



Mbindah & another v Mwende & 10 others (Environment & Land Case 32 of 2021) [2024] KEELC 6265 (KLR) (26 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6265 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE 32 OF 2021
AY KOROSS, J
SEPTEMBER 26, 2024
[ORIGINALLY KISUMU ELC 291 OF 2013]**

BETWEEN

CHRISTOPHER MBINDAH 1ST PLAINTIFF

CHRISTOPHER MBINDAH (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF PANCRAS MBINDA - DECEASED) 2ND PLAINTIFF

AND

CLAUDE MWENDE 1ST DEFENDANT

GEORGE OGINGA 2ND DEFENDANT

ODHIAMBO OGORO 3RD DEFENDANT

OTIENO OGORO 4TH DEFENDANT

PHILEMON OMONDI 5TH DEFENDANT

JOHN OMONDI 6TH DEFENDANT

JOHN MARK OMONDI 7TH DEFENDANT

REUBEN ONYANGO OHOLA 8TH DEFENDANT

ODHIAMBO ORARE 9TH DEFENDANT

OOKO OMWANDA 10TH DEFENDANT

HENRY MOI MARANJE 11TH DEFENDANT



JUDGMENT

Background

1. The parties herein are all neighbours and have had a checkered history over a public access road (road) that traverses various parcels of land and ostensibly grants access to them. Unfortunately, official searches or green cards that would confirm the existence or ownership of various parcels were never tendered to the court as evidence.
2. As can be seen from the times gone by as evidenced by the record which facts were undisputed, the dispute has been the subject of proceedings before land registrars, the chief land registrar, the Siaya land dispute tribunal (tribunal), and the adoption of its decision as a judgment of the court in Siaya SPM 2 of 2012. Hence it is paramount that I outline the relevant dispute resolution mechanisms as they are pertinent to the outcome of this case.
3. At the instigation of the 1st plaintiff and according to Sections 21 and 22 of the repealed Registered *Land Act*, the Siaya/Bondo district land registrar on 2/03/2005 sought to fix the boundaries of the road that traversed land parcel nos. North Ugenya/Ndenga/585, 586, 587, 588, 590, 591 and 592.
4. The 1st plaintiff was dissatisfied with the findings and protested to the chief land registrar who nullified the proceedings through a letter dated 7/09/2006. He then directed the Busia/Teso district land registrar to determine the boundary dispute. Consequently, by Section 19 of the *Land Registration Act*, he fixed the boundaries as per his report dated 18/05/2012.
5. During the intervening period, the 2nd defendant instituted proceedings before the tribunal in Siaya/32/2011, and upon hearing parties, it declined to exercise jurisdiction and the outcome thereof was adopted as the court's judgment in Ukwala PM 498 of 2013.
6. By consent of the parties in this matter which consent was adopted as an order of the court on 10/02/2020, the parties agreed for the regional surveyor Nyanza, OCS Ukwala Police Station, and Chief Ndenga Location to implement the report dated 18/5/2012. This was adhered to and a report was filed in court on 5/04/2022.

Plaintiffs' case and evidence

7. By an undated amended plaint filed on 12/10/2023 by M/s. J.A. Guserwa & Co. Advocates, the plaintiffs contended the 1st plaintiff was the registered owner of land parcel nos. North Ugenya/Ndenga/589 and 587 whereas the 2nd plaintiff was allegedly the registered owner of North Ugenya/Ndenga/591.
8. They asserted the defendants had encroached onto the road and their land- the 1st and 2nd defendants had encroached on the road by 8 meters and put up two latrines on it and planted crops thereupon; the 3rd and 4th defendants had encroached on the road by planting a hedge and trees to the tune of 40 meters by 8; the 6th and 7th defendants had constructed huts on the road; the 8th and 9th defendants had planted crops on the road and interfered with the fixed boundaries; the 10th and 11th defendants had trespassed onto the 1st plaintiff's parcels of land with the former planting crops on land parcels no. North Ugenya/Ndenga/589 and 587 and the latter by cutting trees and destroying boundary marks on land parcel no. Ugenya/Ndenga/587.



9. According to the plaintiffs, a surveyor's report confirmed the allegations and, thus they sought permanent injunctive reliefs, an order for the Ukwala land registrar to implement the report, general damages, and the costs of the suit. They filed a reply to amended defence and defence to counterclaim dated 3/03/2023.
10. The 1st plaintiff who is also a legal representative of the 2nd plaintiff testified as PW1 and adopted his witness statement dated 23/10/2013 and reiterated averments contained in the plaint on the areas and levels of encroachments and asserted the particulars were known to the defendants. He produced some of the documents contained in his lists of documents dated 23/10/2013 and 3/03/2023 and they were marked as Pex. 1-53.
11. On cross-examination, he asserted the dispute was a boundary dispute that had already been determined and beacons fixed by the land registrar and that he did not have evidence to substantiate the claim of trespass or that crops were planted on the road.
12. He asserted his bone of contention was that despite the determination, the 1st and 2nd defendants had not complied with the land registrar's report by removing a hedge and a toilet that obstructed the road. He clarified that he did not have a physical photograph to prove this but a visual image.
13. Antony Karonji Macharia, a senior government photogrammetrist, and an expert, adopted his statement dated 3/03/2024. He testified as PW2 and gave his expert evidence on this image. He testified that the image was taken in 2010 and according to him, the toilet fell in North Ugenya/Ndenga/588 and the picture and his drawings on it were derived from the Preliminary Index Diagram (PID).
14. On seeking clarification from the court, PW1 testified the 1st and 2nd defendants' hedge, chain link, and toilet encroached on the road and North Ugenya/Ndenga/589 while the 3rd defendant's banana crops were on the road.
15. PW3 Titus Ojwang who is the county land registrar and one of the officers who participated in the preparation of the report of 12/05/2012 adopted his statement dated 3/03/2023. He stated as per the report, they fixed boundaries on North Ugenya/Ndenga/588, 589, 590, and 591 which are all separated by a road. According to him, the complainant was the plaintiff and his grievance was directed at North Ugenya/Ndenga/589 and 591.
16. It was his testimony a toilet encroached on a road reserve which was between land parcels no. North Ugenya/Ndenga/588 and 590, and ordered its demolition and he did not know if it still existed. He testified parties were ordered to remain on their portions of land and the road was adopted as marked.
17. He contended North Ugenya/Ndenga/592 had encroached on North Ugenya/Ndenga/591. He testified the suit was an afterthought since they had already ruled on the dispute. PW4 Tedei Hawenga Bwire testified as a neighbour and adopted his statement dated 3/03/2023 and averred he was familiar with the dispute.

1st and 2nd defendants' case, counterclaim and evidence

18. In their defence and counterclaim filed by M/s. Wasuna & Co. Advocates dated 15/07/2021, they denied the plaintiffs' claim against them and put them to strict proof. They asserted the plaintiffs' claim did not disclose a cause of action against them and one of the reliefs sought was vague.
19. They stated that on the contrary, it was the plaintiffs who had encroached onto the road common to land parcel nos. North Ugenya/Ndenga 588, 589, 590, 591, and 592 (counter claimants' properties) thus causing it to divert to land parcel nos. North Ugenya/Ndenga 590 and 591 which were owned by



the 1st defendant. They challenged the report dated 18/5/2012 for being authored by a land registrar who lacked jurisdiction.

20. In their counterclaim, they asserted the plaintiffs had encroached on the road that separated land parcel nos. North Ugenya/Ndenga 588 and 590, demolished beacons and caused the road to divert into land parcel no. North Ugenya/Ndenga 590 by 0.03 ha and particularised special damages of kshs. 15,000/-. They prayed for the counterclaim to be allowed, general damages, and costs of the suit. The jurisdiction of this court was admitted.
21. The 1st and 2nd defendants who are brothers respectively testified as DW1 and DW2 and produced as Dex1-6 some of the documents contained in their lists of documents dated 14/11/2013 and another filed on 5/06/2022.
22. DW1 adopted his statement. It was his testimony that by an adopted consent order, the land registrar's report was implemented on 19/02/2022 and it was established that the plaintiffs had encroached onto the access road thus causing it to veer into North Ugenya/Ndenga 590 by 0.03ha.
23. On cross-examination, he testified he was not aware of encroachment on the road and even though his toilet is adversely mentioned in the report as being on the said road, that was not so and he had not removed it. On clarification from the court, he testified his fence which was mentioned in the plaintiffs' evidence, was removed.
24. DW2 adopted his statement dated 5/06/2023. He corroborated DW1's evidence in chief and testified that the plaintiffs' allegations against him were false as he had never planted trees on his land and denounced the credibility of PW4.
25. Their evidence was led by their surveyor Nicholus Ongwae Obura who testified as DW3 and stated he participated in the implementation exercise of 29/01/2022 which was his 2nd visit and he confirmed the encroachment as alluded by the 1st and 2nd defendants. He stated that during the exercise, he did not use the 12/05/2012 report and he was not familiar with it.

3rd, 4th, 5th, 7th, 8th, 9th, 10th and 11th defendants' cases and evidence

26. Their defence dated 11/10/2022 was filed by M/s. Wasuna & Co. Advocates. It was composed of denials, put the plaintiffs to strict proof, and stated the plaint failed to disclose a reasonable cause of action against them. They admitted this court had jurisdiction to entertain the suit.
27. The 4th, 5th, 8th 9th and 10th defendants respectively testified as DW4, DW5, DW6, DW7 and DW8.
28. In their evidence, there were variances in the names: the 4th defendant testified his ID bore his name Francis Otieno Okoth but the plaint bore the name "Ogoro" which was his father's nickname; the 8th defendant testified that his ID showed his name was Ezekiel Omondo Walter Onyango and stated the names contained in the plaint were his alias names and lastly, the 9th defendant testified that he was Vincent Odhiambo Obiero Obiero yet the suit described him by his alias name of Odhiambo Orare. Their testimonies largely corroborated that of DW1. According to them, the dispute was between the plaintiffs and 1st, 2nd and 3rd defendants.
29. On cross-examination, DW4 testified that "their" land was North Ugenya/Ndenga 592 but his uncle lived on it and that the fixed boundary lay outside this land and though their relative had initially been buried on the road, they removed the remains and that the disputed toilet was within a homestead.
30. DW5 testified that he was an occupant of North Ugenya/Ndenga 592 and his banana plantation was within this property and not on the road.



31. DW6 testified that “their” land was North Ugenya/Ndenga 584 and denied that a road traversed it hence it was not feasible for him to plant crops on a road.
32. DW7 testified that “their” land was North Ugenya/Ndenga 585 but denied any allegations of encroachment.
33. DW8 testified that “their” land was North Ugenya/Ndenga 586 and similarly denied any allegations of encroachment. It is noted the 6th defendant did not participate in the proceedings.

Testimony of common witness (CW1)

34. The parties recorded a consent on 10/02/2020 which was adopted as an order of the court in the following terms: -
 - a. That by consent, the Siaya County land registrar assisted with the regional surveyor Nyanza, the OCS Ukwala Police Station, the Chief Ndenga location to visit the disputed area and implement the Land Registrars Report dated 18/5/2012 in respect to access of land parcels North Ugenya/Ndenga 585-596.
 - b. That parties to share costs of the surveyors.
 - c. That the report of implementation to be made within 60 days.
 - d. That mention on 1/4/2020.
35. Due to intervening factors including hostility during the initial exercise and transfer of the file from Kisumu ELC to this court, the report was not implemented until 29/02/2022 and a report was filed in court on 5/04/2022.
36. Mr. Vitalis Ambwao, a surveyor from the Nyanza regional survey office, testified as CW1 and he was cross-examined by both counsels.
37. On cross-examination by Mr. Museve for the plaintiffs, he testified the report of 12/05/2012 was implemented as per the consent order which entailed marking positions, and according to him, no structures obstructed the road, and during the exercise, they used the PID, GPS and tape as the tools of trade which usually had a margin of error of 1.5 meters. He was categorical that no toilet intruded on the road.
38. On cross-examination by Mr. Odhiambo and Mr. Ondari who jointly appeared for some of the defendants, he testified that he complied with what was entailed in the report, parties agreed on the position of the road and there were no disagreements or contest between the parties.

Plaintiffs' submissions.

39. The plaintiffs' counsel filed written submissions dated 7/05/2024 and, they identified 4 issues for resolution; whether the defendants had encroached on the access road, whether the report of 18/05/2012 was implemented, whether boundaries were fixed and whether the plaintiffs were entitled to the reliefs sought. Their counsel relied on two authorities to bolster his arguments.
40. Except the 6th defendant, all the other defendants who were represented by one counsel filed written submissions dated 6/05/2024 and identified the following 4 issues as arising for resolution; whether the plaintiffs' undated, unsigned, and unverified plaint should be struck out, whether the defendants had encroached onto the plaintiffs' parcels of land and whether the plaintiffs had encroached onto the road.



41. In their supplementary submissions dated 16/05/2024, counsel rehashed outcomes of various survey reports which were alluded to in the background of this judgment and the proceedings of this court. Counsel relied on provisions of law and one authority.
42. Upon identifying and considering the issues for determination, this court will in its analysis and determination consider the respective counsels' arguments on the particular issue and also consider provisions of law and legal authorities they relied upon to advance their respective arguments.

Preliminary issues

43. The 4th, 8th, and 9th defendants admitted that their names were misdescribed in the pleadings. These parties specifically knew who was being sued. In my view, these misdescribed defendants understood the substratum of the suit, and issues in contestations therefore, the misdescription cannot render the suit incompetent.

Issues for determination, Analysis, and Determination

44. I have considered the pleadings, evidence adduced by the parties and their witnesses, as well as the rival submissions. Being guided by the provisions of law and judicial precedents that have been well cited, I shall now proceed to consider the merits or otherwise of the plaintiff's claim and the 1st and 2nd defendants' counterclaim, and conceivably the issues for determination are;
 - I. Whether the plaintiffs' suit is incompetent.
 - II. Whether the plaintiffs' claim and 1st and 2nd defendants' counterclaim proved ownership or possession of various parcels of land.
 - III. Whether the road boundary dispute was settled.
 - IV. What orders should this court issue including an order as to costs?

I. Whether the plaintiffs' suit is incompetent.

45. The plaintiffs' counsel did not address me on this issue but the defence counsel did. He argued the provisions of Order 2 Rule 16 of the Civil Procedure Rules provided that pleadings must be signed by an advocate, recognized agent, or a party if he acts in person.
46. According to the defence counsel, the plaintiffs' amended plaint was unsigned, undated, and did not have an affidavit to verify the averments therein as required by Order 4(2) of the Civil Procedure Rules.
47. A scrutiny of the amended plaint confirms that though there is a regular verifying affidavit dated, signed, and sworn by the 1st plaintiff, the amended plaint is undated and unsigned.
48. I must agree with the defence counsel that failure to sign an amended plaint is fatal, irregular, defective, and essentially improperly before the court and it is liable for striking out. By signing of pleadings, the author authenticates them and takes ownership of the contents therein.
49. This legal requirement of the signing of pleadings was well elucidated in the binding Court of Appeal decision of *Vipin Maganlal Shah & another v Investment & Mortgages Bank Limited & 2 others* [2001] eKLR where on examination of the then Order VI Rule 14 of the Civil Procedure Rules which is similar to the current Order 2 Rule 16 of the Civil Procedure Rules, the court stated thus: -

“In Kenya, we have already cited the *Samaki* case, *supra*. There is of course the object the legislator had in mind in requiring that a plaint be signed either by counsel or the party



suing. The object must clearly be to make the party suing or filing any other pleading take ownership and responsibility for the contents of the pleadings or as was said in the Great Australian Gold Mining Co case, supra, to be: "a voucher that the case is not a mere fiction." "

50. This unsigned pleading cannot be accepted by the court and I find the amended pleadings dated 12/10/2023 null and void and it is hereby struck out. Having struck it out, the plaintiffs' claim reverts to the original pleadings dated 23/10/2013. However, since the 2nd plaintiff died on 19/02/2020 without proper amendment of pleadings to substitute him, the only valid claim is that contained in the original pleadings with a rider- it is only the 1st plaintiff's claim that is competent.

II. Whether the plaintiffs' claim and 1st and 2nd defendants' counterclaim proved ownership or possession of various parcels of land.

51. Section 3 (1) of the Trespass Act defines trespass as: -

"any person who without unreasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on private land without the consent of the occupier thereof shall be guilty of an offence."

52. Section 152A of the Land Act 2016 states as follows: -

"A person shall not unlawfully occupy Private, Community or Public Land."

52. The case of John K Koech v Peter Chepkwony [2019] eKLR cited with approval Clerk & Lindsell on Torts 18th Edition at paragraph 18-01 which defined trespass as follows:

"Any unjustifiable intrusion by one person upon land in possession of another"...Trespass is actionable at the instance of the person in possession and that proof of ownership is prima facie proof of possession."

52. By the definition, a claimant who pleads trespass has to prove either possession or ownership of the disputed land. The 1st plaintiff based his claim on ownership of North Ugenya/Ndenga 587 and 589. It was expected he would tender evidence to prove such ownership by producing green cards or certificates of official searches but that was not so.

52. Additionally, since trespass is a tort and by Section 4 (2) of the Limitation of Actions Act it must be filed within 3 years, a claim of trespass must disclose the date or dates the actions accrued and, in my view, the elements of trespass were not properly expressed and particularised in the claim. I find their claim failed.

52. As to the counterclaim, the 1st and 2nd defendants' pleadings did not equally disclose the date or dates of accrual of their causes of action. They also did not claim to be possessors or owners of any parcel of land.

52. Further, it is uncertain if their claim concerns encroachment of land or diversion of a road onto North Ugenya/Ndenga 590. A scrutiny of their counterclaim reveals trespass it is not well articulated and particularized in their pleadings. I find their counterclaim failed.

52. Before I conclude, I must mention in the claim of encroachment onto the road, it would have been prudent if the 1st and 2nd defendants joined the custodian of the access road to the proceedings.



III. Whether the road boundary dispute was settled.

52. As stated earlier in this judgment, on 12/5/2012, the land registrar fixed the boundary between various parcels of land in dispute and the road. There has been no appeal or review against the decision. This was done per Section 19 of the [Land Registration Act](#) which states as follows: -

- (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.
- (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.”

52. Considering several reports adduced by the parties, the relief sought in the plaint is unclear on which report the 1st plaintiff sought to have implemented. This notwithstanding, from adduced evidence, the long outstanding dispute was the issue of implementation of the report dated 12/05/2012.

52. In appreciation of this and by the consent of the parties as earlier highlighted in this judgment, an implementation exercise was carried out on 29/01/2022, and in attendance were a myriad of attendees including parties herein, experts, advocates, ministry of lands officials and police officers. A report confirming the implementation was filed on 5/04/2022.

52. The defence counsel submitted the implementation exercise resolved the road dispute while the 1st plaintiff's counsel submitted that this was not so and adduced several reasons; the image by the senior government photogrammetrist showed the toilet extruded from North Ugenya/Ndenga 590 onto the road; banana plants extruded from North Ugenya/Ndenga 592 to the road and lastly, took issue with the tools of trade used in measuring the road and preparing the report.

52. In his testimony, CW1 was categorical that there were no obstructions on the road. It is noted following the report dated 12/05/2012, parties were given up to 31/12/2012 to clear the road's pathway. It is possible that in the 12 years since this decision, circumstances may have changed including compliance.

52. It must be borne that as experts, a margin of error is acceptable in the survey field, and the Court of Appeal weighed in on this in the case of *Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others* [2019] eKLR thus: -

“Although, like in all professions, the highest standard of competency is required, permissible errors in the measurement is acceptable so long as there is effort to comply with the elaborate procedure laid down under Regulations 56, 57 and 60, on the method of taking triangulation and fixing of beacons. It is significant to bear in mind the express requirement of Regulation 91 that a surveyor must take into consideration and reflect in his plan properties, including road or railway reserve which have been surveyed and which abut the property being surveyed.”



52. CW1's testimony that the implementation exercise was peaceful, the road was marked and there were no structures including a toilet on the road was not controverted.
52. Although the report of 12/05/2012 demonstrated the 2nd defendant's toilet was on the access road, this was controverted by the PW2's expert witness who corroborated CW1's testimony when he stated the toilet lay in North Ugenya/Ndenga/588.
52. A glimpse of the image that was produced shows the toilet falls on parcel no. North Ugenya/Ndenga/588. Considering the implementation exercise was carried out in the presence of the 1st plaintiff and several survey experts, I am satisfied with CW1's evidence that there were no obstructions on the road. CW1's testimony was also credible and consistent.
52. CW1 is a survey expert and he is primarily governed by Section 21 (1) of the Survey Act which requires him to be responsible for the correctness and completeness of a survey exercise. The boundaries had already been fixed by the report of 12/05/2012 and the methodology of measurement applied in this report was clear and it was uncontroverted that beacons fixing the boundaries were installed on 12/05/2012.
52. Thus, I agree with CW1's testimony that his scope was restricted by the consent court order. The absence of the methodology applied does negate the implementation report. Having so complied with the consent order, I find the report dated 5/04/2022 resolved the dispute.

IV. What orders should this court issue including an order as to costs?

52. The report of 12/05/2012 determined the boundaries over several parcels of land and to bring the process and dispute to an end, it is paramount for the land registrar to fully comply with Section 19 of the Land Registration Act by filing a plan and making a note in the register on the various properties whose boundaries were fixed.
52. Finally, and for the reasons stated hereinabove, it is my ultimate finding that the 1st plaintiff's and 1st and 2nd defendants' claims were unsuccessful and are hereby dismissed.
52. Since costs follow the event and considering the 1st plaintiff's and 1st and 2nd defendants' claims were unsuccessful, the 1st plaintiff shall bear the 3rd, 4th, 5th, 7th, 8th, 9th, 10th and 11th defendants' costs of the suit. The 6th defendant did not participate in the proceedings hence costs are not awarded to him.
52. Therefore, I hereby issue the following final disposal orders;
- a. The 1st plaintiff's suit is hereby dismissed.
 - b. The 1st and 2nd plaintiffs' amended counterclaim dated 12/10/2023 is hereby struck out.
 - c. The 1st and 2nd defendants counterclaim dated 13/07/2021 is hereby dismissed.
 - d. The 1st plaintiff shall bear the 3rd, 4th, 5th, 7th, 8th, 9th, 10th and 11th defendants' costs of the suit.
 - e. Per Section 19 of the Land Registration Act, the relevant Land Registrar where land parcel nos. North Ugenya/Ndenga/585, 586, 587, 588, 589, 590, 591, 592, 593, 594, and 596 are situated to complete the process of fixing the boundaries by filing a plan containing the particulars and making a note on the register.

Orders accordingly.

DELIVERED AND DATED AT SIAYA THIS 26TH DAY OF SEPTEMBER 2024.



HON. A. Y. KOROSS

JUDGE

26/9/2024

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

In the Presence of:

Mr. Museve for the plaintiffs

Mr. Odhiambo and Mr. Ondari for the defendants

Court assistant: Ishmael Orwa

