



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ndeda v Saisi (Environment & Land Case 59 of 2017)  
[2023] KEELC 323 (KLR) (27 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 323 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT & LAND CASE 59 OF 2017**

**BN OLAO, J**

**JANUARY 27, 2023**

**BETWEEN**

**JOHN NDEDA ..... PLAINTIFF**

**AND**

**DAVID MUKANGULA SAISI ..... DEFENDANT**

**JUDGMENT**

1. This judgment was due on October 31, 2022. However the file was misplaced and later found inside another file. The delay in delivering the judgment is regretted.
2. By an amended plaint dated March 8, 2018 John Ndeda (the plaintiff herein and suing as the administrator to the estate of (Eliseyo Ndeda Mubweka) sought judgment against the defendant (David Mukangula Saisi) in the following terms:
  1. That the defendant be evicted from the land parcel No Bukhayo/Bugengi/2084.
  2. That the defendant by himself, his agents, workers, personal representatives and/or assignees be restrained from entering, trespassing or in any way interfering with the plaintiff's quiet enjoyment of the land parcel No Bukhayo/Bugengi/2084.
  3. Costs of the suit.
  4. Any other alternative relief that this honourable court may deem fit to grant.

The basis of the plaintiff's case is that he is the administrator to the estate of Eliseyo Ndeda Mubweka (the deceased) who is the registered proprietor of the land parcel No Bukhayo/Bugengi/2084 (the suit land) while the defendant is the registered proprietor of the land parcel No Bukhayo/bugengi/12077. That in or about October 2016, the defendant without just cause and without the permission of the plaintiff encroached onto the suit land and annexed a portion thereof measuring about one acre which he then fenced as part of his land. The



plaintiff protested the encroachment and reported to the County Land Registrar who came to the site together with the surveyor and pointed out the correct boundary to the parties but the defendants has refused and/or neglected to remove his illegal boundary hence necessitating this suit.

3. The plaintiff first filed his statement dated March 20, 2017 filed together with the original plaint filed on March 20, 2017 and subsequently filed another statement dated September 1, 2021 following the amendment to the plaint. The key plank of the plaintiff's evidence is that he is the Administrator to the Estate Of Eliseyo Ndeda Mubweka who was at all times the proprietor of the suit land which he purchased from one Goeffrey Makokha in 1988. That the suit land is adjacent to the land parcel No Bukhayo/Bugengi/12077 belonging to the defendant who has however refused to recognise the common boundary between the two parcels of land and has instead annexed a portion of the suit land measuring one acre despite the fact that the land registrar has pointed at the correct boundary to both parties.
4. The plaintiff also filed statements of his witness namely Robert Ndeda and David Mang'eni Ibuwho however did not testify during the plenary hearing before Omollo J on July 7, 2022.
5. The plaintiff filed the following documents in support of his case:
  1. Certified copy of the register to the land parcel No Bukhayo/Bugengi/2084.
  2. Grant of letters of administration issued to the plaintiff in respect to the estate of Eliseyo Ndeda Mubweka on January 31, 2017 in Busia CM Succession Cause No 456 of 2016.
  3. Certificate of official search in respect to the land parcel No Bukhayo/bugengi/2084.
6. The defendant filed his defence dated June 28, 2021 in response to the amended plaint. He denied the particulars of trespass and pleaded in paragraph 4 thereof that he would 'seek unequivocal clear particulars of the true intent of the plaintiff's averments before a response is made.' He added further that the County Surveyor one Kennedy Masibo had confirmed that it was the plaintiff who had encroached into his land by planting trees on the road reserve for which he would hold him liable for trespass and malicious damage to property. The defendant further pleaded that on October 24, 2017, the plaintiff invaded his land, destroyed the boundary and the defendant's trees valued at Kshs 35,900 a matter that was reported to the police and was recorded vide OB NO xxxx. The defendant pleaded therefore that the plaintiff's suit is frivolous, unmeritorious, vexatious and an abuse of the process of this court and that at the earliest opportunity, he would apply for it to be struck out and dismissed.
7. The defendant filed his statement and list of documents both dated June 28, 2021.
8. In his statement, he said that he has been the proprietor of the land parcel No Bukhayo/bugengi/12077 since 2015 but since 2014, he and the plaintiff have been having a long standing dispute over boundary and the access road separating his land from the suit land. That the plaintiff's trespass onto his land has caused him untold suffering and his visit to various offices for help have fallen on deaf ears. That unless the boundary is ascertained, this will lead to family wrangles. He therefore sought the dismissal of the plaintiff's suit.
9. The defendant filed the following documents in support of his case;
  1. Title deed for the land parcel No Bukhayo/Bugengi/12077.
  2. Mutation form.
  3. Valuation report for trees destroyed on the land parcel No Bukhayo/Bugengi/12077.



4. Boundary dispute report on land parcels No Bukhayo/bugengi/12077, 12078, 12076 Vs 2083 dated April 4, 2017 prepared by Kennedy Masibo, County Surveyor, Busia.
5. Green card for the land parcel No Bukhayo/Bugengi/12077.
6. Report dated September 29, 2016 on the dispute between parcels No Bukhayo/Bugengi/12077 Vs 2083.
10. The hearing commenced before Omollo J on July 7, 2022 although the record shows that there were previous ex-parte proceedings before Kaniaru J on March 14, 2018 which culminated in a judgment in favour of the plaintiff on June 20, 2018. That judgment was however later set aside.
11. On July 7, 2022, the plaintiff called as his witness Nicholas Obiero (PW1) the Land Registrar Busia. He told the court that following an order of this court, he visited the suit land and found that an access road had been irregularly opened on the plaintiff's land following a sub-division of the land parcel No Bukhayo/bugengi/12077 and others. That the road ought to have been created from the land which was not the suit land. He prepared a report dated November 8, 2021 as his documentary evidence and it was marked as plaintiff's exhibit No 1.
12. In his testimony, the plaintiff (PW2) adopted his statement dated September 1, 2021.
13. After the plaintiff had closed his case, Ms Kituyi Counsel for the defendant sought an adjournment to enable her 'interact with the defendant' as she had only come on record. That application was opposed by Mr Jumba Counsel for the plaintiff but was overruled by Omollo J and the defence case was listed for hearing on October 11, 2022 when it came before me following Omollo J's transfer.
14. However on October 11, 2022, there was no appearance by either the defendant or Ms Kituyi and on the application by Mr Juma, the Court directed that the case proceeds from where it had reached and since there was no attendance by the defendant or counsel, the defence case was marked as closed. Mr Juma opted not to make any submissions and a judgment date was taken.
15. I have considered the evidence by the plaintiff which has not been controverted as the defendant did not turn up on the date fixed for his case.
16. It is common ground that the plaintiff is the registered proprietor of the suit land which is adjacent to the land parcel No Bukhayo/bugengi/12077 registered in the name of the defendant. It is the plaintiff's case that the defendant has encroached onto the suit land and annexed a portion measuring upto one acre which he has fenced off as part of his land hence this case.
17. In support of his claim, the plaintiff called as his witness one Nicholas Obiero(PW2) a land Registrar Busia who produced a report dated November 8, 2021 signed by one Wilfred N Nyaberi the County Land Registrar Busia. The report which was produced without objection reads as follows in the last paragraph:

### **Registrar's Verdict**

That the road of access to pass within LR Bukhayo/bugengi/12077 and 12078 as these are the parcels which were involved in the sub-division which created the said road.

That parties to respect the existing boundary between LR No Bukhayo/bugengi/12077 and 2084 and the road of access to be offset from the said boundary into the respondent's land.

The parties have the right to appeal this decision within 30 days from the time thereof (sic) December 30, 2021.

**Wilfred N Nyaberi**



## County Land Registrar

### Busia County.'

18. Earlier on in the same report, the Land Registrar makes the following crucial observations:

' In this case, the respondent have sub-divided parcel 7587 (which resulted from parcel 813) but is seeking for road of access including parcel 2084 (which resulted from parcel 814). This is both illegal and unfair. The common boundary between the two parcels is there and never disputed. It is therefore evident that the road of access can only be opened from this undisputed boundary into the respondents' land because it is their land which was undergoing sub-division and creating the road of access.'

The respondent for purposes of the report was of course the defendant who was present when the Land Registrar visited the scene and conducted very elaborate proceedings before preparing his report. His testimony was therefore in the class of the evidence of an expert witness whose role is to provide independent assistance to the Court on matters within the witnesses' expertise. The Court however has the discretion to admit or reject such evidence. In the circumstances of this case, the said Land Registrar was cross-examined by Ms Kituyiduring the plenary hearing before Omollo J on July 7, 2022. No aspersions were cast on his expertise and this Court finds no reason to discredit his report which fully supports the plaintiff's case. There are other reports filed herein including one prepared by Kennedy Masibo for the County Surveyor Busia and dated April 4, 2017. It is really of no useful purpose in these proceedings firstly because, the duty of establishing boundaries is reposed in the Land Registrar under Section 18 of the [Land Registration Act](#) and not in the Surveyor. Secondly and most fundamentally, the report by Kennedy Masibo is headed:

### **Re: Boundary Dispute On P/no's Bukhayo/bugengi/12077, 12078, 12076 v 2084'**

The dispute herein does not involve the boundaries to the above parcels of land. Rather, it involves the dispute between the boundary to the land parcels No Bukhayo/bugengi/2084 and 12077. There is no reason why this Court should not accept the report of Wilfred N Nyaberiand produced by Nicholas Obiero(PW1) as representing the court position on the ground with regard to this dispute. And as is clear from the said report, the boundary between those two parcels of land had already been determined 'and is never disputed.' This is not therefore a boundary dispute. As the plaintiff has pleaded, it is a case of trespass onto the suit land. And from the evidence on record, un-controverted as it is, the defendant has indeed encroached onto the suit land.

19. It is also instructive to note that whereas the defendant did plead in his defence that it is the plaintiff who has 'invaded' his land (see paragraph 6 of his defence), he made no counter-claim. The evidence has clearly shown that it is infact the defendant who has trespassed onto the suit land. Indeed the defendant has not made any counter-claim for trespass.
20. Having considered all the evidence herein, I am satisfied that the plaintiff has proved his case against the defendant as required in law.
21. The up-shot of all the above is that there shall be judgment for the plaintiff against the defendant in the following terms:
1. The defendant shall within three (3) moths of this judgment vacate the portion of the land parcel No Bukhayo/bugengi/2084 on which he has encroached and remove any structures thereon including the illegal fence and road.
  2. In default of (1) above, the defendant, his agents, workers and assignees and all other persons claiming under him shall be evicted therefrom.



3. Thereafter, the defendant, his agents, workers, assignees and all other persons claiming under him shall be permanently restrained from trespassing onto or in any other way interfering with the plaintiff's quiet enjoyment of the land parcel No Bukhayo/bugengi/2084.
4. The defendant shall meet the plaintiff's costs.

**BOAZ N. OLAO**

**JUDGE**

**27TH JANUARY 2023**

**Judgment dated, signed and delivered on this 27th day of January 2023 by way of electronic mail at BUSIA ELC with notice to the parties. Right of Appeal.**

**BOAZ N. OLAO**

**JUDGE**

**27TH JANUARY 2023**

