



REPUBLIC OF KENYA



**Aloo v Ouma & another (Environment & Land Case 23 of 2021)
[2023] KEELC 519 (KLR) (31 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 519 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND CASE 23 OF 2021
GMA ONGONDO, J
JANUARY 31, 2023**

BETWEEN

JECTON OTIENO ALOO PLAINTIFF

AND

WILLIS ODHIAMBO OUMA 1ST DEFENDANT

THE LAND REGISTRAR KOSELE LANDS OFFICE 2ND DEFENDANT

JUDGMENT

1. The instant dispute revolves around the following land reference numbers;
 - a. Central Kasipul/Kamuma/measuring approximately Zero Decimal Two hectares (0.2 Ha) in area (The suit land herein)
 - b. Central Kasipul/Kamuma/1736 (The 1st other parcel of land herein)
 - c. Central Kasipul/Kamuma/4279 measuring approximately Zero Decimal Zero Zero Three hectares (0.003 Ha) in area (The 2nd other parcel of land herein)
2. The plaintiff through the firm of Bigogo Onderi and Company Advocates, originated this suit by way of a plaint (Fast Track) dated July 24, 2018 and filed in court on July 25, 2018. He asserted that he is the sole registered proprietor of the suit land. That on or about August 17, 2001 and without his notice, the 1st and 2nd defendants illegally and fraudulently curved the 2nd other parcel of land out of the suit land and registered the same in the name of the 1st defendant. The particulars of fraud and illegality are set out at paragraph 9 of the plaint.
3. So, the plaintiff prays for judgment against the defendants jointly and severally for;



- a) An eviction order against the first defendant, his servants, agents and/or associates do issue evicting him from the plaintiff's illegal curved portion of Land Parcel No Central Kasipul/Kamuma/1735 forthwith.
 - a. An eviction order against the first defendant, his servants, agents and/or associates do issue evicting him from the plaintiff's illegal curved portion of Land Parcel No Central Kasipul/Kamuma/1735 forthwith.
 - b. A permanent injunction do issue to restrain the first defendant, his servants, agents and/or associates from transferring, charging, leasing and interfering with the plaintiff's peaceful occupation in any manner whatsoever other than by way of a surrender/re-transfer to the plaintiff the grabbed portion of his land now registered as Central Kasipul/Kamuma/4279.
 - c. An order directing the second defendant to rectify the register by cancelling entries related to Land Parcels No Central Kasipul/Kamuma/1736 and 4279 and reversion of these twin parcels of land to be part of parcel No Central Kasipul/Kamuma/1735 as it exists in the Kosele Lands Office records.
 - d. An injunction order do issue to the second defendant to stop him from interfering with registration of the plaintiff's land parcel No Central Kasipul/Kamuma/1735 in any manner whatsoever.
 - e. Costs of the suit and interest be awarded.
4. By the statement of defence dated September 29, 2018 and filed on October 2, 2018, the 1st defendant through the firm of Kinyanjui, Kirimi and Company Advocates, stated, inter alia;
 - a. The 1st defendant states that this Honourable Court has no jurisdiction to adjudicate the dispute and the defendant will file an objection shortly in this regard.
 - b. The Plaintiff's suit is flawed, incompetent, bad in law and discloses no reasonable cause of action against the 1st defendant who will move appropriately to have the suit against him dismissed with costs.
 5. The 1st defendant stated in part that the 2nd other parcel of land being a sub division of land reference number Central Kasipul/Kamuma/4279 was sold to him by one Sije Owade in 1994. He therefore, denied the plaintiff's claim and prays that the suit be dismissed with costs.
 6. The 2nd defendant through the Attorney General filed a memorandum of appearance dated September 13, 2018 on September 20, 2018 only in this matter.
 7. In a reply to defence dated October 15, 2019, the plaintiff entirely reiterated the contents of paragraphs 5, 6 and 9 of his plaint and stated in part that he will not cede even an inch of the suit land to any intruder including the 1st defendant. That the statement of defence is a sham.
 8. On May 18, 2021, the court partially allowed the 1st defendant's preliminary objection dated September 28, 2018 with costs in the cause. Further, Homa Bay Land Registrar and Surveyor were ordered to avail report (s) for consideration by the court.
 9. As a result, a report of two pages authored by Tiberious N Ndigwa, Land Registrar Homa Bay was duly filed in court on March 25, 2022 (The report herein). It concludes thus;
 - ' Parcel number Central Kasipul/Kamuma/1736 did not exist on the ground and nobody claimed to own it. It reflection on the map was an error.



The plaintiff has fully utilized his land to its limits, that is to say the plaintiff's land was the area occupied by the two permanent houses.

The wall of the house facing the disputed area had neither windows nor entrance.

The boundary was determined and fixed immediately after the wall'

10. The report was made in consonant with Section 18 (2) of the [Land Registration Act](#), 2016 (2012) which stipulates;
 - (2) The court shall not entertain any action or other proceedings relating to a dispute as to boundaries of registered land unless the boundaries have been determined in accordance with this section.
10. On May 9, 2022, the court ordered and directed the parties to file and serve their respective submissions on the report in the spirit of fair hearing anchored under Articles 48, 50 (1) and 25 (c) of the [Constitution](#) of Kenya, 2010
11. In the plaintiff's submissions dated June 29, 2022, learned counsel for the plaintiff referred to the court's orders of May 18, 2022 and that the findings and observation in the report create wrong impression and that the boundary was not determined and fixed as alleged in report. That the Land Registrar and Surveyor did not comply with the letter and spirit of the orders of May 18, 2022.
12. By the submissions dated November 1, 2022 and filed on November 9, 2022, learned counsel for the 1st defendant made reference to the orders of May 18, 2022, the report and relied on the case of [David Otieno Obanda-vs-Henry Opiyo Akama and 2 others 2021 KLR](#). Counsel submitted that the boundaries were delineated, determined and fixed. That what the plaintiff is challenging is the merits of the proceedings before the Land Registrar which is totally misplaced. Thus, counsel urged the court to uphold and adopt the report as judgment and dismiss the suit with costs to the 1st defendant.
13. The 2nd defendant's counsel, Mr Kajo relied on the report in his submission.
14. I have duly considered the parties' respective pleadings, report and the plaintiff's submissions and the 1st defendant's submissions. Therefore, should the court adopt the report as Judgment for the plaintiff and dismiss the suit with costs to the defendants?
15. The right to be heard is a fundamental principle and permeates our entire justice system; see [Onyango Oloo-vs-Attorney General \(1986-1989\) EA 456](#).
16. Notably, one Luka Muma allegedly represented the 1st defendant at a meeting convened by the Land Registrar and surveyors to determine boundary as shown at page 1 of the report. The same is discerned at page 1 of the plaintiff's submissions and the 1st defendant confirms the report.
17. Be that as it may, the plaintiff and the 1st defendant participated in the proceedings that generated the report. As noted at paragraphs 11, 12 and 13 hereinabove, the parties herein were made aware of the existence of the suit and report and had the right to appear or decline to appear or present submissions; see also [Ogada-vs-Mollin \(2009\) KLR 620](#).
18. Plainly, the 1st and 2nd defendants were given opportunity to be heard by the Land Registrar and by the court on the report as per Articles 48, 25 (C) and 50 (supra) and [Halsbury's Laws of England 5th Edition \(2010\) Volume 61](#) paragraph 639.



19. It is well established that where there is clear procedure of redress of any particular grievance, the same to be adhered to since there are good reasons for such special procedures; see *Speaker of National Assembly-vs-Karume (1992) KLR 21.*
20. In the case of *Geoffrey Muthiga Kabiru and 2 others-vs-Samuel Munga Henry and 1756 others (2015) KLR*, the Court of Appeal esteemed the exhaustion principle thus;

' Courts ought to be for a last resort and not the first port of call the moment a storm brews.
The exhaustion principle is a sound one.'
10. Learned counsel for the 1st defendant submitted that the boundary was delineated, determined and fixed as noted in the report. It is abundantly clear that the approximate boundaries, situation and position of the suit land vis a vis the 2nd other parcel of land were ascertained and fixed pursuant to sections 18 and 19 of the *Land Registration Act, 2016 (2012).*
11. Sections 48 to 54 of the *Evidence Act* Chapter 80 Laws of Kenya make provision for evidence from expert witnesses. However, as a general rule, opinion evidence is not binding on the court which is at liberty to accept or reject it depending on the facts and circumstances of the case as held in, inter alia, *CD Desouza-vs-BR Sharma (1953) 26 KLR 41* at page 42, *Amosam Builders Developers Ltd-vs-Gachie and 2 others (2009) KLR 628*; see also this court's decision in *Registered Trustees Legio Maria Africa Church Mission-versus-Simeon Nyamweya Obwocha (2018) eKLR.*
12. In the obtaining scenario, I find no reasons to reject the report herein generated by an expert witness in this context. The same has ascertained the approximate boundaries, situation and position of the suit land and the 2nd other parcel of land as the 1st other parcel of land does not exist. Therefore, the plaintiff has failed to prove his claim against the defendants on a balance of probabilities.
13. Accordingly, I hereby adopt the report and dismiss this suit with costs to the 1st defendant.
14. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 31ST DAY OF JANUARY, 2023.

G. M .A ONG'ONDO

JUDGE

PRESENT

1. Mr. Bigogo Onderi, learned counsel for the plaintiff.
2. Ms. Tuwei holding brief for Kirimi, learned counsel for 1st defendant.
3. Mr. Kajo, learned counsel for 2nd defendant.
4. Okello, court assistant

