



REPUBLIC OF KENYA



**KENYA LAW**  
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**Oluoch v Nyawalo & 2 others (Environment & Land Case 609 of 2015)  
[2024] KEELC 13777 (KLR) (10 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13777 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND CASE 609 OF 2015  
SO OKONG'O, J  
DECEMBER 10, 2024**

**BETWEEN**

**NELLY ATIENO OLUOCH ..... PLAINTIFF**

**AND**

**DAMARIS A NYAWALO ..... 1<sup>ST</sup> DEFENDANT**

**MILTON OBOTE KWACH ..... 2<sup>ND</sup> DEFENDANT**

**KENYA BANKERS COOPERATIVE SAVINGS & CREDIT SOCIETY  
LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. There is a dispute about the location of all that parcel of land known as Kisumu/Kogony/2955 (Plot No. 2955) owned by the Plaintiff. Plot No. 2955 has a title and exists on the Registry Index Map for Kisumu Kogony Registration Section but does not exist on the ground. The Plaintiff has contended that the 2<sup>nd</sup> Defendant who is the registered owner of the parcel of land known as Kisumu/Kogony/2956 (Plot No. 2956) has encroached on the entire parcel of land comprised in Plot No. 2955. Plot No. 2955 and Plot No. 2956 are subdivisions of a formerly larger parcel of land that was owned by the 3<sup>rd</sup> Defendant. The 3<sup>rd</sup> Defendant through the Kisumu District Surveyor, a Mr. Odila subdivided the hitherto larger parcel of land into several portions, Plot No. 2955 and Plot No. 2956 inclusive. The 3<sup>rd</sup> Defendant allocated Plot No. 2955 and Plot No. 2956 which measured 0.05Ha. each to the Plaintiff and the 1<sup>st</sup> Defendant respectively. The 1<sup>st</sup> Defendant sold Plot No. 2956 to the 2<sup>nd</sup> Defendant who owned two other parcels of land in the neighbourhood. The 1<sup>st</sup> Defendant and the Plaintiff were members of the 3<sup>rd</sup> Defendant. Evidence has been led that during the plot allocation, both the Plaintiff and the 1<sup>st</sup> Defendant were shown Plot No. 2955 and Plot No. 2956 on the ground and the beacons marking their boundaries.



2. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants have denied encroaching on Plot No. 2955. On its part, the 3<sup>rd</sup> Defendant has averred that the dimensions and the location of Plot No. 2955 and Plot No. 2956 were confirmed and fixed on the ground. The 3<sup>rd</sup> Defendant has denied any wrongdoing on the said disappearance of Plot No. 2955 from the ground.
3. To unravel this mystery of the lost parcel of land, two survey reports have been filed. The first survey report was prepared and filed in court by the Kisumu District Surveyor one Francis Owara on 28<sup>th</sup> May 2012. According to this report, Plot No. 2955 does not exist on the ground. The location where the parcel of land is supposed to be has been fenced off with a stone wall that has been put up around land parcels Kisumu/Kogony/2956, Kisumu/ Kogony/2957 and Kisumu/Kogony/2958. This surveyor recommended that since the map and ground measurements of the various plots formerly owned by the 3<sup>rd</sup> Defendant on the block on which Plot No. 2955 existed differed, it was necessary for all the parcels of land on the block to be identified and their measurements harmonized. The other survey report was prepared by Hamilton Odhiambo of Beacon Point Surveyors. This report was filed in court on 16<sup>th</sup> May 2018. According to this report, Plot No. 2956 has encroached onto Plot No. 2955 by 11.5 meters. This surveyor recommended that the map that was used by the 3<sup>rd</sup> Defendant to allocate among others, Plot No. 2955 and Plot No. 2956 should be employed to place boundary beacons on the ground as it was the one that was used to show the various allottees their parcels of land. The surveyor stated that the existing Registry Index Map was plotted erroneously and does not tally with the position of the plots on the ground.
4. The suit has been heard and both parties have closed their cases. After the close of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' case on 7<sup>th</sup> October 2024, the Plaintiffs made an oral application for the court to order that a fresh survey be conducted and a report filed in court to assist the court unravel this mysterious disappearance of Plot No. 2955 from the ground. The application was opposed by the advocates for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who argued that the Plaintiff was seeking the assistance of the court to fish for new evidence as there was nothing new that had come up that would call for clarification through a new survey report. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants argued that the survey reports referred to earlier have been on record and as such their contents are not new. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that there is an order on record made on 24<sup>th</sup> June 2014 for the 3<sup>rd</sup> Defendant's surveyor who had originally done the survey work to go to the suit property together with the surveyors appointed by the Plaintiff and the other defendants and do a re-survey work to identify Plot No. 2955 and Plot No. 2956 and to file a report in court within 60 days. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants argued that this order was not complied with and that instead, the Plaintiff unilaterally conducted her own survey through Beacon Point Surveyors in 2018. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants argued that the survey report on record by the District Surveyor did not support the Plaintiff's case and that the Plaintiff was now trying to fill up the gaps in her case which should not be allowed. The 3<sup>rd</sup> Defendant did not object to the application, it argued that no party would suffer prejudice if the application was allowed. In a rejoinder, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that it was the 3<sup>rd</sup> Defendant who had the responsibility under the order made on 24<sup>th</sup> June 2014 to arrange for a resurvey and that despite several requests, they did not comply with the order. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants wondered what had caused a sudden change of heart.
5. I have considered the Plaintiff's application and the submissions by the advocates for the parties. It is not disputed that on 24<sup>th</sup> June 2014, the court made an order by consent of the parties that a resurvey be carried out by the 3<sup>rd</sup> Defendant's surveyor who did the initial survey with the assistance of surveyors appointed by the Plaintiff and the other Defendants to identify the boundaries of Plot No. 2955 and Plot No. 2956. It is common ground that that order was not complied with. I have perused the two survey reports on record. The two surveyors have come up with a recommendation on what in their



view may assist in resolving the dispute between the parties herein over the location and boundaries of Plot No. 2955. I am of the view that what they have recommended is what the court had intended to achieve through the order of 24<sup>th</sup> June 2014. I am of the view that a resurvey of the two parcels of land by the surveyor who did the initial survey with the assistance of the surveyors appointed by the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants would assist the court in arriving at an informed and just decision in this matter. I am of the view that none of the parties would be prejudiced if the order of 24<sup>th</sup> June 2014 was complied with. Once a resurvey is done and a report filed in court, the court will allow all the parties to examine the 3<sup>rd</sup> Defendant's surveyor who will be responsible for preparing the report, on his report.

6. In conclusion, I allow the Plaintiff's oral application and direct that the order made herein on 24<sup>th</sup> June 2014 be complied with forthwith. The re-survey report shall be filed in court within 60 days from the date hereof. The 3<sup>rd</sup> Defendant's advocates shall liaise with the advocates for the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to ensure that they are given an opportunity to be represented by a surveyor of their choice during the re-survey exercise. Delivered and Dated at Kisumu on this 10<sup>th</sup> day of December 2024

**S. OKONG'O**

**JUDGE**

**RULING DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO  
CONFERENCING PLATFORM IN THE PRESENCE OF:**

Mr. Kinara for the Plaintiffs

Ms. Anuro h/b for Mr. Otieno for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants

Ms. Omondi for the 3<sup>rd</sup> Defendant

Ms. J.Omondi-Court Assistant

