

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ELC NO 57 OF 2018

WILFRED OPAKASI OYEKE

PLAINTIFF

= VERSUS =

THE CATHOLIC DIOCESE OF BUNGOMA 1ST

DEFENDANT

**THE BOARD OF MANAGEMENT
OJAMII PRIMARY SCHOOL 2ND
DEFENDANT**

J U D G M E N T

1. By a re-amended plaint dated 6th December 2018, **WILFRED OPAKASI OYEKE** (the Plaintiff) impleaded **THE CATHOLIC DIOCESE OF BUNGOMA ST. BENEDETTE OJAMII PRIMARY SCHOOL** and **THE BOARD OF MANAGEMENT OJAMII PRIMARY SCHOOL** (the 1st and 2nd Defendants respectively) and sought judgement against them jointly and severally in the following terms in respect to the land parcel **NO SOUTH TESO/ ANGOROMO/9563** (the suit land):

(aa) An eviction order.

(bb) Boundary demarcation and opening of roads of access.

(cc) Any other relief the Honourable Court deems just to grant.

(dd) Costs

2. The basis of the Plaintiff's claim is that he is the registered and sole proprietor of the suit land measuring 0.646 Hectares. That on or about the year 2005, the Defendants without any colour of right whatsoever unlawfully encroached, trespassed and occupied part of the suit land fencing off the encroached area and thereby denying the Plaintiff any access to his land. That the Defendants acts amounted to fraud particulars of which have been pleaded in paragraphs 6A of the plaint to include:

- Curving out part of the Plaintiff's land and converting the same to their exclusive user.
- Obtaining title to the suit land through falsification of official documents of purchase and transfer of land.
- Creating title to land that never belonged to the seller.

The Plaintiff filed his statement also dated 6th December 2018 and which is basically a rehash of the contents of his plaint. He states that he is the registered proprietor of the suit land which measures 0.646 Hectares and which was previously registered in the name of his deceased father. That sometime in 2005, the Defendants without any colour of right trespassed thereon and unlawfully occupied part of it by fencing it and denying him a road of access. The Plaintiff could not commence any action then because he had not done succession in respect to this late father's Estate nor obtained crucial documents to support his case. That the Defendants have not obtained any title to the suit land and what they hold is fraudulent hence this suit.

3. The Plaintiff filed his list of documents also dated 6th December 2018 containing the following:

- 1) Copy of the title deed for the land parcel **NO SOUTH TESO/ANGOROMO/9563.**
- 2) Copy of certificate of confirmation of Grant in respect to the Estate of **ANDEREA OYEKE**

EMORUTU issued to the Plaintiff in **BUSIA HIGH COURT SUCCESSION CAUSE NO 62 of 2008.**

- 3) Copy of letter dated 7th July 2015 addressed to the Plaintiff by the 2nd Defendant.
- 4) Copy of letter dated 1st December 2017 addressed to the Land Registrar Busia by the Chief Angorom location in respect to the land parcel **NO SOUTH TESO/ ANGOROMO/9563.**
- 5) Copy of map for **SOUTH TESO/ANGOROMO** Registration Section.
- 6) Copy of Mutation Form for the land parcel **NO SOUTH TESO/ ANGOROMO/5867.**

Prior to that, and while still acting in person, the Plaintiff had filed a list of documents dated 28th June 2018 containing the following:

- 1) Copy of title deed for the land parcel **SOUTH TESO/ANGOROMO/9563.**
- 2) Copy of the title deed for the land parcel **NO SOUTH TESO/ANGOROMO/11465.**

- 3) Copy of certificate of Official Search for the land parcel **NO SOUTH TESO/ANGOROMO/11465** in the name of the 1st Defendant.

The 2nd Defendant filed a statement of defence dated 22nd December 2019 together with the statement of it's witness **OKOTH ISAAC ALUSO** dated 16th March 2020.

4. In its defence, the 2nd Defendant denied all the averments of encroaching the suit land and also put the Plaintiff to strict proof of the claim that he is the registered proprietor thereof. It added that it occupies its own parcel of land being parcel **NO SOUTH TESO/ANGOROMO/11465** which does not share any boundary with the suit land. It also denied all the averments of fraud and pleaded further that this Court lacks the pecuniary jurisdiction to determine this suit which is premature and against the provisions of the **Land Registration Act 2012** and that a Preliminary Objection would be raised to have the suit struck out.
5. In his statement **OKOTH ISACK ALUSO (DW1)** who is the Secretary to the 2nd Defendant states that the said 2nd Defendant is occupying it's land parcel **NO SOUTH**

TESO/ANGOROMO/11465 which was donated to it by one **JOHN ONKWARE EMOJOU** being a sub-division out of the land parcel **NO SOUTH TESO/ANGOROMO/3187**. He adds that the 2nd Defendant's land does not border the Plaintiff's land and also denied having obstructed the access to the suit land. It added that it followed all the legal process in obtaining title to it's land and that all the documents which it holds are authentic and were approved by the lands office.

6. The 2nd Defendant filed the following documents in support of it's case:

- 1) Copy of Mutation Form for the land parcel **NO SOUTH TESO/ANGOROMO/3187**.
- 2) Copy of Letter of Consent for the land parcel **NO SOUTH TESO/ANGOROMO/11465**.
- 3) Copy of transfer of land parcel **NO SOUTH TESO/ANGOROMO/11465**.
- 4) Copy of application for consent of the Land Control Board.
- 5) Copy of the register for the land parcel **NO SOUTH TESO/ANGOROMO/11465**.

6) Copy of title deed for the land parcel **NO SOUTH TESO/ANGOROMO/11465.**

Prior to the hearing which commenced on 3rd July 2024, the Plaintiff had, vide his Notice of Motion dated 2nd November 2021, applied for an order directing the Land Registrar Busia and the County Surveyor to visit the land parcels **NO SOUTH TESO/ANGOROMO/9563** and **11465** and determine whether there is any overlap in the said land parcels boundary and file a report. That application was allowed by **OMOLLO J** on 27th January 2022 and on 23rd October 2023, I adopted the same as part of the evidence in this case.

7. The hearing commenced on 3rd July 2024 with the Plaintiff adopting as his evidence the contents of his statement as summarized above and produced as his documentary evidence the documents filed as per the list dated 6th December 2018. The Court also marked as **MFI-8** the report by the Land Registrar dated 10th October 2023.
8. The Plaintiff then called as his witness **JAMES ONYINKWA (PW2)** the County Surveyor Busia. He told the Court that

pursuant to an order of this Court dated 2nd February 2022, he and the Land registrar visited the land parcels **NO SOUTH TESO/ANGOROMO/9563** belonging to the Plaintiff and the land parcel **NO SOUTH TESO/ANGOROMO/11465** belonging to the 2nd Defendant to confirm if they over-lap. He told the Court that they did confirm from their site visit that the two parcels of land overlap and specifically, that 0.30 Hectares of the Plaintiffs land has been fenced off by the 2nd Defendant. The same is contained in paragraph 3 clause 2 of his report which he produced as an exhibit.

9. The 2nd Defendant's secretary **ISAAC OKOTH ALUSO (DW1)** was the only witness who testified on behalf of the Defendants. The 1st Defendant did not file any defence nor call any witnesses but that is not surprising because in respect to the suit land, the Defendants are one and the same entity and in my view, there was no need to implead both of them. I would imagine, without saying so, that the 1st Defendant must be the sponsor of the 2nd Defendant. At the appropriate time, I will strike out the case against the 1st Defendant.

10. The hearing commenced on 3rd July 2024 and ended on 1st October 2024 when the 2nd Defendant testified and closed his case. The witnesses all adopted as their testimony the contents of their respective statements. The Plaintiff and 2nd Defendant's witness produced as their documentary evidence all the documents filed herein. The Land Surveyor **MR JAMES ONYINKWA (PW2)** produced as the Plaintiff's documentary evidence the report dated 11th October 2023.
11. After the plenary hearing, submissions were filed both by **MR IPAPU** instructed by the firm of **IPAPU JACKAH & COMPANY ADVOCATES** for the Plaintiff and by **MR GILBERT C. TARUS - PRINCIPAL STATE COUNSEL** on behalf of the 2nd Defendant.
12. I have considered the evidence by the Plaintiff and the 2nd Defendant as well as the submissions by counsel. The gravamen of the Plaintiff's case is that Defendants have encroached onto the suit land and fenced a portion thereof thus denying the Plaintiff access to the suit land. It is not in dispute that the suit land is registered in the name of the Plaintiff while the 2nd Defendant is the proprietor of the land

parcel **NO SOUTH TESO/ANGOROMO/11465**. What this Court needs to determine is whether indeed the Defendants have trespassed onto the suit land, fenced a portion thereof and thereby blocked the Plaintiff's Road of access to the suit land.

13. Before I interrogate that claim, it is important that I consider two jurisdictional issues raised by the 2nd Defendant in his defence. These are:

- 1) That this Court has no pecuniary jurisdiction to hear this matter which is premature and against the provisions of the **Land Registration Act 2012**.
- 2) That this suit is statutory statute barred.

The 2nd Defendant's counsel did not in his submissions, touch on the issue of this Court's lack of pecuniary jurisdiction or the claim that the suit is premature and against the provisions of the **Land Registration Act**. This is a claim for trespass to land. It has not been suggested how this Court, being a superior Court, can be bereft of "**pecuniary**" jurisdiction. On the issue of this suit being premature and against the provisions of the **Land Registration Act**, the

parties consented to the Land Registrar and Surveyor visiting the suit land and filing their report which they did in accordance with **Section 18** of that **Act**. Nothing suggests that this is a boundary dispute from the report. There is no merit in that claim.

14. With regard to the issue that the Plaintiff's suit is statute barred, counsel for the Defendants has submitted in paragraph 17 **"that the Plaintiff is not entitled to the reliefs as the case is statute time-barred as per the provisions of Section 7 of the Limitation of Actions Act cap 22 Laws of Kenya."** That provision reads:

7: "An action may not be brought by an person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."

The Plaintiff's claim is one of trespass which, as per the **Trespass Act** includes entering, remaining erecting structures, cultivation, grazing stock etc on private land. It is

a violation of a right to possession - **M'MUKANYA -V- M'MBIJIWE 1984 KLR**. A trespass is a continuing tort. In **CLERK & LINDSEL ON TORTS 16TH EDITION**, it is stated thus:

“Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues.”

That definition including that in **WINFIED AND JOLOWICZ ON TORTS** has been adopted in many cases to demonstrate that trespass, being a continuing tort, cannot be statute barred. The Court of Appeal reiterated as much in **ISAACK BEN MULWA -V- JONATHAN MUTUNGA MWEKE 2010 eKLR** when it states:

“... it is a well-settled principle that continuous injuries to land caused by the maintenance of tortious acts create separate causes of action barred only by the running of the statute of limitation against each successive acts.”

The Court then went on to cite the authors of **WINFIELD AND JOLOWICZ ON TORT, 11TH EDITION SWEET AND MAXWELL, LONDON 1979** at page **342** thus:

“Trespass, whether by way of personal entry or by placing things on the Plaintiff’s land may be continuing and give rise to actions de die in diem so long as it lasts. Nor does a transfer of the land by the injured party prevent the transferee from suing the Defendant for continuing trespass.”

It is obvious, therefore, that the plea of want of jurisdiction by this Court or that the Plaintiff’s claim is statute barred are both without any valid reason. Both are therefore dismissed.

15. Having dispensed with those two issues, I can now address the core of the dispute between parties with regard to trespass by the 2nd Defendant on the suit land. The answer to the Plaintiff’s claim is, in my view, provided by the report by the County Surveyor Busia **MR J. O. ONYINKWA (PW2)** who testified and availed it as part of the Plaintiff’s evidence. In his testimony during the plenary hearing, he confirmed that he visited the suit land together with the Land Registrar

pursuant to an order of this Court. In his report dated 11th October 2023 he states as follows in the penultimate paragraphs:

“The survey was carried out and the following realized:

1) The surveyed road separating the two parcels of land is not existing on the ground. Its not part of parcel number SOUTH TESO/ANGOROMO/11465. Its area is 0.05 Hectares.

2) Parcel number SOUTH TESO/ANGOROMO/11465 has overlapped into parcel number 9563 by an area of 0.30 Hectares with its ground size now 0.78 hectares against it’s registered area of 0.43 hectares. The current boundary of the parcel is defined by barbed wire fence except on the part fronting the Busia-Alupe Road where it was removed as the road is under construction.

3) The area of parcel number SOUTH TESO/ANGOROMO/9563 is 0.48 Hectares against it's registered area of 0.646 Hectares. The deficiency being the part overlapped by parcel Number 11465.

From the above survey findings, it's evident that parcel number SOUTH TESO/ANGOROMO/11465 has overlapped into parcel number SOUTH TESO/ANGOROMO/9563."

And although the Land Registrar did not testify, his un-dated report which was admitted without objection as an annexure to the Surveyor's report made the following conclusion in the last paragraph:

"The school has fenced its land accordingly which is adverse. However, as per the record, part of the school land as per the Surveyor's illustration lies on the title of parcel NO SOUTH TESO/ANGOROMO/9563 causing overlap."

It is clear from the above that the 2nd Defendant's land parcel **NO SOUTH TESO/ANGOROMO/11465** which, as per

the copy of title deed measures 0.43 Hectares has overlapped i.e. encroached into the Plaintiff's land parcel **NO SOUTH TESO/ANGOROMO/9563** by 0.30 Hectares. Parcel **NO SOUTH TESO/ANGOROMO/11465** covers 0.78 Hectares on the ground against its registered area of 0.43 Hectares. On the other hand, the land parcel **NO SOUTH TESO/ANGOROMO/9563** (the suit land) with a registered area of 0.646 Hectares covers 0.48 Hectares. Part of its area is occupied by parcel **NO SOUTH TESO/ANGOROMO/11465** from which the 2nd Defendant must be evicted. This Court must also find that there is no need for boundary demarcation because the Land Registrar in his report has also stated that:

“There are clear boundary marks which clearly separate the two parcels of land. The claimant parcel has a path on the lower side that he currently uses to access his parcel and is also used by most neighbours and therefore the claimed road blockage does not deter him from accessing his land.”

The fact of encroachment on the Plaintiff's land was also clearly conceded by **OJAMII PRIMARY SCHOOL** the occupant of part of the suit land. Vide a letter dated 7th July 2015 and addressed to the Plaintiff, the said school states thus:

"TO MR OPAKASI

You are hereby asked to attend our B.O.M meeting on Friday the 10th July starting at exactly 3.00pm

Agenda:

Consultation meeting with B.O.M members and other stakeholders on your share of land as an individual.

Thank you.

Yours faithfully,

NYAGAYA (MRS)

FOR SEC (B.O.M)".

This letter, in my view, is a clear affirmation by the 2nd Defendant that it recognizes the Plaintiff's claim to a portion of the suit land which it (Defendant) occupies.

16. Ultimately therefore and having considered the evidence herein, this Court makes the following disposal orders:

1) The suit as against the 1st Defendant is struck out with no orders as to costs.

2) There shall be judgment for the Plaintiff as against the 2nd Defendant in the following terms:

a) The 2nd Defendant has trespassed into the land parcel NO SOUTH TESO/ANGOROMO/9563 by 0.30 Hectares.

b) The 2nd Defendant shall within 90 days of this judgment vacate from the portion measuring 0.30 Hectares which is part of the land parcel NO SOUTH TESO/ANGOROMO/9563.

c) Alternatively, and always subject to the consent of both parties, the 2nd Defendant shall make an offer to purchase the said portion measuring 0.30 Hectares from the Plaintiff at a consideration acceptable to

both and commence the sale process within the same period.

d) In default of (a) above the 2nd Defendant shall be evicted from the portion of the land parcel NO SOUTH TESO/ANGOROMO/9563 measuring 0.30 Hectares.

e) Costs to the Plaintiff to be borne by the 2nd Defendant.

**BOAZ N. OLAO
JUDGE**

28TH NOVEMBER 2025

Judgement dated, signed and delivered by way of electronic mail on this 28th day of November 2025 with notice to the parties.

Right of Appeal.

**BOAZ N. OLAO
JUDGE**

28TH NOVEMBER 2025

ORIGINAL