



REPUBLIC OF KENYA



Nyambati & 2 others v Okere & 4 others (Environment and Land Case 314 of 2015) [2025] KEELC 6662 (KLR) (2 October 2025) (Judgment)

Neutral citation: [2025] KEELC 6662 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE 314 OF 2015**

E ASATI, J

OCTOBER 2, 2025

BETWEEN

**JASON M. NYAMBATI 1ST PLAINTIFF
JERUSA B. NYAMBATI 2ND PLAINTIFF
JAMES AGULO OKORA 3RD PLAINTIFF**

AND

**FLORENCE ATIENO OKERE 1ST DEFENDANT
PATRICK NGUJU OGUKE 2ND DEFENDANT
COUNTY GOVERNMENT OF KISUMU 3RD DEFENDANT
DISTRICT LAND REGISTRAR, KISUMU 4TH DEFENDANT
HON. ATTORNEY GENERAL 5TH DEFENDANT**

JUDGMENT

1. Vide the plaint dated 16th November, 2015 Jason M. Nyambati, Jerusa B. Nyambati and James Agulo Okora sued the Defendants herein. Their case was that the 3rd Plaintiff was the original registered owner of a land parcel known as Kisumu/Kasule/1571 which he sub-divided into various parcels including parcel No. Kisumu/Kasule/4240 which he sold to the 1st and 2nd Plaintiffs, Kisumu/Kasule/4494 which he sold to the 1st Defendant and Kisumu/Kasule/2770 sold to the 2nd Defendant amongst other many purchasers.
2. The Plaintiffs' complaint was that time and again, the 1st and 2nd Defendants have made concerted efforts to interfere with the public road of access which exists for the benefit of the general public. That the 3rd Defendant has threatened to move to the site and make access road through areas where no such public road of access exists and that if this is to be done, the property of the 1st and 2nd Plaintiffs



comprising of permanent residential and commercial multistorey building will be demolished, thereby subjecting the 1st and 2nd Plaintiffs to substantial loss of no fault of their own.

3. The Plaintiffs therefore sought for the following relief against the Defendants jointly and severally;
 - a. An order of permanent injunction restraining the Defendants by themselves, their employees, servants, agents or assigns from however interfering with the Plaintiffs' peaceful enjoyment of land parcel known as Kisumu/Kasule/4240.
 - b. An order directing the District Land Registrar, Kisumu in conjunction with the District Surveyor Kisumu to move to the site with a view to establishing the proper boundaries, beacons, extent, location and size of public access road as appropriate.
 - c. Costs of the suit.
 - d. Any other relief the honourable court may deem fit and expedient to grant in the circumstances.
4. In response to the Plaintiffs' claim, the 1st and 3rd Defendants' filed a Statement of Defence dated 5th February, 2016 denying the claim.
5. A memorandum of Appearance dated 8th December, 2015 was filed on behalf of the 4th and 5th Defendants by the Provincial Litigation Counsel.

The Evidence

6. On behalf of the Plaintiffs, three witnesses testified. PW1 was the 1st Plaintiff. He adopted the contents of his witness statement dated 16th November, 2015 as his evidence in chief.
7. He had reiterated the contents of the plaint in the said witness statement. He produced a copy of title deed for Kisumu/Kasule/1571, copy of title deed for Kisumu/Kasule/4240, letter dated 15th October, 2015, letter dated 16th May, 2008, consent for sub-division of land parcel number Kisumu/Kasule/1571, mutation for Kisumu/Kasule/4239, mutation for Kisumu/Kasule/3782, mutation for Kisumu/Kasule/3725, mutation for Kisumu/Kasule/3921 and letter dated 27th August, 2018 as exhibits.
8. On cross-examination, he stated that his land does not share a common boundary with the land of the 1st Defendant. That the 1st Defendant trespassed onto his land. That he had sued the 1st Defendant because the 1st Defendant wanted to demolish his house.
9. PW2 was one John Obura Nyagol. He testified vide his witness statement dated 17th August 2021 that he had been appointed by the Land Adjudication Officer, Kisumu Adjudication Area to be a committee member of the Kasule Adjudication. That he determined the boundaries of land parcel No. Kisumu/Kasule/1571 and that the said boundaries as determined by the adjudication process were as they were on the ground and not as they appeared on the map provided by the Land Registrar.
10. He testified further that one James Agulo Okora and one Washington Oruko Nyagol each voluntarily surrendered 3 metres of their respective parcels to pave way for creating the current access road passing between land parcels Kisumu/Kasule/1571 – 2770, 4494, 4240, 3784, 3783, 2922 bordering parcel No. Kisumu/Kasule parcel numbers 1847, 1731, 2423, 3729, 3730, 8116, 8117 and 1608. He testified further that parcel number 1571 and its sub-divisions were too far from parcel numbers 1601, 1792 and 1793. That there is disharmony between information on the ground and the information on the map and that the said map needs to be rectified to reflect the access road.



111. On cross-examination, PW2 stated that he was a committee member during land adjudication in the 1990s though he had no documents to show.
12. PW3, one Washington Ouko Nyagol, adopted the contents of his witness statement dated 18th August, 2021. He stated that he was the registered owner of land parcel number 3728 neighbouring parcel number 1571 belonging to James. That the 1st and 2nd Plaintiffs and the 1st and 2nd Defendants all bought their land from the 3rd Plaintiff and that their titles emanate from the 3rd Plaintiff's land parcel number Kisumu/Kasule/1571.
13. That it was him and the 3rd Plaintiff who each surrendered 3 metres from their respective parcels of land to pave way for creating a road of access passing between land parcel number Kisumu/Kasule/1571 and its resultant sub-divisions and parcel numbers Kisumu/Kasule/1847, 1731, 2423, 3729,3720, 8116, 8117 and 1608.
14. That the properties have been served by those roads for a long time and that the wrangles only begun when the newest buyers, including the 1st Defendant settled on their lands and decided to overlook the road boundaries and constructed a shop onto the access road which shop was marked for demolition as it encroached onto the access road.
15. That there is an error on the map. That the access road on the ground is clear having been created years ago before any sub-divisions of the properties involved.
16. That the Defendants were now keen on making a road of access where non-exists thereby destroying the property of the 1st and 2nd Plaintiffs. That the map in the land office does not indicate the correct position as it is on the ground as the same does not show the existence of the access road which has always been there since time of adjudication.
17. That there is disharmony between the information on the ground and on the map.
18. On behalf of the defence, two witnesses testified. DW1 was the 1st Defendant. She testified vide her witness statement dated 5th February, 2016 that she was the owner of land parcel known as Kisumu/Kasule/4494 where she resides.
19. That the land was sold to her by the 3rd Plaintiff. That she has no proper access to her land as the public access road to the land had been encroached onto by the 1st and 2nd Plaintiffs who had built a one storey building in the middle of the access road on Mbeme – Ogango road.
20. That she had not interfered with the public access road as claimed by the Plaintiffs. That the Plaintiffs' claim against her is baseless, lacks merit and amounts to abuse of court process.
21. On cross-examination PW1 stated that she came to the land in the year 2008 by which time the Plaintiffs were already on their lands. That the access road in dispute is in use at the moment.
22. DW2 was a land surveyor working with the County Government of Kisumu. He produced a survey report dated 21st August, 2018. He testified that one of his findings was that the road of access had been diverted to private land where no road existed and that structures had been constructed on the place where the road ought to have been. That the road was an easement provided by private land owners.
23. No evidence was called on behalf of the 2nd Defendant. Counsel for the Plaintiff in formed court that the 2nd Defendant had died and hence the case against him had abated.
24. On behalf of the 4th and 5th Defendants, no witness was called. Counsel placed reliance on exhibit P.2 a report prepared by the Land Registrar.



Submissions

25. It was submitted on behalf of the Plaintiff vide the written submissions dated 4th April, 2025 filed by N.E. Mogusu & Associate Advocates that a report by the Land Registrar and Surveyor recommended a resurvey of the original parcel from where the Plaintiffs' and the Defendants parcels of land had been created from. That it recommended for the picking of the ground positions and measurements of the various parcels of land as occupied by various households so that each parcel of land would be properly captured on the Registry Index Map and be given a parcel number and an access road be created to serve each parcel of land.
226. Counsel submitted further that the report if fully implemented will benefit the 1st Defendant whose land is not captured on the Registry Index Map and other neighbours with a similar problem.
27. That the Plaintiff had demonstrated that their property was under threat from the Defendant. That articles 40 of the *constitution* provides for protection of the right to property.
28. Counsel prayed that the Plaintiffs' claim be allowed.
29. On behalf of the 1st and 3rd Defendants, it was submitted that the issues that emerge for determination are;
 - a. whether the Plaintiff have met the criteria for grant of permanent injunction order,
 - b. whether the Plaintiffs have met the criteria for grant of orders compelling the 4th Defendant to visit the site with a view to establishing the proper boundaries, beacons, extent location and size of the public access road as appropriate,
 - c. who shall bear the costs of the suit?
30. Counsel submitted that the *evidence Act* places the burden of proving existence of any facts in issue on the party who asserts. That in the instant suit, the burden rests with the Plaintiff who must prove existence of a public access road and that the 1st and 2nd Defendants have colluded amongst themselves to interfere with the Plaintiff's right to use the said road and/or construct another public access road across the Plaintiff's property.
31. Counsel relied on the case of *Doset Wanjala t/a Blessed International Ministries Church - v- Wandera* (EL Appeal E050 of 2022) [2024] KEELC 4789(KLR) (20 June 2024) Judgement, where it was held that even though the standard of proof in a civil case is proof on a balance of probabilities, a litigant alleging encroachment through construction of part of a building into his parcel cannot simply rely on his own layman's assertion to prove his case.
32. That the Plaintiffs failed to establish the manner in which the 1st Defendant interfered with the public access road and/or the manner in which the 3rd Defendant has constructed an access road through the 1st and 2nd Plaintiff's land parcel No. Kisumu/Kasule/4240.
33. Counsel further submitted that the *Public Road and Road Access Act* Cap 399 Laws of Kenya ousts the jurisdiction of this court regarding the issue of the access roads. That the exhaustion doctrine requires that where a dispute resolution mechanism exists outside the court, that mechanism must be exhausted before the jurisdiction of the court is invoked. That the Plaintiff had not produced any evidence that they made an application to the District Road Board of Kisumu to seek prayer 2 in the plaint.
34. That the court can only be invited to intervene in respect of prayer 2 of the plaint if the Plaintiffs are dissatisfied with the decision of the District Roads Board.



35. Counsel urged the court to dismiss the Plaintiff's suit with costs to the 1st and 3rd Defendants.
36. On behalf of the 4th and 5th Defendants, written submission dated 18th January, 2025 were filed by Callen Masaka, Deputy Chief Litigation Counsel for the Hon. Attorney General. Counsel submitted that from the evidence, it was clear that all the parties in court have portions of land from the sub-division of land parcel No. Kisumu/Kasule/1571. That they all use the created road and none of them is blocked.
37. That the alleged amendment of the map by the County Government so as to create an access road in the middle of Kisumu/Kasule/1571 does not hold as all portions are well serviced by access road created during sub-division.
38. That the County Government did not justify the creation of another access road and why the existing one should be closed.
39. Counsel relied on the case of *Andrew M. - v- Joseph Ondicki* where the court adopted the Land Registrar's and Land Surveyor's report and ordered to effect the necessary amendment to the Registry Index Map to reflect the actual status on the ground and submitted that where the map does not agree with the ground position, it is the map that must be amended to align with the ground.

Issues for determination

40. From the pleadings filed, the evidence produced and the submissions made, the following emerge as the issues for determination;
 - a. whether or not the Plaintiffs have proved their claim on a balance of probabilities;
 - b. whether or not the plaintiffs are entitled to the relief sought;
 - c. costs.

Analysis

41. The Plaintiffs' claim was premised on the tort of trespass to wit; that the 1st, 2nd and 3rd Defendants were threatening to create a road of access at a place where none exists which action could result in destruction of property of the 1st and 2nd Plaintiffs.
42. The 3rd Plaintiff appears to have been joined in the suit merely because he was the owner of the original land parcel from which the lands of the 1st and 2nd Plaintiffs and 1st and 2nd Defendants were created. There is no cause of action disclosed by the 3rd Plaintiff in the pleadings or evidence.
43. The 1st Defendant denied interfering with the road of access.
44. The 3rd Defendant through the testimony of DW2 admitted that it was creating a road of access as per the map and that this road could interfere with the Plaintiffs' land and that the Plaintiffs had not been given any notice of this.
45. The 1st Plaintiff produced a title deed and a certificate of official search which show that he is the registered owner of the suit land. The case of Defendants as contained in the evidence of DW2 was that they were planning to open a road of access in accordance with the map. There was no evidence that the 1st and 3rd Defendants followed the correct procedure for opening an access road. The claim that if the exercise of opening the said road was carried out the Plaintiffs' property would be destroyed was not denied. DW2 admitted that he is not a licensed surveyor but nonetheless had gone to the site



to survey the road for opening by a contractor and that the 3rd Defendant was to finance the exercise and that the plaintiffs had been given no notice. DW2 also testified that each of the lands had access.

46. I find that the Plaintiffs, 1st and 2nd have demonstrated grounds for grant of an order of permanent injunction as prayed. Their property is at risk of being wasted by the 3rd Defendant.
47. The second prayer is for an order compelling the Land Registrar to visit the site and show the positions. It was agreed that the position of the suit lands on the ground differs with the positions on the map. That even the land of the 1st Defendant does not reflect on the map. In the circumstances, prayer (b) of the plaint is merited.
48. The court finds that the 1st and 2nd Plaintiffs have proved their case on a balance of probabilities and enters judgement in their favour and against the 1st and 3rd Defendants in terms of prayers (a) and (b) of the plaint.
49. Regarding costs of the suit, each party to bear own costs of the suit as the Plaintiffs and the 1st Defendant are neighbours.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 2ND DAY OF OCTOBER, 2025 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Maureen - Court Assistant.

Nyamweya for the Plaintiffs.

N/A for the 1st and 3rd Defendants.

Gaceri for 4th and 5th Defendants.

