

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ELC NO. 171 OF 2017

ANDREW ASWANI OGWENO

PLAINTIFF

= VERSUS =

ALBERT WESONGA WAFULA

DEFENDANT

J U D G M E N T

1. **ANDREW ASWANI OGWENO** (the Plaintiff) first approached this Court vide his plaint dated 13th October 2017 and later amended on 23rd April 2021 in which he impleaded **ALBERT WESONGA WAFULA** (the Defendant) and sought judgment against the Defendant in the following terms with respect to the land parcel **NO BUKHAYO/MUNDIKA/12880** (the suit land):

- a) **An order of permanent injunction against the Defendant by himself, his servants, workers and/or agents from constructing on, cultivating on and in any manner**

whatsoever interfering with the Plaintiff's land parcel NO BUKHAYO/MUNDIKA/12880.

b) An order of eviction of the Defendant from the land parcel NO BUKHAYO/MUNDIKA/12880.

c) An order that the County Surveyor do proceed to the ground and determine the boundaries to the land parcel NO BUKHAYO/MUNDIKA/12880.

d) Costs of the suit and interest.

e) Any other relief this Honourable Court may deem just and fit to grant.

2. The Plaintiff's claim is that he is the registered proprietor of the suit land on which the Defendant has willfully and without the Plaintiff's authority trespassed and has continued to do so despite a clear demarcation done by the surveyor and the beacons thereto planted. That the Defendant has also commenced excavation with the intention of constructing on the suit land. The Defendant has denied the Plaintiff access to the suit land which is an illegal infringement of the Plaintiff's rights of ownership.

And despite several demands and notice of intention to sue, the Defendant has persisted in his illegal actions hence this suit.

3. The Plaintiff filed an affidavit dated 18th September 2019 and which he adopted as his evidence when he testified before **A. OMOLLO J** on 25th July 2022 when the trial commenced. Therein he has deposed inter alia that on 16th June 1969 he entered into a land sale agreement with one **JOSEK WAFULA WADIDWA** for the purchase of the land parcel **NO BUKHAYO/MUNDIKA/1284** at a consideration of Kshs.1,645 which he paid in instalments and the last instalment was paid on 12th February 1970. He then went to work in Uganda but when he returned, he found that **JOSEK WAFULA WADIDWA** was deceased and his son who is the Defendant filed for succession and was issued with a Grant of Letters of Administration in respect of the deceased's Estate. That the Defendant only gave him a portion measuring 1.725 acres instead of 3.5 acres out of the land parcel **NO BUKHAYO/MUNDIKA/1284**. He is therefore claiming a portion measuring 1.775 acres from

the Defendant or in the alternative, a refund of Kshs.21,000,000.

4. The Plaintiff annexed to his affidavit the following documents:

1) Copy of land sale agreement between the Plaintiff and **JOSEK WAFULA WATITWA** dated 16th June 1968.

2) Copy of an acknowledgement of 16th September 1969 and 12th February 1970 in which **JOSEK WAFULA WATITWA** received final payment of the balance of the purchase price.

5. The record shows that when the Plaintiff testified before **A. OMOLLO J** on 25th July 2022, he requested that an order be issued for the surveyor to determine the boundary to the suit land. That request was objected by **MR MAKOKHA** counsel for the Defendant on 26th July 2022 but **MR OUMA** counsel for the Plaintiff insisted that the survey be done. In a brief ruling delivered by **A. OMOLLO J** on the same day, she directed that the Land Registrar and County Surveyor Busia do visit the disputed land parcel **NO BUKHAYO/MUNDIKA/12889** and ascertain if

there is any encroachment of its boundaries and file a report within 21 days.

6. That report was eventually filed on 19th March 2024 and despite objections by **MR OUMA**, I delivered a brief ruling on 22nd October 2025, admitted the report and directed that either the Land Registrar or Surveyor should attend Court on the hearing date and be cross-examined by both **MR OUMA** and **MR MAKOKHA**.
7. When the case came up for hearing on 5th November 2025, the Land Registrar Busia **MS VIOLET LAMU (PW2)** formally produced the report authored by her and the County Surveyor on 19th March 2024 following the Court order. She told the Court that the suit land was one of the six (6) portions of land carved out of the land parcel **NO BUKHAYO/MUNDIKA/11940** and the mother title was **BUKHAYO/MUNDIKA/1264**. She added that the Plaintiff was present when the suit land was inspected.
8. In addition to the documents annexed to the Plaintiff's affidavit, he also filed two lists of documents one dated 18th February 2019 and a further list of documents dated 18th September 2019.

9. The list of documents dated 18th February 2019 had annexed to it a copy of demand letter dated 13th October 2017 addressed to the Defendant from the firm of **ASHIOYA & COMPANY ADVOCATES** instructing him to desist from digging trenches on the suit land and in default, a suit would be filed against him.
10. The further list of documents dated 18th September 2019 contained the same documents annexed to the Plaintiff's affidavit and which I have already referred to earlier in this judgment.
11. The Defendant filed a defence to the amended plaint in which he pleaded, inter alia, that he was the registered proprietor of the land parcel **NO BUKHAYO/MUNDIKA/11941** which he sub-divided to create parcels **NO BUKHAYO/MUNDIKA/13178** and which was further sub-divided to create parcels **NO BUKHAYO/MUNDIKA/13882, 13823, 13824, 13825, 13826, 13827** and **13828**.
12. That the suit land arose out of the sub-division of the land parcel **NO BUKHAYO/MUNDIKA/11940** and according to the records, the two parcels of land do not share a

common boundary. That the survey process was done in the presence of all the parties and the boundaries fixed. This suit is therefore mischievous and should be dismissed.

13. The Defendant filed his list of documents dated 12th May 2021 containing the following:

- 1) Mutation form for the land parcel **NO BUKHAYO/MUNDIKA/11940.**
- 2) Mutation form for the land parcel **NO BUKHAYO/MUNDIKA/1284.**
- 3) Confirmed Grant issued on 23rd March 2015 to the Defendant in respect to the Estate of **JOSECK WAFULA WADIDWA.**
- 4) Application to the Land Control Board to partition the land parcel **NO BUKHAYO/MUNDIKA/1284.**

The plenary hearing commenced on 25th July 2022 before **A. OMOLLO J** when the Plaintiff testified. He adopted as his evidence the contents of his affidavit dated 18th September 2019 and also produced as his documentary evidence the documents annexed thereto. It was at that point that he also applied that the surveyor be ordered to

determine the boundary because the Defendant was interfering with his land. **A. OMOLLO J** granted that request and a report was subsequently prepared as is clear from the proceedings. And at his request, the Land Registrar Busia **VIOLET LAMU (PW2)** testified before me on 5th November 2025 and produced the report.

14. I also heard the Defendant and he too adopted as his testimony the contents of his statement dated 22nd February 2021. He also produced as his documentary evidence the documents filed by the two lists of documents dated 3rd August 2020 and 12th May 2021 which I have already referred to above.
15. Submissions were thereafter filed both by **MR OUMA** instructed by the firm of **B. M. OUMA & COMPANY ADVOCATES** for the Plaintiff and by **MR MAKOKHA** instructed by the firm of **J. P. MAKOKHA & COMPANY ADVOCATES** for the Defendant.
16. I have considered the evidence by the parties as well as the submissions by counsel. At the commencement of this judgment, I set out the remedies which the Plaintiff seeks

from this Court. I will commence with prayer **NO (c)** by which he seeks:

“Any order that the County Surveyor do proceed to the ground and determine the boundaries to L.R NO. BUKHAYO/MUNDIKA/12880.”

The remedy which, in my view, is the fulcrum upon which the Plaintiff’s claim is hinged, is now spent. As is now clear from the preceding paragraphs of this judgment, an order was issued by **A OMOLLO J** way back on 25th July 2022 that the surveyor do visit the suit land and determine the boundaries. That order was made at the request of the Plaintiff himself at the commencement of the trial. A report dated 19th March 2024 was prepared jointly by the Land Registrar Busia **VIOLET LAMU (PW2)** and the County Surveyor and was produced by the Plaintiff as part of his own evidence who was even cross-examined by his own counsel **MR OUMA**. The last paragraph of the report reads:

“Implementation of Court order:

a) Survey land parcel Bukhayo/Mundika/12880.

This being a sub-division of NO 11940 is established and marked.

Then a 0.09ha portion that represents NO 12880 is curved out and marked.

b) Establishment of boundaries of NO 12880.

The 0.09ha portion is marked which is just below the sewer line and its boundary is planted.”

Clearly therefore, the boundary to the suit land **“is marked”** as is obvious from the said report. It is instructive to note that having requested as far back as 25th July 2022 that a surveyor do determine the boundaries to the suit land, and after the said report had been filed on 30th April 2024, the Plaintiff’s counsel **MR OUMA** addressed the Court on 23rd September 2024 as follows:

“MR OUMA: I can see the report was filed on 30th April 2024. My client was not satisfied with the survey. I ask the Court to order a re-survey.”

That application was opposed by **MR WERE** then holding brief for **MR MAKOKHA** who stated that the said report was done with the consent of the parties. That of course was the correct position as is clear from the record. However, that notwithstanding, and for the avoidance of any doubt, this Court bent backwards and accommodated the Plaintiff by directing that the Land Registrar be called to testify and be cross-examined in fulfilment of the provisions of Article 50 of the Constitution. The Land Registrar **VIOLET LAMU (PW2)** testified and there was nothing to derogate from her testimony with regard to boundary of the suit land as per the report. The only plausible explanation as to why the Plaintiff, having himself called for the survey to be done, changed his mind midstream and tried to object to it by seeking a re-survey, is because he discovered that the report did not support his case.

17. In paragraph 4 of his amended plaint, the Plaintiff has pleaded that:

4: “The Plaintiff contends that the Defendant without any justifiable reason or cause and

without the consent of the Plaintiff has entered onto the Plaintiff's L.R NO BUKHAYO/MUNDIKA/12880 and commenced excavation of the suit parcel with intention to construct thereon."

When he was cross-examined by **MR MAKOKHA** on 25th July 2022, the Plaintiff said:

"I was given 11940 which I sub-divided to produce other numbers including 12880. The boundaries are still intact but the Defendant is cultivating my portion."

This Court would have expected that if indeed the Defendant is **"excavating"** the suit land and **"cultivating"** thereon, nothing would have been easier than producing photographs of the excavation and cultivation on the suit because those are activities that must be very visible on any land. That was not done with the result that trespass by the Defendant upon the suit land was not proved. Therefore, an order of eviction of the Defendant from the suit land would be of no basis as it would not be supported by any evidence. Counsel for the

Plaintiff in his submissions took issue with the Land Registrar (**PW2**) for being confused about the correct parcel of land in her report. This is how **MR OUMA** submitted on page one (1) of his submission:

“The same Land Registrar purposely did not provide mutation for L.R NO BUKHAYO/MUNDIKA/11940 which displays exactly the subdivisions and also displays the other block from the mother parcel L.R NO BUKHAYO/MUNDIKA/1284 and also the Land Registrar appeared not to be certain about the mother parcel as she was confused of L.R NO BUKHAYO/MUNDIKA/1264 instead of NO BUKHAYO/MUNDIKA/1284. This left her reported doubted by this Court.”

Annexed to the report by the Land Registrar and Surveyor is a copy of the Mutation Form for the land parcel **NO BUKHAYO/MUNDIKA/11940** dated 10th June 2016 and which was prepared on the instructions of the Plaintiff to create the land parcels **NO BUKHAYO/MUNDIKA/12880, 12881, 12882, 12883** and **12884**. It is duly signed by

the District Surveyor Busia. It cannot therefore be true to submit, that the Land Registrar **“purposely did not provide Mutation for L.R NO BUKHAYO/MUNDIKA/11940.”** She may not have produced it when she testified but she annexed it to her report dated 19th March 2024. And on the submission that the Land Registrar was **“confused of L.R NO BUKHAYO/MUNDIKA/1264 instead of L.R NO BUKHAYO/MUNDIKA/1284”** and therefore left doubt in this Court, the Land Registrar said she did not have the mutation form for the land parcel **NO BUKHAYO/MUNDIKA/1284.** Not the mutation form the land parcel **NO BUKHAYO/MUNDIKA/11940** which, as I have already stated above, was annexed to her report. And as to the alleged confusion between the land parcels **NO BUKHAYO/MUNDIKA/1264** and **1284**, she clarified this when she was cross-examined by **MR MAKOKHA** on 5th November 2025 as follows:

“I do not have the mutation form for land NO 1284. It reads 1264 which is an error. It is 1284.”

Therefore, the witness clarified the error by stating that the mutation form should read **BUKHAYO/MUNDIKA/1284** and not **1264** which was an error. To err is human and the Land Registrar is not infallible. She clarified the error in her oral testimony and the Court was not **“confused”** and neither did that error prejudice the parties. To the contrary, it is the Plaintiff who has tried to confuse and mislead this Court by seeking orders which are not supported by any credible evidence. It must be remembered that having approached this Court seeking the orders set out in his amended plaint, the onus was on him to prove those allegations as set out in **Section 107(1)** of the **Evidence Act** which provides that:

“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists.”

See also the case of **EVANS NYAKWA -V- CLEOPHAS BWANA ONGARO 2015 eKLR** where it was held that as a general rule, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts

the affirmative of the issue. That is the purport of **Section 107 (1)** of the **Evidence Act**. It appears to me that the Plaintiff was on a fishing expedition and has failed to meet the above threshold.

18. The up-shot of all the above is that having considered the evidence by all the parties herein and the law, this Court makes the following disposal orders:

- 1) The Plaintiff's suit is devoid of any merit. It is dismissed.**
- 2) The Plaintiff shall bear the Defendant's costs agreed or taxed.**

BOAZ N. OLAO

JUDGE

9TH APRIL 2026

Judgment dated, signed and delivered by way of electronic mail on this 9th day of April 2026 and with notice to the parties.

Right of Appeal.

BOAZ N. OLAO

JUDGE

9TH APRIL 2026

Explanatory notes:

This judgment was due on 10th March 2026. However, following my transfer to Iten Court from Busia Court and which was effective 15th January 2026, I had to prioritize my part heard cases as well as deliver pending judgments and rulings. That has contributed towards the delay in delivering this judgment. The same is regretted.

BOAZ N. OLAO

JUDGE

9TH APRIL 2026