



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ombese & another v National Housing Corporation & another (Environment & Land Case 741 of 2016) [2023] KEELC 186 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 186 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND CASE 741 OF 2016**

**M SILA, J**

**JANUARY 26, 2023**

**BETWEEN**

**SIMEON NYACHAE OMBESE ..... 1<sup>ST</sup> PLAINTIFF**

**AGNES N. OSORO ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**NATIONAL HOUSING CORPORATION ..... 1<sup>ST</sup> DEFENDANT**

**CLERK, MUNICIPAL COUNCIL OF KISII ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The application before me is that dated April 7, 2022 filed by one Aboko J S Kumenda who has filed this application pursuant inter alia to the provisions of Order 45 of the *Civil Procedure Rules*. The applicant seeks to be joined to this suit as interested party for the limited purpose of moving the court to vacate the orders relating to the land parcel Central Kitutu/Daraja Mbili/789, on the basis that the said land has never been part of the claim in this suit and he, as registered owner, has never been party to this suit. He seeks that upon joinder, the orders of 15 December 2021 touching on the land parcel Central Kitutu/Daraja Mbili/789 (the subject land) be set aside and further that findings related to the subject land in any report filed by the Land Registrar be expunged. He also seeks orders that the introduction of a claim over the subject land after judgment via a report of the Land Registrar is irregular as the subject land has never been subject of any claim in this suit. The application is opposed.
2. To put matters into context, this suit was commenced through a plaint filed on February 20, 2012 by Simeon Nyachae Ombese and Agnes N Osoro, through which they sued the National Housing Corporation, and the Clerk, Municipal Council of Kisii. They pleaded that on April 1, 1990, they entered into a sale agreement with the 2<sup>nd</sup> defendant, for the purchase of two plots, respectively being Plots No 200 and 201, within the land parcel Central Kitutu/Daraja Mbili/789. It was averred that the plots were in Nyanchwa Site & Service Scheme under the auspices of the 1<sup>st</sup> defendant and they



were purchased through a loan arrangement which they paid and that they took possession of their plots. They pleaded that in October 2011, a group of people entered the plots and forcefully claimed ownership. They reported the matter to the 2<sup>nd</sup> defendant who failed to take any steps to protect them. In the suit, they sought two substantive prayers; the first being an order to have the defendants transfer the two plots to them and the second, an order to compel the defendants to put them in possession. The 1<sup>st</sup> defendant filed defence and generally pleaded to be a stranger to the plaintiffs' claim.

3. On April 17, 2013, parties entered into a consent, where it was recorded that judgment be entered for the plaintiffs against the defendants in terms of prayer (a) of the plaint (being the prayer that the 1<sup>st</sup> and 2<sup>nd</sup> defendants do clear and transfer title to Plots No. 200 and 201 to the 1<sup>st</sup> and 2<sup>nd</sup> plaintiff respectively) subject to the plaintiffs proving full payment of the loan advanced by the 1<sup>st</sup> defendant. The remaining part of the claim (prayer (b) seeking that the 1<sup>st</sup> and 2<sup>nd</sup> defendants put the plaintiffs into possession free of encumbrances, prayer (c) costs, and (d) for any other relief the court deemed fit to grant) was to proceed for full hearing or be settled by the parties. Nothing happened in the suit from the day the consent was recorded until March 30, 2017 when the matter was placed before Kullow J, for dismissal for want of prosecution, but was spared. There followed several mentions where it was averred that the process of transfer was on going.
4. On March 5, 2018, before Mutungi J, Mr Ombachi, learned counsel for the plaintiffs, stated that the partial judgment has been complied with, and that the plot No 200 was now Kisii Municipality Block 1/351, and the plot No 201 was now Kisii Municipality Block 1/350. He added that the issue of vacant possession remains to be sorted out and asked for an order for the Land Registrar to delineate the plot boundaries. The court then issued an order to the Land Registrar and County Surveyor to visit the land parcels Kisii Municipality Block 1/350 and 351 and to fix their boundaries. A report was to be filed in 90 days. It took a while before the report was prepared and filed, but it was eventually filed on October 13, 2020 by which time Mutungi J had been transferred from the station, and the file was now in the hands of Onyango LJ. On November 17, 2020, counsel appearing stated that the report that had been filed relates to a different matter and the court issued summons to the Land Registrar and County Surveyor to show cause why they had not implemented the court order. On February 17, 2021, Mr Bosire, counsel for the 2<sup>nd</sup> defendant, proposed to have the two land officers visit the ground and separate the leasehold land from the freehold land which it borders. This was subsequently agreed by Mr Ombachi for the plaintiff, and Mr. Omangi for the 1<sup>st</sup> defendant, and on March 23, 2021, the court issued orders to the Land Registrar and Surveyor, to visit the plots Kisii Municipality/Block 1/350 and 351, and establish the following :-
  - i. Whether the parcels fall within the freehold land or leasehold land.
  - ii. Whether either parcel emanated from Plot No 200 and 201 Site and Service Scheme.
  - iii. Mark the boundary between the said parcels of land.
  - iv. File a report in court within 45 days.
5. The report dated September 20, 2021 was eventually filed on September 28, 2021. The County Surveyor, Mr Lemaian, appeared in court on November 29, 2021 and explained that they marked the boundaries between the land parcels Kisii Municipality/Block 1/350 and 351. However, he noted that there is an ongoing construction on a parcel No 787 (probably meant parcel No 789) which interferes with the two leasehold parcels. He stated that he was unable to fix 3 beacons as they fall on some buildings. The court directed the Surveyor and Land Registrar to revisit the land parcels Kisii Municipality/Block 1/350 and 351 and confirm the position of the beacons marking the two parcels of land. The court went further to state that "they shall also establish the extent of encroachment by



parcel No. Central Kitutu/Daraja Mbili/789 on the said parcels” and file a report within 45 days and directed the matter to be mentioned on 28 February 2022.

6. On February 28, 2022, Mr. Otieno, counsel for the applicant, appeared before Onyango LJ, and contended, on behalf of his client, that the order issued on 29 November 2021 affected his client yet his client was not party to this suit. He also submitted that there were orders made in the suit Kisii ELC No. 34 of 2019 which were subject to a matter in the Court of Appeal and which would be defeated by the orders issued herein. Counsel added that the 2<sup>nd</sup> plaintiff, Agnes Osoro, had filed a suit, being Kisii CMCC No 742 of 1999 against the predecessor in title to the parcel No 789 which suit was dismissed. The court after hearing the opposing arguments from Mr Ombachi, Mr. Omangi, and Mr Bosire, was of opinion that the proper channel is for Mr Otieno to file a formal application. It is then that this application was filed.
7. The application is based on grounds inter alia that the applicant is owner of the land parcel Central Kitutu/Daraja Mbili/789 (hereinafter simply referred to as parcel No 789) measuring 0.17 Ha; that through the suit Kisii CMCC No 742 of 1999, the family of the plaintiffs mounted a claim where they contended that the acreage of the applicant’s land had interfered with their Plots Nos. 200, 201 and 210 Site and Service Scheme, which suit was dismissed on November 18, 2009; that in any event the claim mounted was fallacious as its boundaries were affirmed through a court order dated 2 November 1995 in the suit Kisii HCCC No. 282 of 1989; that upon re-establishment of the boundaries to the plot No. 789 the property was secured by a perimeter wall which has remained intact; that on October 29, 2019, one John Osoro Ombese on behalf of the plaintiffs mounted a suit against the applicant, being Kisii ELC No. 34 of 2019, which sought to regurgitate the same claim which was subject of the dismissed suit Kisii CMCC No. 742 of 1999 whereby an application for injunction was dismissed, whereupon the plaintiff therein who alleged to be administrator of the 2<sup>nd</sup> plaintiff (who was said to be deceased) proceeded to the court of appeal and his appeal is still pending; that the parties herein hatched a scheme while working with the Land Registrar and Surveyor to generate a report touching on the parcel No. 789 so as to alienate the applicant’s land; that the report was generated without the participation of the applicant; that the dispute herein is not a boundary dispute; that the court was misled in issuing the orders herein; that parties are bound by their pleadings; that the claim of the plaintiffs needs to be resolved in the case Kisii ELC No. 34 of 2019; that the intention of the plaintiffs is to split their claim into many causes of action so as to litigate in various forums so as to test which is favourable; that introducing the parcel No. 789 post judgment constitutes introducing a new cause of action and the court should decline to travel this path.
8. The application is supported by the affidavit of the applicant. I have gone through that affidavit, it more or less repeats what I have already set out above as constituting the grounds upon which the application is based. He has annexed copies of his title deed, pleadings and orders made in the suit Kisii CMCC No. 742 of 1999, a survey report tabled within the suit Kisii HCCC No. 282 of 1989, photographs depicting the perimeter wall that he states he constructed, copy of plaint and orders made in the suit Kisii ELC No. 34 of 2019. He has added that his title is a freehold title acquired after the process of adjudication and claims that the titles Kisii Municipality/Daraja Mbili/Block I/350 and 351 do not exist on the ground. He has pointed out that Mr. Ombachi, who appears for the plaintiffs in this suit, is also counsel appearing for the plaintiff in the suit Kisii ELC No. 34 of 2019 and he believes that the intention of the plaintiffs herein is to sneak in the claim subsisting in the suit Kisii ELC No. 34 of 2019. He contends that the report of the Land Registrar has been secretly generated to aid the plaintiffs.
9. The plaintiffs filed Grounds of Opposition and a replying affidavit sworn by the 1<sup>st</sup> plaintiff. The grounds of opposition state that the application is incompetent in so far as it seeks the applicant to be joined as interested party for limited purposes; that the application does not meet or offer any



grounds for review of the order of December 15, 2021; that the impugned order was correctly made considering the circumstances of the case; that the application is mischievous and frivolous; that the application seeks to undermine the jurisdiction of this court in dealing with matters before it; that the application is against the administration of justice and the rule of law; that the application raises matters which are incapable of being dealt with through affidavit evidence and that the application should be dismissed with costs. In the replying affidavit, Mr. Ombese has deposed inter alia that the titles Kisii Municipality/Block 1/350 and 351 are leasehold titles; that their location is separate and distinct from the freehold parcels; that the suit herein seeks transfer of title and handing over of possession free from encumbrances; that he was issued with a certificate of lease on February 10, 2018. He has proceeded to set out the orders issued by the court to the Land Registrar and County Surveyor which I have already alluded to above. He referred to the report of the Land Registrar and Surveyor which indicates encroachment into their plots by the land parcel No. 789. He adds that the marking of the Plots No. 350 and 351 will resolve any matters in controversy and contends that the applicant has no good reason to block the determination of the boundaries. He avers that the applicant will not be prejudiced in any way if the boundaries between the plots No. 350 and 351 and parcel No. 789 are fixed.

10. The 1<sup>st</sup> defendant filed grounds of opposition. Inter alia it is contended that the applicant cannot be joined into proceedings in piecemeal; that the issues for the court to determine have to first be dealt with by the Land Registrar and Surveyor which issues relate to the boundary between Plots No. 350 and 351 and parcel No. 789.; that the aspersion that the intention is to defraud the court is an abuse of the court process; that the all construction works should stop until the issue of the boundary is agreed between all parties; that time does not run against title.
11. I invited counsel to file written submissions and I have seen the submissions of Mr. Otieno for the applicant, Mr. Ombachi for the plaintiffs, Mr. Omangi for the 1<sup>st</sup> defendant and Mr. Bosire for the 2<sup>nd</sup> defendant. I have considered them before arriving at my decision.
12. The applicant of course seeks to be joined as interested party for the purpose of having set aside the order of December 15, 2021. There is actually no order that was made on 15 December 2021 and I believe that the order sought to be set aside is that made on November 29, 2021 which directed the Land Registrar and Surveyor to visit the plots No. 350 and 351 and establish the extent of encroachment by the parcel No. 789.
13. I am aware that the respondents have raised some technical issues regarding partial entry into a suit by an interested party and the grounds for review, but I opt not to go into too much legal technicality, for the issues to me are straightforward.
14. The applicant herein is the owner of the parcel No. 789 and it is apparent that he stands to be affected by any order made in respect of that land. For that reason, I would have a basis to readily admit him as interested party to this suit. The applicant does not wish to be admitted in this suit for any other purpose other than to set aside the order of November 29, 2021 and to expunge any findings in the report of the Land Registrar. I do not see how I can set aside that order for it has already been fully implemented. The Land Registrar and Surveyor have already visited the ground. We cannot reverse that, and whatever order I make will not change the fact that they have already been on the ground. Courts do not issue orders in vain and this prayer is clearly overtaken by events. I am also not persuaded to expunge any report. That report is the opinion of the Land Registrar and Land Surveyor, and I do not see any reason to expunge it, though as it will be seen shortly, I will not make any orders touching on that report.
15. Where I am in full agreement with the applicant is that what is before court is not a boundary dispute between the Plots No. 350 and 351 *inter se*, or between these two plots and the parcel No. 789. Parties



are bound by their pleadings. The plaintiff herein sought two substantive orders. The first was to have the defendants issue title to the plaintiffs. That has already been done. The second was to have the defendants put them into possession free of encumbrances. Technically, this prayer is still pending and is probably what invited the court to issue orders to the Land Registrar and Surveyor to proceed to the ground to identify the beacons. However, it is clear to me that the question of putting the plaintiffs into possession is much more complicated because there appears to be a boundary dispute between these two plots and the parcel No. 789. In light of that, I do not see how the claim seeking to have the defendants put the plaintiffs into possession can be agitated herein. This court cannot issue an order to the defendants to give possession to the plaintiffs because there is another party laying claim to part of the land where the two titles fall. My view of this suit is that it is now spent. The plaintiffs have titles. Subject to any limitations in law, they are now the ones to pursue any claim of trespass by any other party. They cannot place that burden upon the defendants. This of course is without prejudice to any claim that they may have against the defendants in the event that it turns out that what they hold is worthless paper for not having any land upon which they are based.

16. This court cannot proceed to delve into the question of the boundaries between the plots No. 350 and 351 vis-à-vis the parcel No. 789. To do so will be going outside the ambit of the pleadings filed herein as there is no such prayer in the plaint. It follows therefore that though there is a report filed herein, giving an opinion on the boundaries, this report will simply remain a report filed, but the court will not deal any further with it. The question of the boundaries between the two plots No. 350 and 351 and parcel No. 789 can only be subject of determination in separate proceedings between the owners of these titles (subject of course to any objections that can be raised in such suit such as res judicata). Indeed, there appears to be evidence that the 2<sup>nd</sup> plaintiff, through her legal representative (I am aware this is contested but I will not delve into it), filed suit against the applicant over the boundaries of her Plot No. 350 and the parcel No. 789. That suit is yet to be finalized and should be left to run its natural course.
17. As I have mentioned, there is nothing left of this suit, for whatever was left hanging, cannot be continued herein, an aspect that I have explained above.
18. What the applicant has convinced me to do, is to order the closure of this suit, which I hereby do. I make the order that this suit is spent, and the court file be closed, as the plaintiffs have obtained title and the prayer for possession cannot be pursued against the defendants given the circumstances that have played out herein. Since the parties agreed to settle the substantive question of title by consent, I will make no orders as to the costs of this suit. The other dispute between the plaintiffs and the applicant over their boundaries will be determined in other forum.
19. The last issue is costs of this application. What was in issue was an order by court and I think it was made in good faith considering the circumstances. I will therefore make no orders as to the costs of this application.
20. Orders accordingly.

**DATED AND DELIVERED AT KISII THIS 26 DAY OF JANUARY 2023**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

AT KISII

