injunction as prayed against the defendants;
 - b) Whether the plaintiff is entitled to an order of compensation for destroyed properties and loss of user;
 - c) What orders should this court make?
 - d) Who should pay the costs of the suit?
16. On the claim for trespass, the plaintiff testified that he is the legal owner of L.R. No. Bunyala/Bukoma/306 and produced a copy of title deed and copy of official search to demonstrate his ownership. He told the court that the defendants acting on orders obtained from Busia PM Land Case no. 45 of 2007 in which he was not a party to, proceeded to destroy his property on Bunyala/Bukoma/306. The said order which is dated 24th September 2008 was an adoption of the decision of the Budalangi Land Disputes Tribunal issued on 8/8/2007. The parties to the suit before the Land Disputes Tribunal was the 1st defendant herein and one William Odiaga Mwoya. The said order was in relation to Bunyala/Bukoma/1823 and 1824 which are subdivisions of L.R No. Bunyala/Bukoma/307. The plaintiff further relied on the report produced by PW2 to show that the demolished buildings were on the suit land and the loss he incurred.
17. The defendants on their part maintained that the eviction orders were against one Zacharia Otieno Opere and the demolished buildings were on L.R. No. Bunyala/Bukoma/307 and not on Bunyala/Bukoma/306 as claimed by the plaintiff. DW1 in his evidence admitted that L.R. 1823, 306-308 are neighbouring each other while DW2 stated that though the suit parcels are neighbouring each other, they are separated by a tarmacked road. To buttress their defence, the defendants produced a copy of the order emanating from case No. 45 of 2007 and proceedings in Petition no 3 Of 2012.
18. There is no dispute that the plaintiff is the registered owner of L.R. No. Bunyala/Bukoma/306. The two issues in dispute are first, whether defendants are staying on the suit land either as trespassers or they have acquired rights by operation of law. The second issue is whether or not the eviction order executed and resulted in the demolition of the plaintiff's house which house he has valued at Kshs.420,000. From the pleadings and evidence adduced by the defendants, they are claiming adverse possession of ½ acre of the plaintiff's land which shows that they are in one way or another they are utilizing a portion of suit land. According to the plaintiff, the defendants entered this land on 2nd October, 2012. The plaintiff said he made reports of the invasion to Port Victoria police Station citing some OB numbers although no copies of the same or evidence of such a report made was availed.
19. For this court to award the plaintiff the order of permanent injunction, he had to prove and not merely state that the defendants entered the suit land in October 2012. In his affidavit dated 2nd July 2013, the plaintiff admits the defendants had a dispute over L.R. No. Bunyala/Bukoma/1823 which was a subdivision of 307. From the series of their numbering, it is implied that the two parcels of land neighbour each other. Therefore, if the defendants took occupation of parcel No. 1823 by virtue of execution of a court order and which is the period the Plaintiff avers the action of trespass took place, then there was need to prove by way of survey report that while the defendants extended their



occupation to the Plaintiff's parcel as at October 2012. I am alive to the admission by the defendants to be occupying part of parcel 306 measuring 0.23ha which they say has been for over twelve years. I choose not to take their admission as proof of trespass on the basis that the Plaintiff alleged the invasion took place from October 2012 under the guise of executing a court order. Therefore, my finding that the acts of trespass have not been proved is for want of proof that using the execution process, the defendants entered into a portion of the suit property.

20. The plaintiff was aware that the eviction exercise was pursuant to a court order however, he blames the defendants for demolishing his house yet he was not a party to those proceedings. From a perusal of a copy of the order produced as pex3, it is indeed true that the plaintiff was not a party to the case from which the order was issued. The defendants asserted that the house demolished belonged to the assistant chief Zachary Otieno Opere. The defendants said they were sure the demolished house did not belong to the plaintiff. They relied on the pleadings and proceedings in Busia High Court Pet. No. 3 of 2012 initiated by Zachary Otieno Opere and Lucas Hainja and two others. At paragraph 7(1) of petition giving particulars of breach and violation of his rights, Mr Otieno Opere pleaded thus;

“Humanity Dignity under Article 28 of the Constitution: that on various dated between 27/9/2012 your petitioner a, the behest of agents of the 1st and 3rd respondents was subjected to undignified treatment including harassment and threat of eviction and physical assault to self and his property by persons known to him, was humiliated and had his homestead demolished, had his personal effects, clothing and other items spread all over for public view and was forced to leave his property and seek refuge in a market place. All this was happening in the presence of his children and other closer family members.”

And in 7(4) he pleaded thus;

“Protection of Right to Property under Article 40: That on various dates as stated herein about and or thereabout your petitioner's right to property and peaceful ownership of the same have been breached, which violation still persists. Your petitioner is the legal and registered owner of land parcels number Bunyala/Bukoma/1823. That sometimes on 2nd July 2012 your petitioner's property on land parcel Number Bunyala/Bukoma/1823 were destroyed. Your petitioner made a report thereof to the police and had the damage assessed but no action has ever been against the perpetrators of this damage. That again on 1st March 2011 the 3rd Respondents kin was on land parcel number Bunyala/Bukoma/1823 in total disregard of a court order which had been granted vide civil suit number 50/2011. That again on the 27/9/2012 known people attempted to evict your petitioner from his land parcel number Bunyala/Bukoma/1823 and in the process demolished your petitioners kitchen and bathroom. That on the 1st October 2012, the same people returned and went ahead to evict your petitioner from his said parcel and flattened his home, destroyed all your petitioner's property and restrained his re-entry/return.”

21. Mr Zachary Otieno, the petitioner for orders inter alia compensation and restoration of the petitioner against the Respondents jointly and severally. At page 5 of a ruling delivered on 20th March 2013 in the said petition, the judge noted that the Petitioner/Applicant through the affidavit in support of the application was no longer in possession of the land having been evicted. He also noted that the Respondent had been reportedly in occupation of the portion described in the Land Disputes Tribunal proceedings for over 40 years. The pleadings in the Petition case No. 3 of 2012 demonstrates that the person whose house was demolished is Zachary Otieno Opere and it appears from a reading of those pleadings that the house(s) demolished were not on parcel number 306. For this court to find otherwise, the plaintiff had a duty to prove that besides Zachary's house, his house was also



demolished. I found that he did not sufficiently do so taking note that he invited a surveyor to identify the boundaries but chose not to produce the survey report or call him as his witness.

22. In light of my findings that the plaintiff has not proved that the house demolished belonged to him, I find no basis to award compensation as prayed. In concluding, I reach a decision that the plaintiff has not proved his case to the required standards. As consequence, this suit be and is hereby dismissed with costs to the defendants.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 7TH DAY OF JULY 2022.

A. OMOLLO

JUDGE

