



**Ochoki v Siro (Environment & Land Case 351 of 2016)  
[2022] KEELC 2633 (KLR) (6 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2633 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND CASE 351 OF 2016**

**JM ONYANGO, J**

**JULY 6, 2022**

**BETWEEN**

**PETER AUMA OCHOKI ..... PLAINTIFF**

**AND**

**HELLEN NYAGAKA SIRO ..... DEFENDANT**

**RULING**

**Introduction**

1. By a plaint dated 28<sup>th</sup> October, 2016 the Plaintiff filed suit against the Defendant claiming that the Defendant who is the registered owner of land parcel number Nyaribari Chache B/B Boburia/ 3435 had trespassed into his parcel of land known as L.R No. Nyaribari Chache B/B Boburia/10130 and constructed some semi-permanent structures made of iron sheets thereon without his consent. He therefore sought an order of eviction and permanent injunction restraining the Defendant from interfering with the Plaintiff's parcel of land.
2. Together with the Plaint, the Plaintiff filed an application that pending the hearing and determination of the main suit, the Defendant by herself, her agents, servants and/or anybody claiming under her be restrained from interfering with, damaging, wasting, alienating, selling, disposing of the Plaintiff's land parcel known as L.R No. Nyaribari ChacheB/B Boburia/10130.
3. Upon being served with the Plaint, Summons to enter appearance and the Notice of Motion, the Defendant entered appearance and filed a Replying Affidavit sworn on the 14<sup>th</sup> November, 2016 denying that he was the registered owner of parcel number 3435. He however admitted that he was the registered owner of parcel number 3545 and that he had previously sued the Plaintiff vide Kisii CM Misc Application No. 111 of 2009 and the court had ordered that the Plaintiff should not interfere with the fixed boundary on parcel number 3545.



4. When the matter came up for inter partes hearing on 24<sup>th</sup> November 2016, the court noted that the disputes related to the physical location of the Plaintiff's and Defendant's parcels on the ground. The court then directed that the Land Registrar and County Surveyor Kisii County visit land parcels number 3545 and 10130 to establish their respective boundaries on the ground in terms of sections 18 and 19 of the [Land Registration Act](#), 2012 and file their report in court within 90 days.
5. The Land Registrar and County Surveyor visited the two parcels of land and filed their report dated 26.6.2018. On 25.10.2018 the court noted that the two officers had visited the site and established the boundary between the two parcels. The court endorsed the report of the Land Registrar as the judgment of the court and ordered that the parties implement the report by fencing their respective plots along the boundary fixed by the Land Registrar. The suit was then marked as settled with no order as to costs.
6. On 13<sup>th</sup> March, 2019 the Plaintiff filed an application seeking orders that the Defendant be evicted from the suit property and that she be ordered to remove her structures from land parcel no. 10130. The Plaintiff also prayed that the Defendant be detained in prison for a period of 30 days for obstructing the Plaintiff's peaceful occupation of the suit property.
7. The Defendant opposed the application through her Replying Affidavit sworn on the 2<sup>nd</sup> day of April, 2019. In the said affidavit she had fenced her plot in accordance with the court order and denied that she had obstructed the Plaintiff's peaceful occupation of the suit property.
8. When the application came up for hearing on 9<sup>th</sup> May 2019, counsel for Plaintiff informed the court that the Defendant had trespassed into the Plaintiff's land. In his response, counsel for the Defendant pointed out that in his report, the Land Registrar did not indicate whether there was any encroachment by either party. The court therefore directed the Land Registrar to visit the suit properties and confirm if there was any encroachment and file his report in court within 60 days.
9. In his report dated 15<sup>th</sup> June, 2021 the County Surveyor stated that they had re-visited the suit property and confirmed that the boundary was in the correct position. He noted that both parties had constructed iron structures on their respective parcels of land and no party had encroached on the other's parcel.
10. On 6.10.21 the parties agreed that the County Surveyor be called to attend court and clarify his report as the Plaintiff was of the view that the report was not clear on the issue of the structures constructed on the suit property. On 9.12.2021, Mr. Thomas Ongeru Orangi the County Surveyor attended court and confirmed that they had visited the suit properties and established that the parties had erected structures on their respective parcels of land. He stated that the Plaintiff owned parcels 10130 and 10112, while the Defendant owned parcel 3545. He stated that the Defendant's structures were on parcel no. 3545.
11. The Plaintiff was still not satisfied with the clarification provided by the County Surveyor and on 22.2.2022 he filed yet another application seeking orders that the Land Registrar and County Surveyor Kisii County be directed to put in place beacons on the boundary between parcels number Nyaribari ChacheB/B Boburia/10130 and 3545. The application is based on the Plaintiff's Supporting Affidavit sworn on the 22<sup>nd</sup> February, 2022. In the said affidavit, he acknowledges that the County Surveyor visited the suit property and filed a report dated 15<sup>th</sup> June, 2021 in which he made a finding that the exiting barbed wire fence separates the two parcels and agrees with the map i.e the boundary is in the correct position.



12. In her Replying Affidavit the Defendant depones that the application is res judicata as the court has already pronounced itself on the prayers being sought by the Plaintiff. The Plaintiff has attached the Land Registrar's reports dated 26<sup>th</sup> June, 2018 which was adopted as the judgment of the court and a further report dated 15<sup>th</sup> June, 2021 maintaining the same position as the one in the earlier report. The Defendant is therefore of the view that the Plaintiff is abusing the court process as the issues he is raising have already been determined by the court.

It is the said application that is the subject of this ruling.

13. The application was disposed of by way of written submissions and both parties filed their submissions which I have considered.

### **Analysis and Determination**

14. The only issue for determination is whether the Plaintiff's claim of trespass has been determined and whether the application dated 22.2.22 is res judicata.

The doctrine of res judicata is embodied in Section 7 of the *Civil Procedure Act* Cap 21 of the Laws of Kenya. This section provides as follows:-

“7. Res judicata

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

15. In the instant suit, the court observed that the main issue in dispute was that the Plaintiff was claiming that the Defendant who was the owner of land parcel no. Nyaribari ChacheB/B Boburia/3545 had trespassed into the Plaintiff's land parcel no. Nyaribari ChacheB/B Boburia/10130. The court therefore directed the Land Registrar and County Surveyor, Kisii County to visit the two parcels of land, establish their physical boundaries and file a report in court. The visit took place and the Land Registrar and County Surveyor filed their joint report dated 26.6.2018 in which they indicated that the boundary between parcels 10130 and 3545 had been fixed and established on the ground.
16. The court then proceeded to adopt the said report as the judgment of the court. Following the Plaintiff's application for eviction of the Defendant from parcel no. 10130, the court once again directed the County Surveyor to visit the suit property to establish whether the Defendant had encroached onto the Plaintiff's parcel of land and constructed structures thereon. The County Surveyor visited the suit property and confirmed that there was a barbed wire fence separating parcel number 10130 and 3545 and both parties had constructed iron sheet structures on their respective parcels of land. The report was categorical that none of the parties had encroached on either party's land.
17. From the foregoing, it is not in dispute that the issues in dispute have been addressed by the two reports filed by the Land Registrar and County Surveyor. It is not clear why the Plaintiff has filed another application seeking similar orders. The Land Registrar's report dated 26.6.2018 indicates that the boundary between parcels 10130 and 3545 had been fixed and that the report dated 15.6.2021 indicates that the fence is in the correct place and none of the parties has encroached on the other's parcel. The court has rendered its judgment and confirmed that the same has been implemented. It



is therefore my finding that the application dated 22.2.2022 is res judicata and the same is hereby dismissed. Each party shall bear their own costs.

**DATED, SIGNED AND DELIVERED AT KISII THIS 6<sup>TH</sup> DAY OF JULY, 2022.**

**J.M ONYANGO**

**JUDGE**

