



**Ong'enga v Sioka (Environment and Land Case 18 of 2015)
[2024] KEELC 23 (KLR) (18 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 23 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT AND LAND CASE 18 OF 2015**

BN OLAO, J

JANUARY 18, 2024

BETWEEN

CORNEL BWIRE ONG'ENGA PLAINTIFF

AND

JULIUS BWIRE SIOKA DEFENDANT

RULING

1. Cornel Bwire Ongenga (the Plaintiff), through his amended plaint dated 26th April 2017 and filed on the same day, impleaded Julius Bwire Sioka (the Defendant) as well as the Land Registrar and Surveyor Busia, seeking judgment against them in the following terms:
 - 1A: An order for the Land Registrar and Land Surveyor Busia to visit land parcels No Bunyala/Bulemia/2760, 1435 and 2389 and survey the same re-establishing and fixing boundaries there between.
 - 2A: An order of permanent injunction against the Defendant and/or any of his agents from further encroachment trespass and/or interference with occupation and use of the land parcels No Bunyala/Bulemia/2760 and 1435.
 - 3A: An order to evict the Defendant from land parcels No Bunyala/Bulemia/2760 and 1435.
2. I need to point out at this stage that prior to the amendment of the plaint, the plaintiff had, in addition to the Defendant also impleaded the District Registrar and District Surveyor Busia as 2nd and 3rd Defendants respectively. However, their names were deleted in the amended plaint.
3. Having heard the parties, Kaniaru J delivered a judgment on 12th September 2019 and made the following disposal orders:
 1. Prayer 1A was allowed.



2. Prayers 2A and 3A were declined.
3. The Defendant was ordered to pay costs.
4. The Plaintiff has now come back to this Court vide his Notice of Motion dated 27th September 2023 seeking the following orders:
 1. That leave be granted to the firm of B. M. Ouma & Company Advocates to come on record for the Plaintiff.
 2. That the body buried by the Defendant in the Plaintiff's land parcel No Bunyala/Bulemia/1435 be exhumed.
 3. That the Officer Commanding (OCS) Port Victoria Police Station and the Public Health Officer Port Victoria do assist in effecting the said order.
 4. That costs be provided for.
5. The application is premised under the provisions of Section 1A and 3A of the Civil Procedure Act, Order 53 Rule 3 of the Civil Procedure Rule and Section 146 of the Public Health Act. It is predicated on the grounds set out therein and supported by the Plaintiff's affidavit also dated 27th September 2023.
6. The gist of the application is that the Plaintiff is the registered proprietor of the land parcel No Bunyala/Bulemia/1435 measuring 0.9 hectares and on 22nd June 2023, his sister Prisca Nabwire Ongenga informed him that the Defendant and two others namely Barasa and John had trespassed onto the said land and removed the chain link and barbed wire. Then on the following day, his sister informed him that the Defendant and his group had brought a dead body to the land through an illegal path. On 24th June 2023, he was informed that the said body had been buried on the land. He reported the incident to Port Victoria Police Station for investigation and when he visited the land, he found that his fence had been damaged and a path illegally created and there was a grave thereon.
7. That he had a boundary dispute with the Defendant and the Court ordered for the fixing of their boundaries. However, the Defendant became violent when that order was being implemented and so he had to seek for security.
8. The following documents are annexed to the application:
 1. A copy of title deed to the land parcel No Bunyala/Bulemia/1435.
 2. Copy of Occurrence Book (OB).
 3. Photographs of damaged fence.
 4. Judgment delivered by Kaniaru J on 12th September 2019.
 5. Order for security issued by Hon. P. Y. Kulecho on 21st September 2021.
9. There is also an un-dated affidavit by Prisca Nabwire Ongenga filed on 20th September 2023 confirming what she told the Plaintiff and which is repeated in the Plaintiff's affidavit.
10. When the application was placed before me on 28th September 2023, I did not certify it as urgent but directed that it be served upon the Defendant who would file his response within 14 days. Both parties were also directed to file their submissions.
11. However, the Defendant did not file any reply nor submissions as directed. The Plaintiff however filed his submissions on 12th October 2023 through the firm of B. M. Ouma Advocate.



12. I have considered the application, un-opposed as it is, as well as the submissions by counsel. Prayer (1) is hereby granted.
13. With regard to prayer (2) which is the crux of the application, the Plaintiff seeks the main order that the body buried by the Defendant on his (Plaintiff's) land be exhumed. That land has been identified as the land parcel No Bunyala/Bulemia/1435. What this Court needs to determine is whether in fact the body sought to be exhumed is buried on the land parcel No Bunyala/Bulemia/1435.
14. When the Plaintiff approached this Court vide his amended plaint dated 26th April 2017, the main remedies which he sought have already been set out in this ruling. The prayer for the Land Registrar and Surveyor Busia to visit the land parcels No Bunyala/Bulemia/2760, 1435 and 2389 and re-establish the boundaries thereof was allowed. The other two prayers being:
 - a. An order of permanent injunction against the Defendant or his agents from trespassing onto the land parcels No Bunyala/Bulemia/2760 and 1435; and,
 - b. An order to evict the Defendant from the above parcels of land;were both declined.
15. In declining the above prayers, Kaniaru J addressed himself as follows in paragraphs 20 and 21 of his judgment delivered on 12th September 2019 and I shall only cite the portions relevant to this ruling:

20: "My considered view is that as regards the prayer for a survey visit (prayer 1A), the Plaintiff's claim is well proved on a balance of probability. I am also persuaded that the survey to be done should be followed by rectification of the error shown on the records. I would order rectification under prayer 6 in the amended plaint. And I hereby grant these two orders. I am unable however to grant the prayer of permanent injunction as prayed (prayer 2A). An order of such injunction would require certainty as the physical location where it is meant to apply. With boundaries said to be non existent, and with records showing an error as to size, it is difficult to see how the order can effectively operate as granted."

21: "In my view, the anomaly existing should be rectified first. Once that is done, there will be certainty and if an order of injunction is asked for in such circumstances, it can be granted if merited. In the same way, it is difficult to grant the Plaintiff an order of eviction. I would not know where I would be evicting Defendant from because the boundaries are still uncertain and/or unmarked."
16. The import of all the above is that the boundaries of the land parcels No Bunyala/Bulemia/2760, 1435 and 2389 were unclear. That is why Kaniaru J was unable to grant the Plaintiff the orders of injunction sought. The Plaintiff, it would appear, holds a paper title with no clarity as to the extent of his land parcels No Bunyala/Bulemia/2760 and 1435. Kaniaru J described the situation in paragraph 19 of the same judgment as follows:

19: "More importantly however is the fact that a state of affairs in which the Plaintiff holds paper titles without a corresponding clear identification of the physical area location represented by these titles cannot be allowed to exist. The Plaintiff holds two titles. The approximate sizes of the physical area shown in the two titles should be clearly identifiable on the ground. The Defendant has not lodged a contestation as to ownership but he wishes that this state of affairs remains. That is clearly contrary to how things are supposed to be. It would be wrong to allow it."
17. Arising out of Kaniaru J's judgment delivered on 12th September 2019, an order was extracted directing the Land Registrar and District Surveyor Busia to visit the land parcels No Bunyala/Bulemia/2760, 1435 and 2389 to establish and fix the boundaries. They were also to rectify the errors shown on the records as to the sizes of the land parcels No Bunyala/Bulemia/2389 and 2759.



18. Pursuant to that judgment and order, the Land Registrar Busia Mr Nicholas Obiero and the Land Registrar Busia Mr Kennedy Masibu visited the land in dispute on 18th January 2021 and heard both parties and their witnesses. They then filed their report dated 18th January 2021 (it is also dated 22nd January 2021) and which was signed by Mr Wilfred N. Nyaberi the Land Registrar Busia. After making their findings and observations; the two made the following final remarks:

“Communication To The Court

This office would like to report to the Honourable Court that we were not able to implement the order due to the lack of adequate security to undertake the boundary marking process.

We request the Honourable Court to intervene by providing adequate security of any other appropriate remedy to enable us implement the order.”

19. It is clear from the penultimate paragraph of the report that the Defendant and his family frustrated the exercise as “they threatened the surveyor and dared him to continue.”
20. The result is that the boundary issue referred to the Land Registrar and Surveyor Busia remained undetermined.
21. Meanwhile, by a Notice of Motion dated 18th January 2022, one Raphael Bitta Sauti Wanjala asked this Court to enjoin him in these proceedings as a 2nd Defendant and to set aside the judgment dated 12th September 2019 and grant him leave to file his defence. That application was heard by Omollo J and vide a ruling delivered on 28th September 2022, the judge allowed Raphael Bitta Sauti Wanjala to be enjoined as a 2nd Defendant. She however declined the prayer to set aside the judgment delivered on 12th September 2019. The following further orders were made by Omollo J and which are relevant to this application:
- (c) “An order be and is hereby made that the execution through surveying the boundaries be done in the presence of all parties to this suit (including the Applicant now joined as a 2nd Defendant).
 - (d) -
 - (e) The Court shall give further directions as the parties deem fit.”
22. The record does not show if the parties appeared before Omollo J for further directions as directed in paragraph (e) of the ruling delivered on 28th September 2022. Instead, the parties appear to have moved suo moto back to the Land Registrar Busia on 10th March 2023 where the 2nd Defendant was now the Applicant while the Plaintiff and the 1st Defendant i.e. Cornel Bwire Ogenga and Julius Bwire Sioka were the 1st and 2nd Respondents respectively. This time, the dispute was heard by Mr Nicholas A. Obiero the then Land Registrar. Having heard all the parties and their witnesses, he made the following final remarks in his report dated 4th April 2023;

“In view of the above, I believe that the boundary can only be placed after the claims of Raphael Wanjala intimating adverse possession, are properly addressed in Court. As such, the boundaries that I placed regarding parcel 1435 on 17th December 2021 will remain set aside until the Court provides further orders on the same. However, the boundary as was marked for parcel 2760 to be maintained and respected by all parties.”



23. With those comments, the dispute over boundary that had been first referred to the Land Registrar and Surveyor by Kaniaru J way back on 12th September 2019 and reiterated by Omollo J vide her ruling on 28th September 2022 remains pending with no conclusive report. A Notice of Appeal was filed on 11th October 2022 in respect to the ruling by Omollo J but it is not clear if any appeal was filed.
24. Before I proceed further, my attention has been drawn to some remarks made by Mr Nicholas A. Obiero Land Registrar Busia, in his report dated 10th April 2023. In the paragraph titled “Determination,” he has said:
- “Ordinarily, I would use a map to mark out the boundaries of 1435 currently registered to Cornel Bwire. However, this will mean that I am turning a blind eye and deaf ear (sic) to legitimate claims of the applicant. I am also limited by Section 7 of the [Limitation of Actions Act](#)” Emphasis mine.
25. I find those comments rather strange for the following reasons. Firstly, the Applicant referred to above i.e. Raphael Bitu Sauti Wanjala had, through his application dated 18th January 2022 sought, inter alia, the setting aside of the judgment by Kaniaru J on 12th September 2019 and for leave to defend the Plaintiff’s suit. That prayer was dismissed although the judge directed that the exercise by the surveyor undertaken on 17th December 2021 be set aside. However, the judge proceeded to direct that the survey exercise “be done in the presence of all parties to this suit (including the Applicant now joined as a 2nd Defendant)”. Omollo J having declined to set aside the judgment by Kaniaru J, it is not clear to this Court what “legitimate claims” the Applicant could possibly pursue in this suit when there is already a final judgment, subject of course to appeal, in this case. The Applicant could only have had a forum to prosecute his claim if the suit was still alive. There was clearly no basis upon which the Land Registrar could purport to consider a claim that was not part of his mandate.
26. Secondly, Mr Obiero proceeded to down his tools citing the provisions of Section 7 of the [Limitation of Action Act](#). That provision reads:
- 7: “An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action occurred to him or, if it first occurred to some person through whom he claims, to that person.”
- That provision is directed towards the Court. The Land Registrar is not by any stretch of imagination a Court for purposes of Section 7 of the [Limitation of Action Act](#).
27. Finally, in the last paragraph of his report, Mr Obiero states that “the boundary can only be placed after the claims of Raphael Wanjala, intimating adverse possession, are properly, addressed in Court.” Raphael Wanjala has not filed any claim by way of adverse possession in this case. Omollo J only allowed him to be present when the boundary was being surveyed. The judge did not allow Raphael Wanjala leave to file any pleadings, leave alone a claim on adverse possession, and he did not do so. The Land Registrar clearly went off on a tangent of his own and in the process, did not perform the duty that was required of him by Omollo J in paragraph 17 (a) of her ruling delivered on 28th September 2022. That lapse, unfortunately, has now given rise to the application subject of this ruling. My advise to Land Registrars and Surveyors is that they should strictly comply with the directions of the Court and if in doubt, revert back to the Court for clarification.
28. The result of all the above is that this Court is not in a position to determine, with any certainty, if the body sought to be exhumed is in the land parcel No Bunyala/Bulemia/1435 as sought by the Plaintiff. In view of that uncertainty, the easiest route for this Court would be to dismiss the Notice of Motion



dated 27th September 2023. However, this Court will not take that route because my prime mandate is to do justice to the parties. Not to take easy escape routes. Besides, it is clear that the orders contained in paragraph 17(a) of the ruling delivered by Omollo J on 28th September 2022 are yet to be effected. Those orders were issued post judgment as it is common ground that Kaniaru J delivered judgment herein on 12th September 2019 and which was not set aside nor appealed. That notwithstanding, Omollo J proceeded to issue other orders vide her ruling delivered on 28th September 2022 which are basically post judgment directions. The place of such post judgment directions has adequately been discussed in our jurisprudence including in the decision of the Supreme Court in the case of Mitu Bell Welfare Society -v- Kenya Ports Authority & 2 Others Supreme Court Petition No 3 of 2018 [2021 KESC 34 KLR]. This Court cannot interrogate those post judgment orders and in any event, the Plaintiff did demonstrate his dissatisfaction with the ruling of Omollo J delivered on 28th September 2022 and filed a Notice of Appeal on 11th October 2022. However, no appeal appears to have been filed and if any was preferred, the Court has not been notified of its status. The bottom line, therefore, is that those orders having been issued by a competent Court, must be complied with because Courts do not act in vain. Once issued, Court orders cannot be frustrated by parties who do not want them to be implemented or by other actors in the justice system through dereliction of their duties. It is therefore the duty of this Court to ensure that the said orders are fully carried out by the responsible persons who happen to be the Land Registrar and Surveyor Busia. Only then will this Court be in a position to issue any appropriate order with respect to the application now before me.

29. Having considered all the evidence before me, I issue the following disposal orders with respect to the Notice of Motion dated 27th September 2023:
1. This Court shall withhold making final orders in respect to prayers (3) and (4) of the application pending the report called for by Omollo J in paragraph 17(c) of her ruling dated 28th September 2022.
 2. The report must also specify whether the body is buried on the land parcel No Bunyala/Bulemia/1435.
 3. The exercise be conducted by the Land Registrar Busia (other than Mr Nicholas A. Obiero if he is still based in Busia) and the County Surveyor.
 4. The issue of costs of the exercise shall be as ordered by Omollo J in her ruling delivered on 28th September 2023 and which the Land Registrar and Surveyor must therefore familiarize themselves with.
 5. Mention on 28th February 2024 when this Court expects the report to have been filed for further directions.
 6. Costs shall abide final orders of this Court.

BOAZ N. OLAO

JUDGE

18TH JANUARY 2024

RULING DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 18TH DAY OF JANUARY 2024 WITH NOTICES TO THE PARTIES.

BOAZ N. OLAO

JUDGE



18TH JANUARY 2024

