Adina v Otiato & 2 others (Environment & Land Case 81 of 2018)
[2024] KEELC 1218 (KLR) (6 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1218 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ENVIRONMENT & LAND CASE 81 OF 2018

BN OLAO, J

MARCH 6, 2024

BETWEEN

LINUS OCHIENG ADINA ..... PLAINTIFF

AND

TUZINDE MBAGA OTIATO ..... 1ST DEFENDANT

ANDEREA LUMUMBA KECHULA ..... 2ND DEFENDANT

MARK KECHULA OTIATO ..... 3RD DEFENDANT

JUDGMENT

1. Linus Ochieng Adina (the Plaintiff herein) impleaded Tuzinde Mbaga Otiato, Anderea Lumumba Ketsula And Mark Kechula Otiato (the 1st, 2nd and 3rd Defendants respectively), seeking judgment against them in the following terms with respect to the land parcel No Bunyala/Bulemia/3150 (the suit land):
    1. An order of eviction of the Defendants from a portion of LR No Bunyala/Bulemia/3150.
    2. An order directing the County Surveyor to do a visit on LR No Bunyala/Bulemia/3150 and fix the boundary thereof.
    3. An order of permanent injunction against the Defendants by themselves and/or agents from use and occupation of LR No Bunyala/Bulemia/3150.
    4. Mesne profits.
    5. Costs of this suit and interest thereon.
2. The basis of the claim is that the Plaintiff is the registered proprietor of the suit land measuring approximately 0.2 hectares and is therefore entitled to quiet and full utilization thereof. The Defendants have, in flagrant breach of the Plaintiff's right, encroached into a portion of the Plaintiff's

land by about 10 metres in the area where they have a common boundary and taken possession thereof by putting up a permanent structure which transcends their common boundary. The Defendants have ignored the Plaintiff's pleas and have continued with impunity to unlawfully encroach onto the suit land and refused to vacate it thus necessitating this suit.

3. The Plaintiff also filed his statement dated 22nd August 2018 in which he basically repeats the contents of his plaint save to add that he would like the District Surveyor to be invited to plant beacons on the suit land. He filed the following documents in support of his claim:

    1. Copy of title deed for the land parcel No Bunyala/Bulemia/3150.
    2. Copy of the Green Card for the land parcel No Bunyala/Bulemia/3150.
    3. Copy of Demand Notice dated 18th April 2018.

    By a further list of documents dated 112th August 2021, the Plaintiff filed the following documents:

    1. Surveyor's report dated 8th August 2020.
    2. Mutation Form.
    3. Letter dated 26th September 2015 from assistant chief Bulemia sub-location.
    4. P3 Form dated 12th February 2018 in the name of the Plaintiff.
    5. Un-dated land sale agreement between Clement Wanyama and Mark Otiato.
    6. Letter dated 16th November 2016 from the plaintiff to chief Bunyala north.

4. The Defendants filed a joint defence dated 26th April 2019. They pleaded that they are the proprietors of the land parcel No Bunyala/Bulemia/3618 which neighbours the suit land belonging to the Plaintiff. They added that they had purchased the land parcel No Bunyala/Bulemia/3618 from the Plaintiff's deceased brother one Clement Wanyama Adina and it was the Plaintiff who assisted them during the survey process as well as the sub-division and procurement of their title deed. They however denied having encroached on the Plaintiff's land and added that the Plaintiff's suit is misconceived, incompetent and the Plaintiff is therefore not entitled to the reliefs sought. They pleaded further that infact this is a boundary dispute and therefore the Court lacks the jurisdiction to determine it and should strike it out or dismiss it.

5. The Defendants also filed a joint statement dated 25th April 2019. The same is simply a rehash of their defence and I need not reproduce it.

6. They filed the following documents as per their list dated 14th December 2018:

    1. Copy of the certificate of search for the land parcel No Bunyala/Bulemia/3618.
    2. Copy of title deed for the land parcel No Bunyala/Bulemia/3618.

7. The hearing commenced before Omollo J on 25th November 2021. She heard the Plaintiff's evidence. I then heard the Defendants' testimonies on 23rd October 2023.

8. Submissions were thereafter filed both by Mr Makokha instructed by the firm of J P Makokha & Company Advocates for the Plaintiffs and by Mr Fwaya instructed by the firm of Gabriel Fwaya Advocates for the Defendants.

9. I have considered the evidence by the parties as well as the submissions by counsel.

10. The starting point is whether this Court has the requisite jurisdiction to determine the matter.

11. In their defence, the Defendants have pleaded in paragraph 9 that:

    9: "The Defendants aver that the Plaintiff is raising a boundary dispute and has neither addressed them on the issue nor involved the County Surveyor, thus this suit is premature and the Court lacks jurisdiction."

12. Jurisdiction is everything and the classic decision in this regard is the Court of Appeal judgment in the case of *The Owners of The Motor Vessel 'lillian S' -v- Caltex Oil (Kenya) Limited* 1989 KLR 1 where Nyarangi JA said the following at page 14:

> "I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step."

Other than pleading that this Court lacks the jurisdiction to determine this case being a boundary dispute, the Defendant's counsel proceeded further to submit on that issue as follows:

> "The Plaintiff ought to have lodged the issue of the boundary for determination with the Land Registrar and Surveyor prior to the filing of this case. Section 1812 (*sic*) of the *Land Registration Act* provides as follows ..."

Counsel then proceeds to cite the provisions of Section 18(2) [not 1812] of the *Land Registration Act* which reads:

> "The Court shall 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."

The Plaintiff did not file any reply to the defence nor address the issue of this Court's jurisdiction in his submissions.

13. To determine whether or not this Court has the requisite jurisdiction to determine this dispute, I have looked at the orders sought in the plaint. They are:

    1. Eviction of the Defendants from the land parcel No Bunyala/Bulemia/3150.
    2. An order directing the County Surveyor to visit the land parcel No Bunyala/Bulemia/3150 and fixe the boundaries thereof.
    3. An order of permanent injunction against the Defendants.
    4. *Mesne profits*.

14. The Court of course has the jurisdiction to determine an issue relating to eviction from the land, as well as grant orders of a permanent injunction and *mesne profits*. With regard to the order directing the County Surveyor to visit the land in dispute and fix the boundary, I have already cited in extenso what the Defendants have pleaded in paragraph 9 of their defence in which they question this Court's jurisdiction. Taken together with the fact that the Plaintiff is seeking an order for the County Surveyor to fix the boundaries of the suit land, it becomes clear that this suit relates to a boundary dispute. That

therefore means that this Court cannot determine the issue in relation to a dispute over boundary. Section 18(2) of the *Land Registration Act* is clear on where the jurisdiction lies. It states:

> " 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."

The title deed to the suit land was issued on 15th September 2000. The applicable law then was the repealed *Registered Land Act* which under Section 21(4) provided that:

> " No Court shall entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided in this section."

Therefore, when the Plaintiff seeks an order that this Court directs the County Surveyor to "visit LR No. Bunyala/Bulemia/3150 and fix the boundaries thereof" and the Defendants rejoinder is that "the Plaintiff is raising a boundary dispute and has neither addressed them on the issue nor involved the County Surveyor thus this suit is premature and the Court lacks jurisdiction," it becomes obvious that one of the remedies sought by the Plaintiff, and which, in my view, is the prime remedy is not within the jurisdiction of this Court. Unless the boundaries of the suit land are known, how else will this Court be able to determine what portion of the land to injunct the Defendants from or how to determine the mesne profits available to the Plaintiff? It must be remembered that *mesne profits* as defined in *Black's Law Dictionary* 10Th Edition, are;

> " The profits of an estate received by a tenant in wrongful possession between two dates ..."

That definition was adopted in the case of *Christine Nyanchama Oanda -v- Catholic Diocese of Homabay Registered Trustees* Court of Appeal, Civil Appeal No 208 of 2018 [2020 eKLR]. The view I take of this suit is that since I have no jurisdiction to determine the boundary dispute, it would be impossible to injunct the Defendants from any portion of the suit land or assess the mesne profits because unless the boundaries are known trespass cannot be determined.

15. That a boundary dispute is not within the jurisdiction of this Court was settled in the case of *Azzuri Limited –v- Pink Properties Limited* CA Civil Appeal No. 93 of 2017 [2018 eKLR] where the Court held that:

> 21: "On our part, looking at the impugned judgment, it is clear to us that the decision of the trial Court was primarily based not only on the weight of the evidence, but on the failure by the appellant to follow the laid down grievance handling mechanism; namely, referral of the dispute to the Land Registrar as per Section 18 of the *Land Registration Act*."
>
> The Court then went on to cite the provisions of Section 18 of the *Land Registration Act* and proceeded as follows:
>
> 22: This means that under the aforesaid provisions, boundary disputes pertaining to lands falling within general boundary areas must be referred to the Land Registrar for resolution; while disputes pertaining to lands with fixed boundaries may the investigated and possibly resolved simply through a surveyor."
>
> It means therefore, that the first point of call by the Plaintiff was to have this dispute resolved by the Land Registrar or Surveyor who are mandated by law to determine land dispute relating to boundaries. The Supreme Court alluded to this when it discussed the doctrine of exhaustion

in the case of *Albert Chaurembo Mumba & 7 Others -v- Maurice Munyao & 148 Others* SC Petition No. 3 of 2016 [2019 eKLR] where it said; at paragraph 118;

> 118: "... it is our disposition that disputes disguised and pleaded with the erroneous intention of attracting the jurisdiction of Superior Courts is not a substitute for known legal procedures. Even where Superior Courts had jurisdiction to determine profound questions of law, first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute."

In *Speaker of The National Assembly -v- Charles Njenga Karume* 1992 eKLR, it was held that:

> " In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed ..."

The view that I take of this suit is that the boundary dispute ought to have been first determined by the Land Registrar as provided for in the relevant laws. Only then can the other remedies sought be considered by this Court. I am persuaded that I should down my tools.

16. I will nonetheless consider the Plaintiff's suit on its merits notwithstanding my findings on the issue of jurisdiction.

17. It is not in dispute that the Plaintiff is the registered proprietor of the suit land since 15th September 2000. As the registered proprietor therefore, he enjoys all the rights and privileges provided for under Section 24 of the *Land Registration Act*. Such rights include the right to evict trespassers therefrom. In paragraph 6 of his plain, the Plaintiff has pleaded as follows:

6:

> " Notwithstanding the foregoing and in flagrant breach of the Plaintiff's right to the land, the Defendants have encroached into a portion of the Plaintiff's land by about 10 metres in the area they share this common boundary and have by so encroaching taken possession thereof and are putting up a permanent structure that transcends the common boundary into the Plaintiff's land."

And in paragraph 4 of his statement dated 22nd August 2018 which he adopted as his evidence during the plenary hearing, he states thus:

4:

> " That the Defendants without justification have encroached to a portion on my land and are putting the same into their own use without my consent. Their actions are not only illegal but also against *the Constitution*.

In support of his case, the Plaintiff produced vide his further list of documents dated 24th September 2020 a report by one Collins Ochieng dated 8th August 2020. It is headed as "Land Survey Report Field Check on Parcel No Bunyala/Bulemia/3150" and in the last paragraph, it reads;

> " Conclusion:
>
> Hence looked at all acreages of existing boundaries, it is prudent that all the affected pieces of land be searched so as to compare the respective areas to the ground areas as depicted on the

sketch map herein attached so as to be able to assess whether there's truth of encroachment or not." Emphasis mine.

In their joint statement dated 25th April 2019, the Defendants denied having trespassed onto the suit land. They added in paragraphs 4, 5, 6 of that statement as follows:

4:

> " The land was created on sub-division of LR Bunyala/Bulemia/3149."

5:

> " That it is the Plaintiff who assisted us in the transaction and physically showed us our portion."

6:

> " That it is the Plaintiff who assisted the surveyor in identifying the boundaries."

18. The onus was on the Plaintiff to lead evidence to prove encroachment. That is clear from the provisions of Sections 107, 108 and 109 of the *Evidence Act*. Section 107 is very clear. It states that:

107

> " (1): 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 exist.
>
> (2): When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

19. It is clear from all the above that whereas the Plaintiff is seeking the eviction of the Defendants from 'a portion' of the suit land, he is not even sure what portion he is referring to. In his statement, he refers to "a portion" while in his plaint at paragraph 6, he describes the land which the Defendants have encroached into as "a portion of the Plaintiffs land by about 10 meters." It would be difficult for the Court to issue any decree for the eviction of the Defendants from a portion of land whose size is imprecise. Any such decree would be incapable of execution. In his submission, counsel for the Plaintiff has stated thus:

> " Not (*sic*) evidence was tendered by the Defendants to show that indeed there exist marked boundaries between their land and further that they occupy and are in possession of the portion within their boundaries. In absence of such evidence, it is doubtful that the Defendants are in occupation of their portion of land."

As I have already stated above, the onus was on the Plaintiff, not on the Defendants, to prove what they alleged in their plaint. It was never the duty of the Defendants to prove that they "are in occupation of their portion of land" as suggested by counsel for the Plaintiff. It was the Plaintiff to prove that infact the Defendants are the ones encroaching on his land and should be evicted therefrom.

20. Further, from the report by one Collins Ochieng dated 8th August 2020 and who is said to have surveyed the suit land, it is clear that it is not conclusive on whether or not there was any encroachment thereon. Therefore, that report which was produced by the Plaintiff himself, does not aid his case at all.

21. The orders for eviction of the Defendants from the suit land is not available to the Plaintiff.

22. With regard to the prayer that this Court directs the County Surveyor to visit the suit land and fix the boundaries, that is an attempt to draw this Court into usurping another organ's jurisdiction. Besides, neither the Land Registrar nor the County Surveyor Busia are parties to this suit. They are strangers in these proceedings. How then can orders be issued against them?

23. Even if the Land Registrar and County Surveyor Busia were parties in these proceedings, there is no evidence suggesting that the Plaintiff has approached them with an application to fix the boundaries to the suit land which is the mandate of the Land Registrar under Section 19 (1) of the *Land Registration Act*. It reads:

19

(1)

> "If the Registrar considers it desirable to indicate on a field 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." Emphasis mine.

(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."

(3)

> "Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section."

Therefore, the Plaintiff, as an Interested Party, had the right under the above provision to apply to the Land Registrar to fix the boundary. There is no evidence to suggest that he made any application to the Land Registrar to do so and that the Land Registrar declined. The Plaintiff also contradicted himself when in cross-examination by Mr Fwaya on 25th November 2021, he said:

> "I was present when this surveyor came but the Defendants were not present. I had not been told to summon them. The surveyor came with the GDS to identify the boundaries."

If, as he says the surveyor visited the site and identified the boundaries, it is not clear what else the Plaintiff wants fixed.

24. The long and short of the above is that the Plaintiff is trying to circumvent the law by approaching this Court to usurp the jurisdiction of another organ. I decline that invitation.

25. The remedy for directing the County Surveyor to visit the suit land and fix the boundaries thereof is equally declined.

26. In respect to the remedy of an order of permanent injunction restraining the Defendants by themselves, or their agents from using and occupying the suit land, it is clear as I have already stated above that the Plaintiff is himself not ever certain about the portion of the suit land from which he wants to permanently injunct the Defendants. The fact that he is seeking an order to fix the boundary means that he is not even sure about the boundary. How can this Court be of any assistance to him in light of those serious contradictions?

27. That remedy is equally not available in the circumstances.

28. The order for mesne profits is also not borne out of the evidence.

29. Mesne profits is a special damages claim. It must be specifically pleaded and proved and the party seeking such an award must place before the Court evidence to demonstrate how that amount was arrived at – *Peter Mwangi Mbuthia & Another -v- Samow Edin Osman* 2014 eKLR. Further, a reading of the provisions of Order 21 Rule 13 of the *Civil Procedure Rules* makes it clear that before the Court issues a decree for payment of *mesne profits*, it must make an inquiry and be satisfied that indeed such profits have accrued and for a particular period of time. In this case, the Plaintiff has simply sought an unquantified sum in mesne profits and not even led any evidence to substantiate that claim. That is not surprising at all given the ambivalence that has characterized the Plaintiff's testimony in these proceedings.

30. That claim must also be declined.

31. The up-shot of all the above is that notwithstanding the view I take that this Court is bereft of the requisite jurisdiction to determine this dispute, I have, should I be wrong on that finding, decided to determine the case on its merits.

32. It is clear from the record herein that rather than file three (3) separate witness statements for each of them, the Defendants opted to file a joint statement of their evidence headed "witness statements". That statement was adopted by all the three (3) Defendants herein when they testified and became evidence of the Defendants. That statement is dated 25th April 2019 and is signed jointly by all the Defendants herein. Counsel for the Plaintiff has taken the view that the said statement is defective for failure to comply with the provision of Order 7 Rule 5 of the *Civil Procedure Rule* and therefore the Plaintiff's suit is not defended.

33. Order 7 Rule 5 of the *Civil Procedure Rule* provides that:

> " The defence and counterclaim filed under rule 1 and 2 shall be accompanied by-
>
> (a) an affidavit under Order 4 rule 1(2) where there is a counterclaim;
>
> (b) a list of witnesses to be called at the trial;
>
> (c) written statements signed by the witnesses except expert witnesses; and
>
> (d) copies of documents to be relied on at the trial.

Provided that statements under sub-rule (c) may with leave of the Court be furnished at least fifteen days prior to the trial conference under Order 11."

Buoyed by the above provisions, Mr Makokha proceeded to submit, inter alia, that:

> " The defence should be found to have failed to comply with Order 7 Rule 5 of the *Civil Procedure Rules 2010*. To that extend, the entire of the Defence proceedings were a nullity. The suit by the Plaintiff was not defended and accordingly the orders as prayed by the Plaintiff be granted. The case at hand in support of this school of thought is that of *Nicholas Kiptoo Arap Korir Salat -v- Independent Electoral and Boundaries Commission & 6 Others* 2013 eKLR ...".

Counsel then proceeds to quote Kiage JA who stated the following in that case;

> " ... it is in the even-handed and dispassionate application of rules that Courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity."

There is of course no doubt, as Kiage JA said, that rules must be adhered to. His voice was, however, the minority view. The majority view as articulated by Ouko JA (as he then was) with which Mohammed JA concurred was that:

> " Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not to be elevated to the level of a criminal offence attracting such heavy punishment of the offending party who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances, the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness."

34. It is of course true that in compliance with the provisions of Order 7 Rule 5 of the *Civil Procedure Rules*, the conventional practice is that all witnesses, even when their testimony is similar, usually prepare and sign individual witness statements for each of them. However, I am not persuaded that Order 7 Rule 5 (c) of the *Civil Procedure Rules* is a bar to the signing of joint witness statement as occurred in this case. In my view, it is enough if the statement is duly signed by all the witnesses who are called to testify and who subsequently adopt it as their testimony during the plenary hearing. I do not share the view of Mr Makokha when he submits "that the witness statement of 25th April 2019 as filed was defective and therefore not a witness statement in the context of Civil Procedure Rules 2010." I am fortified in that view by the precedent set out in the case of *Francis Kariu Gakumbi & Another -v- Piliska Njoki Maina* CA Civil Application No 348 of 2005 [2008 eKLR] where the Court took the view that an affidavit can properly be sworn by more than one person and that to do so does not render such an affidavit defective. By the same analogy, a witness statement signed by more than one person is not defective and should not be struck out for being an affront to the provisions of Order 7 Rule 5 of the

Civil Procedure Rules. Further, this Court must be guided by the provisions of Article 159(2)(d) of the *Constitution* which provides that:

> "Justice shall be administered without undue regard to procedural technicalities."

Similarly, Section 19(1) of the *Environment and Land Court Act* provides as follows so far as is relevant on this issue:

19

(1):

> "In any proceedings to which this *Act* applies, the Court shall act expeditiously, without undue regard to technicalities of procedure."

In any event, I did not hear the Plaintiff complain that he was prejudiced by the joint statement signed by all the Defendants herein. Besides, as was held by the majority in the case of *Nicholas Kiptoo Arap Korir Salat v IEBC* (*supra*) that was simply a deviation and lapse in form which did "not at all occasion prejudice or miscarriage of justice" to the Plaintiff and therefore, "justice must not be sacrificed on the altar of strict adherence to provisions of procedural law." To take the route suggested by Mr Makokha would be too draconian in the circumstances and would derogate from the calling of a Court of law which is to administer substantive justice to the parties before it.

35. It is for the above reasons that this Court declined to accede to the request of Mr Makokha made during the hearing that the joint statement by the Defendants be struck out and advised counsel to make submissions on that issue and which has now been done and addressed.

36. Ultimately therefore and having considered the evidence by all the parties herein, this Court makes the following disposal orders in respect to this suit:

    1. The Plaintiff's suit is dismissed.

    2. The Plaintiff shall meet the Defendants' costs.

JUDGMENT DATED, SIGNED AND DELIVERED ON THIS 6TH DAY OF MARCH 2024 BY WAY OF ELECTRONIC MAIL WITH NOTICE TO PARTIES.

BOAZ N. OLAO

JUDGE

Right of Appeal.

Explanatory notes:

This Judgment was due to be delivered on 6th February 2024. However, I was away from the station attending to a patient.