



**Ngoche v Owaka & 5 others (Environment & Land Case
17 of 2021) [2023] KEELC 18008 (KLR) (8 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18008 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND CASE 17 OF 2021
GMA ONGONDO, J
JUNE 8, 2023**

BETWEEN

OBADIA AUKO NGOCHE PLAINTIFF

AND

JOSHUA ODERO OWAKA 1ST DEFENDANT

MARY ANYANGO OGUTU 2ND DEFENDANT

JEREMIAH DIANGA 3RD DEFENDANT

DISTRICT LAND REGISTRAR HOMABAY 4TH DEFENDANT

DISTRICT SURVEYOR HOMABAY 5TH DEFENDANT

HON ATTORNEY GENERAL'S OFFICE 6TH DEFENDANT

JUDGMENT

1. By a plaint dated February 21, 2013 and filed on even date, the plaintiff through the firm of Agure Odero and Company Advocates sued the defendants for;
 - a. A permanent injunction restraining the Defendants herein by themselves, servants, agents and/or anyone authorized by or claiming through them from trespassing or by any other means using the plaintiffs parcel of land known as LR No Kalanya/kanyango/329 (The suit land herein) situate at Homa-Bay District. (Now, HomaBay County).
 - b. An order directing the 4th and 5th defendants to facilitate the determination and rectification of the Boundaries in regard to the suit land and land reference numbers. Kalanya/kanyango/330 and 284 (The 1st and 2nd other parcels of land).
 - c. Costs of the suit.



- d. Interest of (c) and (d) above at court rates plus any other relief that the court may deem fit and proper to grant.
2. The gist of the plaintiff's case is that he is the registered proprietor of the suit land which borders the 1st and 2nd other parcels of land registered in the name of the 2nd and 3rd defendants respectively. That in May 2004, the 1st, 2nd and 3rd defendants forcefully created a road on the suit land causing interference to its boundaries hence occasioning loss and damage to the plaintiff. That he sought intervention of the 4th defendant who failed to rectify the anomaly thus, precipitating this suit.
 3. By a statement of defence dated April 8, 2013, the 1st defendant through PR Ojala and Company Advocates, denied the plaintiff's claim and prayed that this suit be dismissed with costs. He stated in part, that there has never been any dispute between him and the plaintiff. That if at all at any given time, he was present when the boundaries were being made, it was his duty in his capacity as the area chief, to maintain law and order.
 4. In their statement of defence dated March 28, 2013, the 2nd and 3rd defendants who appear in person herein, denied the plaintiff's claim and pray that this suit be dismissed with costs. They stated that the 1st defendant, a retired chief acted lawfully in maintenance of law and order. That the road through the suit land as well as the 1st and 2nd other parcels of land, is a public land which was created in 2004.
 5. The 4th, 5th and 6th defendants filed their memorandum of appearance dated January 16, 2014. Besides, they failed to lodge a statement of defence in this suit.
 6. The defendants were duly served as per an affidavit of service sworn March 21, 2023 by the plaintiff's counsel and another one filed on even date by Walter Juma Opiyo, a duly licensed process server. Be that as it may, they neglected to participate in the hearing of the suit.
 7. In his testimony, the plaintiff (PW1) relied on his statement dated September 23, 2021 as corrected in paragraphs 2 to read; "LR Nos Kanyada/Kalanya/Kanyango/284 and 330" in lieu of " LR Kanyada/Kalanya/Kanyango/284 7330" and paragraph 5 to read "a proper map" in lieu of "a proprietor" thereof.
 8. Further, PW1 relied on his list of documents dated February 21, 2013 S/Nos 1 to 4 (PExhibits 1 to 4 respectively). The same include; a certificate of official search (PExhibit 1) and correspondence from the 4th defendant, Ndhiwa District/sub county (PExhibit 2).
 9. The plaintiff called no other witness in support of his case.
 10. On March 22, 2023, Mr Agure Odera, learned counsel for the plaintiff told this court that he did not intend to file submissions. That he relied on evidence and exhibits herein.
 11. The defendants neither testified nor filed any submissions herein.
 12. I have duly considered the parties' respective pleadings and the evidence of PW1. So, the issues for determination are condensed to whether;
 - a. PW1 is the proprietor of the suit land,
 - b. the defendants trespassed thereon
 - c. PW1 is entitled to the orders sought in the plaint.



13. As regards the first issue, paragraph 1 of the statement of PW1 and paragraph 1 of PExhibit 6 do reinforce paragraph 8 of the plaint that he is the proprietor of the suit land. This position is disclosed in Pexhibit 1.
14. Further, PW1 testified in part that;

“...I am the registered proprietor of LR No Kalanya/Konyango/329.....”
15. On that score, PW1 has shown that he has interests and rights as the absolute and indefeasible owner of the suit land as provided for under sections 24, 25 and 26 of the [Land Registration Act](#), 2016 (2012) and the same has not been challenged at all. Furthermore, PW1 has protection of right to the suit land under Article 40 of the [Constitution of Kenya, 2010](#).
16. As pertains to the second issue, paragraph 3 of the plaintiff’s statement speaks to paragraphs 10 and 11, 12, 14 and 16 of the plaint regarding trespass on the suit land by the 1st to 3rd defendants
17. PExhibit 5 (photos) and 6, 7 being reports of Land Registrar and County Surveyor respectively are indicative of boundaries’ issue concerning the suit land alongside the 1st and 2nd other parcels of land. That, at least, the 4th and 5th defendants attended to the issue.
18. The suit land borders the 1st and 2nd other parcels of land of 2nd and 3rd defendants respectively as shown at paragraph 9 of the plaint. PW1 did confirm so even in his examination in chief. Also, he stated that the District Officer Asego Division tried to stop the 1st 2nd and 3rd defendants from their actions of trespass thereon to no avail. That the 4th and 5th defendants failed to rectify the anomaly.
19. The interference of the boundary of the suit land by the defendants and their actions across it, amounted to trespass thereon; see also *James Njeru v Erickson (K) Ltd* (2015) eKLR.
20. Paragraphs 4 and 5 of the statement of PW1 reveal that the boundary in dispute was not fixed by the 4th and 5th defendants. That the same is not definite. However, PExhibit 7 at page 2 reads;

“.....Having listened to the party in dispute, I conclude;

That the boundary between the two parcels Nos. 329 and 330 remains the way it was since the cleared shoots had sprung up showing the boundary clearly.....”
21. It is established law that the burden was always on the plaintiff to prove his case on the balance of probabilities. That such a burden is not lessened even if the case is heard by way of formal proof; see [Kirugi and another v Kabiya and 3 others](#) (1987) KLR 347 and [Eastern Produce \(K\) Ltd-Chemoni Tea Estate v Bonfas Shoya](#) (2018) eKLR.
22. In the present suit, the plaintiff’s testimony is steadfast and cogent. He has demonstrated that he is the proprietor of the suit land into which the defendants trespassed occasioning him loss and damage.
23. Concerning the third issue, the principal orders sought in the plaint are in line with section 13 (7) (a) of the [Environment and Land Court Act](#), 2016 (2012) on permanent preservation orders.

Further, in [Nguruman Ltd v Jan Bonde Nielsen and 2 others](#) (2014) eKLR that the very foundation of the jurisdiction to issue injunctive orders vests in the probability of irreparable injury, the inadequacy of pecuniary compensation and the prevention of the multiplicity of suits
24. To this end, the plaintiff is entitled to the orders sought in the plaint since he has proved his claim against the defendants jointly and severally on a balance of probabilities.



25. Accordingly, I enter judgment for the plaintiff against the defendants jointly and severally for orders (a), (b) (c) and (d) sought in the plaint and as stated in paragraph 1 (a) (b) (c) and (d) hereinabove.

26. It so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 8TH DAY OF JUNE 2023

G.M.A ONG'ONDO

JUDGE

PRESENT

a. Mr. Agure Odera, learned counsel (virtually) for the plaintiff

b. Plaintiff

c. Okello, court assistant

