



**Rubiria v Mtiko & another (Environment and Land Case 575 of 2017)  
[2024] KEELC 5162 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 5162 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MIGORI  
ENVIRONMENT AND LAND CASE 575 OF 2017  
MN KULLOW, J  
JANUARY 31, 2024**

**BETWEEN**

**JOHN MOGORE RUBIRIA ..... PLAINTIFF**

**AND**

**JOHN MASIAGA MTIKO ..... 1<sup>ST</sup> DEFENDANT**

**MURIMI MASIAGA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff commenced this suit by way of an undated Plaint and Amended on the 6<sup>th</sup> March, 2015 seeking the following Orders: -
  - i. An Order of Permanent Injunction restraining the Defendants, servants and/or agents from encroaching, trespassing, closing, interfering and/or in any way from dealing with land parcel No. Bugumbe/ Isebania/ 396 and the survey path and/or road reserve.
  - ii. Eviction of the Defendants from a portion in land parcel No. Bugumbe/ Isebania/ 396 and also from the survey foot path.
  - iii. Costs of this suit.
  - iv. Any other relief this Honourable Court may deem fit to grant.

**Plaintiff's Case.**

2. It is the Plaintiff's assertion that at all material times he is the Administrator and legal representative of the estate of Andrea Rubiria, who was also the registered owner of land parcel No. Bugumbe/ Isebania/ 396 measuring approx. 14.2Ha and shares a common boundary with parcel No. 383 which belongs to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.



3. It is his claim that at all material times in the year 2007; the Defendants jointly and severally, without any color of right or justifiable cause, unlawfully trespassed into a portion of the suit land and started cultivating the same. That the defendants further blocked the road reserve between the two parcels thus depriving him of access and usage of the said passage to the main road and river. He outlined the particulars of trespass and encroachment thereof.
4. The Plaintiff further contends that as a result of the said actions of trespass by the Defendants, he has suffered considerable loss and damage hence the need to grant the orders sought in the plaint.
5. The matter proceeded for hearing of the Plaintiff's case on 13/7/2020; the Plaintiff testified as PW1 and thereafter closed his case. It was his testimony that his claim is against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants over the suit land parcel No. 396. He admitted that the suit land is registered in the names of his brothers; John Mugure and Jacob Marwa while parcel No. 383 is registered in the joint names of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
6. He denied the allegations made against him in the counter-claim and maintained that he has never trespassed into the Defendants' parcel which borders his suit land.
7. He produced the documents on his list of documents filed in court on 08/08/2012 and marked as Pexhibit 1 – 6 as follows; demand letter as Pexh. 1, survey map as Pexh. 2, official search as Pexh. 3, power of attorney as Pexh. 4, Chief's Arbitration letter as Pexh. 5 and summons from the chief as Pexh. 6.
8. On cross-examination, he confirmed that the suit land and parcel No. 383 boarder each other. He admitted that a land surveyor visited both parcels of land and filed a report. He dismissed the contents of the said report as being false but conceded that he had not filed any other survey report to oppose the report dated 12/2/2021.
9. Even though the Plaintiff was granted leave to call additional witnesses to testify in his favor, despite several adjournments on his account for various reasons, no such additional witnesses appeared in court to testify. Consequently, the Plaintiff's case was closed on the 2/10/2023.

#### **Defendant's Case**

10. The Defendants' filed their Joint Statement of Defence and Counter-claim dated 28<sup>th</sup> August, 2012. They denied the allegations of trespass made against them in the plaint and put the Plaintiff to strict proof thereof.
11. They confirmed that the parcels of land in question share a common boundary but averred that parcel No. 383 is registered in the name of Matiko Murimi Marwa, who is since deceased.
12. In their Counter-claim, the Defendants sought the following Orders: -
  - i. Permanent Injunction restraining the Plaintiff by himself, Agents, servants, all other family members of Andrea Rubiria Nyakemo or otherwise howsoever from trespassing upon Title No. Bugumbe/ Isebania/ 383 and the Adjacent public road.
  - ii. An order of restoration of the Common Boundary between Title Numbers Bugumbe/ Isebania/ 383 and 296 and mesne profits
  - iii. Costs
  - iv. Interest



13. In the counter-claim; the defendants stated that the suit land No. 383 measuring approx. 10.8Ha, was at all material times registered in the name of Matiko Murimi Marwa, who is since deceased and that they have instituted the suit in their capacity as the legal representatives.
14. It is their claim that on diverse dates since the year 2007, the plaintiff and other members of the family of Andrea Rubiria Nyakemo, unlawfully trespassed into a portion of the suit land measuring approx. 2 Acres. That they also encroached on the public road adjacent to the said land.
15. They outlined the particulars of trespass and maintained that they have suffered loss and damage as a result of the encroachment by the Plaintiff and his family.
16. The Defence case proceeded for hearing on 2/10/2023; the 1<sup>st</sup> Defendant testified as DW1. He denied trespassing into the Plaintiff's land as alleged and maintained that the Plaintiff is the registered owner of parcel No. Bugumbe/ Isebania/396 while he is the registered owner of parcel No. 383, which parcels boarder each other.
17. It was his testimony that the surveyor visited the two parcels of land and prepared a Report which he asked the court to adopt and use in support of his case.
18. The Surveyor Report dated 12/2/2021 was marked as Dexh. 1. The Defence case thereafter closed their case.
19. Upon close of the Defence case, I directed the parties to file their written submissions to be exchanged within 30 days. Both parties filed their rival submissions which I have read and considered in arriving at my decision.

### **Analysis and Disposition**

20. It is this court's considered view that the issues arising for determination are as follows: -
  - a. Whether the Plaintiff is entitled to the orders sought in his Amended Plaintiff.
  - b. Whether the Defendants are entitled to the orders sought in their Counter-claim.
  - c. Who will bear the costs of the suit

#### **I. Whether the Plaintiff is entitled to the Orders sought in the Amended Plaintiff.**

21. The Plaintiff sought an Order of Permanent Injunction against the Defendants, restraining them from encroaching, trespassing, closing and interfering with the suit land No. 396 and the survey path/road reserve, an Eviction order together with costs of the suit.
22. It is his claim that sometimes in the year 2007, the Defendants jointly and severally, without any color of right or justification, unlawfully trespassed into the suit land No. 396. That they have blocked the road reserve between the two parcels of land; No. 396 and No. 383, thus depriving him of access and usage of the road and river. As a result of the said acts of trespass by the Defendants, he has suffered considerable loss and damage.
23. The Defendants on the other hand vehemently denied the allegations of trespass made against them and instead averred in their counter-claim that the Plaintiff had trespassed into a portion of their land No. 383 measuring 2 Acre.
24. The ownership of the 2 parcels of land is not in dispute; the Plaintiff is a legal representative of the registered owner of parcel No. Bugumbe/ Isebania/396, Andrea Rubiria Nyakemo, while the Defendants are the legal representatives of the registered owner of parcel No. Bugumbe/ Isebania/383,



Matiko Murimi Marwa. What however appears to be in dispute and which is at the center of the present suit is whether or not there was trespass into the Plaintiff's land No. 396 by the Defendants and the extent of the alleged trespass if any.

25. Section 18 of the [Land Registration Act](#) ousts the jurisdiction of the court to entertain boundary related disputes while section 19 of the said Act vests the Land Registrar with the mandate of fixing boundaries. The said sections provide as follows: -

Section 18(2) The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.

18(3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary:

19(1) If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.

19(2) The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.

26. By consent of the parties dated 22/09/2020 and which was adopted as an Order of the court, parties agreed that the Land Registrar Kuria East and West Sub counties, to revisit the disputed parcels No. 383 and 396 for purposes of establishing and fixing boundaries thereof and to ascertain the extent of encroachment by either side if any and to thereafter file a report in court.

27. The County Land Surveyor (National Government) visited the two parcels of land and thereafter filed a report dated 12/2/2021 and filed in court on 15/2/2021 in respect to the two parcels of land and I wish to reproduce the conclusion and findings as follows: -

“Conclusions/ Recommendations

From survey point of view, the litigants are requested to maintain peace and good neighbourliness.

The developers of Bugumbe/ Isebania/ 383 are hereby advised to remove the trees falling on the 6m road reserve leading to Bugumbe/ Isebania/ 396.

Finally, all parties are advised to respect the boundaries as they exist on the ground, pending the determination of the case in court.”

28. From the said report, it is clear that there was no trespass into the Plaintiff's parcel No. 396 as alleged. Even though the Plaintiff dismissed the contents of the Survey Report dated 12/2/2021 filed in court, he did not file any other contrary report challenging the initial report by the County Surveyor.



29. Further, I wish to point out that the Plaintiff made blanket allegations of trespass, he did not state with specificity the portion of his land which was encroached into by the Defendants. He produced as part of his evidence a copy of the Survey Map (Pexh.2) and the certificate of official search (Pexh. 3) which in my view do not prove his claims of trespass. Pexh.2 merely shows the positioning of both suit parcels No. 396 and 383 as exists on the ground, there is no indication of trespass and to what extent if any. Further, pexh. 3 only proves that the suit land No. 396 is registered in the name of the late Andrea Rubiria Nyakemo.
30. It is trite law that he who alleges must prove. Section 107(i) of the *Evidence Act* provides that: -
- “Whoever desires any court to give Judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
31. In the absence of any evidence and proof of the contrary, it is my finding that Surveyor Report dated 12/2/2021 and filed in court reflects the actual position. Consequently, I accordingly find that the Plaintiff has not proved his claim on trespass to the required standard and he is therefore not entitled to the reliefs sought in the Amended Plaintiff.

## **II. Whether the Defendants are entitled to the reliefs sought in the Counter-claim.**

32. The Defendants in their Counter-claim sought an Order of Permanent Injunction against the Plaintiffs from trespassing into their parcel of land No. 383, restoration of the common boundary between parcel Nos. 383 and 396, mesne profits together with costs of the suit.
33. The Plaintiff in response to the allegations raised against him in the Counter-claim, denied encroaching into any portion of the suit land or the road reserve and put the Defendants to strict proof thereof.
34. I do note that both parties are claiming that the other trespassed into their respective parcels of land. As earlier stated, the ownership of the two parcels of land is not in dispute, what this court seeks to establish is whether the Defendants have proved their claim on trespass into a portion measuring 2 Acres by the Plaintiff and the family of the late Andrea Rubiria Nyakemo to the required standard.
35. The Defendants only produced a copy of the Survey Report as Dexh. 1 in support of their case. Is the said report conclusive evidence of trespass and encroachment on the part of the Plaintiff into parcel No. 383 belonging to the Defendants?
36. The conclusion and/or findings in the said Report was that: -
- “From survey point of view, the litigants are requested to maintain peace and good neighbourliness.
- The developers of Bugumbe/ Isebania/ 383 are hereby advised to remove the trees falling on the 6m road reserve leading to Bugumbe/ Isebania/ 396.
- Finally, all parties are advised to respect the boundaries as they exist on the ground, pending the determination of the case in court.
37. A plain reading of the said report, the same does not state whether there is trespass and the extent of the said encroachment into the Defendants’ land No. 383. Further, the surveyor concluded that the boundaries of the said parcels are demarcated and known. Thus, there is no need for restoration of the common boundary as sought by the Defendants. Having held that trespass has not been established against the Plaintiff, I find that the Defendants/ Counter-claimers are not entitled to mesne profits.



38. To this end therefore, this court is unable to conclusively find in favour of the Defendants/ Counter-claimers. I accordingly find that the Defendants/ Counter-claimers have failed to prove their case to the required threshold to warrant the grant of the orders sought in the Counter-claim.

### **Conclusion**

39. The upshot of the above is that the Plaintiff has failed to prove his claim on trespass against the Defendants to the required threshold. Consequently, the Amended Plaint dated 6<sup>th</sup> March, 2015 is hereby dismissed.

40. Further, I equally find that the Defendants have also failed to prove their Counter-claim to the required standard. In the premises, the Counter-claim dated 28<sup>th</sup> August, 2012 is accordingly dismissed.

41. Parties are hereby directed/ ordered to respect the boundaries as they exist on the ground to avoid further conflicts. Each party to bear his own costs of the suit. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 31<sup>ST</sup> DAY OF JANUARY, 2024.**

**MOHAMMED N. KULLOW**

**JUDGE**

In presence of; -

No appearance for the Plaintiff

Mr. Kisera for the Defendants

Court Assistants - Tom Maurice/ Victor

