



**Ong’enga v Sioka & another (Environment & Land Case 18 of 2015)
[2024] KEELC 13870 (KLR) (17 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13870 (KLR)

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

**BN OLAO, J
DECEMBER 17, 2024**

BETWEEN

CORNEL BWIRE ONG’ENGA PLAINTIFF

AND

JULIUS BWIRE SIOKA 1ST DEFENDANT

HON. RAPHAEL BITA SAUTI WANZALA 2ND DEFENDANT

RULING

1. The dispute between Cornel Bwire Ong’enga (the Plaintiff) and Julius Bwire Sioka (the Defendant) with regard to the land parcels No Bunyala/Bulemia/2760, 1435 and 2389 is still raging some five (5) years after Kaniaru J delivered his judgment on 12th September 2019. This is principally because although one of the prayers sought by the Plaintiff in paragraph 2(A) of the amended plaint dated 26th April 2017 was:

2(A): “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 land parcel numbers No Bunyala/Bulemia/2760 and Bunyala/Bulemia/1435,”

the judge made no final orders with regards to the above prayer. This is how he addressed that prayer in paragraph 20(part) of the judgment:

“I am unable however to grant the prayer of permanent injunction as prayed (prayer 2A). An order of such injunction would require certainty of 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 if granted.”



The Judge continued in paragraph 21 (part) of the said judgment that:

“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 the Defendant from because the boundaries are still uncertain and/or unmarked.”

Earlier in the same judgment, the judge said the following in paragraph 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 or 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 remain. That is clearly contrary to how things are supposed to be. It would be wrong to allow it.”

Finally, there was no doubt in the judge’s mind as to who was to blame for the unsatisfactory state of affairs obtaining on the ground. This is what he said in the last two sentences of the judgment:

“The evidence adduced shows that the Defendant was involved in blameworthy conduct regarding the creation of the existing unsatisfactory state of affairs. I therefore order that the Defendant should pay costs and interests.”

There then followed an application by one Raphael Bitta Sauti Wanjala dated 18th January 2022 in which he sought orders, inter alia, that he be enjoined as a 2nd Defendant, stay of execution and setting aside of the judgment herein. That application came for hearing before Omollo J and vide a ruling delivered on 28th September 2022, the judge enjoined Raphael Bitta Sauti Wanjala as a 2nd Defendant but declined the prayer to set aside the judgment. In paragraph 17 (C) of that ruling delivered on 28th September 2022, Omollo J made the following order which is relevant to this ruling:

17(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).”

Following the above order, a re-surveying was done and a report dated 18th January 2021 was prepared by one Mr Wilfred N. Nyaberi the Land Registrar Busia. However, that exercise abated because, as stated in the report, that exercise was “thwarted by the Respondent and his family.” The Respondent was the Defendant herein.

2. The Plaintiff then moved to this Court vide his Notice of Motion dated 27th September 2023. Hew sought various orders but the one relevant for purposes of this ruling was prayer No 3 which was:

3: “That the body buried by the Respondent in the Applicant’s land parcel No L.R. No Bunyala/Bulemia/1435 be exhumed.”

When that application came up before me and having considered all the issues, I delivered a ruling on 18th January 2024 directing that the report called for by Omollo J in paragraph 17 (C) of the ruling



delivered on 28th September 2022 be complied with. I went on to add in paragraph 2 of that ruling as follows:

“The report must also specify whether the body is buried on the land parcel No Bunyala/Bulemia/1435.”

The report dated 24th April 2024 was subsequently filed on 17th May 2024 by the Land Registrar Busia V. K. Lamu. However, before this Court could adopt it as an order of the Court, both Mr Ouma counsel for the Plaintiff and Mr Olwenya holding brief Mr Omiti for the 2nd Defendant applied to address me on the report which had not yet been adopted as an order of the Court. The 1st Defendant did not attend Court. I directed that counsel file written submissions.

3. The submissions were subsequently filed both by Mr Ouma instructed by the firm of B. M. Ouma & Company Advocates And By Mr Omiti instructed by the firm of Ngeri, Omiti & Bush Advocates LLP for the 2nd Defendant. The 1st Defendant did not attend Court on 3rd July 2024 when directions were issued nor file any submissions.
4. I have looked at the report by V. K. Lamu the Land Registrar as well as the submissions by counsel.
5. Both submissions are fairly lengthy and I need not rehash the contents thereof. What is clear from those submissions is that both the Plaintiff and the 2nd Defendant are not entirely contented with the report. In paragraphs 19 and 20 of his submissions, counsel for the Plaintiff has submitted as follows:

19: “We do submit you reconsider the Report filed and make further orders as intimated to meet the circumstances of the case. It is that this Court has the final say, as at now, to preserve the rights of the Plaintiff over property Bunyala/Bulemia/1439 (counsel must have meant 1435) and 2760 as already adjudged and decreed by this Court and there being no compliance by persons entrusted and ordered to implement this Court’s order in advancing the cause of justice insist on total compliance with it’s decree and directions until it is satisfactorily done without altering and or changing the factual findings by it’s implementers.”

20: “The report is not in compliance with the Court decree and directions given earlier.”
On his part, counsel for the 2nd Defendant has submitted as follows at paragraphs 17, 19 and 21 of his submissions:

17: “We submit that the County Land Registrar together with the County Surveyor should re-survey the disputed land parcels for purposes of establishing the boundaries and actual coverage on the ground. Furthermore, the recommendations under the Report for re-survey of the disputed boundaries are sound and should be implemented as soon as possible to settle the question in controversy.”

19: “The Land Registrar Report points out that the disputed boundary affects the 2nd Defendant who is the owner of the Land Title number Bunyala/Bulemia/2809. The findings in the report should be taken into account specifically the fact that the parcel No 1435 is non-existence. Furthermore, the Plaintiff waited until the demise of the original owners to institute this suit.”

21: “In order to settle the questions in controversy arising from the boundaries of the suit land, this Honourable Court should order for re-survey of the land and rectification of the Land Register to align with the actual ground position of the suit land.”

The thread that runs through the submissions by counsel for both parties is that the report by the Land Registrar dated 24th April 2024 and filed herein on 17th May 2024 is clearly inconclusive. I am however concerned when counsel for the 2nd Defendant submits that the land parcel No Bunyala/Bulemia/1435



“is non-existent”. That cannot be factually correct because the title thereto was recognized by the Land Registrar at paragraph two (2) under introduction where she states:

“Land parcel Bunyala/Bulemia/1435 is registered in the name of Cornel Bwire Ong’enga the Plaintiff in this case. He is also the owner of land parcel No Bunyala/Bulemia/2760.”

Most significantly, in his judgment dated 12th September 2019, Kaniaru J addressed that issue as follows:

“I have considered the pleadings, evidence, and rival submissions. The Plaintiff showed his title deeds for land parcels Nos 2760 and 1435. The Defendant would have us believe that the Plaintiff forged the title deed for parcel No. 2760 and that parcel No. 1435 does not exist. But the evidence of PW2, who is the official custodian of ownership documents, shows the titles are genuine...”

The validity of the title to the land parcel No Bunyala/Bulemia/1435, having been affirmed by Judge KANIARU in his judgment, that cannot be a matter for speculation by any party and especially after the Land Registrar confirms the same.

6. Having said so, the Land Registrar in the last findings of her report states as follows under the title;

“implementation of court order:

- a. Establishment of boundary between land parcels Bunyala/Bulemia/1435 and 2008 and 2809.

The actual position of No 1435 is part of No 1436 with No 2760 between it with No 2808. This calls for re-survey and amendment of land records.

- b. The position of the grave.

The grave is within Sioka’s land No 4989 (sub-division of No 2808)”

The report of the Land Registrar dated 24th April 2024 is of course the evidence of an expert which must be given due respect although the final decision whether or not to accept it is a decision to be made by this Court. As was held in the case of Ndolo -v- Ndolo 1995 KLR 390.

“The evidence of PW1 and the report of Munga Were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held, the evidence of experts must be considered with all available evidence and it is the duty of the trial Court to decide whether or not it believes the expert and give it’s decision...”

It is also the law that an expert’s opinion is not binding on the Court – Kagina -v- Kagina & 2 Others Civil Appeal No 21 of 2017 (2021 KECA 242 KLR). And in the case of Dhalay -v- R 1995 – 1998 EA 29, the Court of Appeal held:

“Where the expert who is properly qualified in his field gives an opinion and gives reasons upon which his opinion is based and there is no other evidence in conflict with such opinion, we cannot see any basis upon which such opinion could ever be rejected. But if a Court is satisfied on good and cogent ground(s) that the opinion though it be that of an expert, is not soundly based, then a Court is not only entitled but would be under a duty to reject it.”
Emphasis mine.



What has caused me concern about the Land Registrar's report dated 24th April 2024 is that whereas it concludes that:

“The grave is within SIOKA's land No 4989 (sub-division of No 2808),”

the same report states that “the actual position of No 1435 is part of No 1436 with No 2760 between it with No 2808. This calls for re-survey and amendment of Land Records.” Emphasis mine

If the grave is within land parcel No Bunyala/Bulemia/4989 which is itself a sub-division of the land parcel No Bunyala/Bulemia/2808 being part of the land parcels for which a “re-survey and amendments of Land Records” is being called for, it cannot be said, with any degree of certainty, that the body is buried on SIOKA's (the 1st Defendant's) land parcel No Bunyala/Bulemia/4989 and not the land parcel No Bunyala/Bulemia/1435 belonging to the Plaintiff as was averred in his affidavit in support of his Notice of Motion dated 27th September 2023. The Land Registrar having called for a re-survey and amendments of the records of parcels of land, that ought to be the first port of call before a definitive conclusion is made with respect to where the grave is. It is instructive to note that counsel for the 2nd Defendant also calls for a re-survey and rectification of the Register. On his part, the 1st Defendant (JULIUS BWIRE SIOKA) against whom the orders sought in the Notice of Motion dated 27th September 2023 were directed, filed no response to that application.

7. Having considered the oral submissions by counsel with regard to the report by the Land Registrar dated 24th April 2024, I am persuaded that the said report is not for adoption as an order of this Court. I hereby direct as follows:
 1. The Land Registrar's report dated 24th April 2024 and filed on 17th May 2024 is not admitted.
 2. There shall be a re-survey and amendment of the land records to establish the boundary between the land parcels No Bunyala/Bulemia/1435, 2808, 2809, 2760 and 4989 to confirm definitively on which land parcel the grave is situated.
 3. In carrying out this exercise, the Land Registrar Busia shall familiarize herself with the judgment delivered herein by A.K. Kaniaru J on 12th September 2019 as well as the subsequent rulings by Omollo J and myself.
 4. Bearing in mind that this is an enormous exercise, this Court will not impose any tight time lines but will fix a mention date of 2nd July 2025 to find out if any report shall have been filed on or before that date and for further direction or orders.
 5. No orders as to costs.

BOAZ N. OLAO

JUDGE

17TH DECEMBER 2024

RULING DATED, SIGNED AND DELIVERED BY WAY OR ELECTRONIC MAIL ON THIS 17TH DAY OF DECEMBER 2024.

BOAZ N. OLAO

JUDGE

17TH DECEMBER 2024

