



**Mogaka & 3 others v Kebati & 2 others (Environment & Land Case 401 of 2013 & 541 of 2015 (Consolidated)) [2023] KEELC 18191 (KLR) (21 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18191 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND CASE 401 OF 2013 & 541 OF 2015 (CONSOLIDATED)**

**M SILA, J  
JUNE 21, 2023**

**BETWEEN**

**BENARD NYAMANYA MOGAKA ..... 1<sup>ST</sup> PLAINTIFF  
ALOYS TUMBO MOGAKA ..... 2<sup>ND</sup> PLAINTIFF  
ISABELLA MORAA ELISA ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**PETER MOMANYI KEBATI ..... 1<sup>ST</sup> DEFENDANT  
ZABLON KEBATI NYANGWARA ..... 2<sup>ND</sup> DEFENDANT  
LAND REGISTRAR KISII CENTRAL DISTRICT ..... 3<sup>RD</sup> DEFENDANT**

**AS CONSOLIDATED WITH  
ENVIRONMENT & LAND CASE 541 OF 2015**

**BETWEEN**

**PATRICK ISABOKE MOGESI ..... PLAINTIFF**

**AND**

**PETER MMANYI KEBATI ..... 1<sup>ST</sup> DEFENDANT  
ZABLON NYAGWARA KEBATI ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The 1<sup>st</sup> defendant is the registered proprietor of the land parcel No. Central Kitutu/Mwabundusi/347 (Parcel No. 347). This land is sandwiched between the former parcels numbers Central Kitutu/



Mwabundusi/506 (parcel No. 506) (now subdivided into the plots No. 831, 832 and 833) and Central Kitutu/Mwabundusi/507. The plaintiffs' case is that this land parcel No. 347 is superimposed on the land parcel Central Kitutu/Mwabundusi/833 (parcel No. 833) a subdivision of the parcel No. 506, which they contend to have title to. They aver that the parcel No. 506 was owned by their late father before he subdivided it into the parcels No. 831, 832 and 833. They allege that the parcel No. 833, comprises on the ground, what the 1<sup>st</sup> defendant considers to be his parcel No. 347. They claim that the parcel No. 347 ought to be in Mwabundusi Section Map Sheet No. 1 and should be neighbouring the parcels in map sheet No. 1 bearing the numbers 346 and 348. They contend that this parcel No. 347 was wrongly and fraudulently superimposed into Map Sheet No. 6, where the parcels No. 506 and 507 are located, as it does not follow the sequence of the parcel numbers. They allege that this superimposition has caused loss of ground of the parcel No. 833. In the plaint in the suit Kisii ELC No. 401 of 2013, the plaintiffs seek the following orders :-

- (a) A declaration that the original Land Parcel No. Central Kitutu/Mwabundusi/506 existed in a separate and distinct location and sheet from Land Parcel No Central Kitutu/Mwabundusi/347.
  - (b) A declaration that Land Parcel No. Central Kitutu/Mwabundusi/347 was illegally created and/or curved (sic) from a portion of Land Parcel No. Central Kitutu/Mwabundusi/506 which now affects Land Parcel No. Central Kitutu/Mwabundusi/833.
  - (c). An order for rectification of the maps to have Land Parcel No. Central Kitutu/Mwabundusi/347 identified and relocated to its original location, position and sheet.
  - (d). An order for permanent injunction to restrain the defendant by themselves, agents and servants from selling or dealing howsoever or otherwise interfering with Land Parcel No. Central Kitutu/Mwabundusi/833 in any manner adverse likely to affect the plaintiffs.
  - (e) An order to have the illegal relocation of Land Parcel No. Central Kitutu/Mwabundusi/347 investigated.
  - (f). Costs of this suit.
  - (g). Such further or other relief(s) as the Honourable Court may deem fit to grant.
2. The 1<sup>st</sup> defendant filed defence where he denied the claims of the plaintiffs. He pleaded that the parcels No. 506 and 347 are first registrations upon adjudication. He denied that the parcel No. 347 is mounted on the parcel No. 833. He also claimed that his parcel No. 347 does not share a boundary with the parcel No. 833. He added that there have been previous suits touching on the subject matter being Kisii HCCC No. 450 of 1994 and Kisii HCCC No. 551 of 1995, Miscellaneous Application NO. 36 of 2006, Civil Suit No. 355 of 2013, all determined and thus this suit is res judicata. He asked that the plaintiff's suit be dismissed.
  3. There is the other related suit which is Kisii ELC No. 541 of 2015. It was filed by Patrick Isaboke Mogesi against Peter Momanyi Kebati and Zablon Nyangwara Kebati. The claim is more or less the same, that the parcel No. 347 ought to exist elsewhere on the ground.
  4. Given that the two suits were related, they were consolidated with direction that they be heard together. This judgment thus settles both suits.
  5. I have seen on record a notice by the 3<sup>rd</sup> plaintiff in the suit No. 401 of 2013 filed on 12 November 2013 withdrawing from the suit on the basis that he never instructed the suit to be filed and he was wrongly named as 3<sup>rd</sup> plaintiff.



6. PW-1 was the 1<sup>st</sup> plaintiff. He testified that his father, Mogaka Nyabaro, owned the parcel Central Kitutu/Mwabundusi/506 which he apportioned to his sons and the same was subdivided into the parcels No. 831, 832 and 833. He stated that the parcel No. 833 remained in name of his father. Upon his demise, his mother obtained letters of administration but the 1<sup>st</sup> defendant claimed that the ground where the parcel No. 833 is located belongs to him as parcel No. 347. He produced Map Sheets No. 1 and No. 6 of Mwabundusi Section. He pointed that Map Sheet No. 1 has the parcel numbers 345, 346, 348 and 349 but the parcel No. 347 does not appear. He referred to Map Sheet No. 6 and pointed at the parcels No. 506, 347 and 507 as abutting each other. His evidence was that parcel No. 347 is not supposed to be in Map Sheet No. 6 but should have been in Map Sheet No. 1. He stated that the parcels in Map Sheet No. 1 are in Heresi Village whereas those in Map Sheet 6 are in Kereri Village.
7. . Cross-examined, he testified that his father acquired the parcel No. 506 in the year 1968. It was then subdivided into the parcels No. 831, 832 and 833. He testified that the register shows the parcel No. 833 as measuring 0.59 Ha. He asserted that the land adjudication officers made a mistake in placing parcel No. 347 in Map Sheet 6 instead of Map Sheet No. 1, and that the 1<sup>st</sup> defendant should vacate what is indicated as parcel No. 347. Re-examined, he stated that they came to know of the existence of parcel No. 347 in the year 1994 after his father died in the year 1993. It was triggered by the owner of the parcel No. 347 complaining that the mother of PW-1 was plucking his coffee. They investigated and found out that there is the parcel No. 347 in the map which is owned by the 1<sup>st</sup> defendant.
8. . PW-2 was Elijah Abincha Nyabongoye who is a retired Assistant Chief of Mwabundusi Sub-Location. His evidence was that in 1995 the mother of the plaintiffs, Nyantuka Mogaka, complained to him that part of her land parcel No. 506 had been interfered with. He looked at the maps and found that Plot No. 347 was supposed to be in Map Sheet No. 1 and Plot No. 506 was supposed to be in Map Sheet No. 6. He thought that the plot No. 347 has been moved to occupy the parcel No. 506.
9. PW-3 was Gordon Henry Odhiambo, then the Kisii County Surveyor when he testified on 4/5/2015. His evidence was that according to the Registry Index Map, the parcel No. 347 is between the parcels No. 506 and 507. He had visited the ground on another dispute, and while there, the owners of parcel No. 506 and 507, who are brothers, came with a Map Sheet No. 1 which they claimed had the parcel No. 347 though rubbed out. This prompted him to write a letter asking for the original aerial photographs from where the Map Sheets were produced but the same were not availed to him by the Director of Surveys. Cross-examined, he testified that the original parcel No. 506 is subdivided into the parcels No. 831, 832 and 833 whereas the original parcel No. 507 is subdivided into the parcels No. 1103, 1104 and 1105. He testified that the parcel No. 347 borders the parcel No. 833 to the East but there is an access road between them. From the register, the size of the original parcel No. 506 measured 1.7 Ha and the subdivisions No. 831, 832 and 833 measure 0.65 Ha, 0.38 Ha and 0.59 Ha respectively. The parcel No. 347 measures 0.38 Ha. He testified that Map Sheet No. 6 was prepared during adjudication. The parcel No. 347 was registered on 16 January 1971 and the Map Sheet is shown in the title deed.
10. With the above evidence, the plaintiffs closed their case.
11. DW-1 was Peter Momanyi Kebati, the 1<sup>st</sup> defendant in both suits. He is the registered proprietor of the parcel No. 347. He testified that his father, Zablon Nyanwara Kebati, purchased this land from Moywaya Nyabaro and he subsequently transferred the land to him in the year 2012. He testified that his father died in the year 2016 and that he is the one currently in possession of the land. He relied on a Land Registrar's Report dated 22 November 2019 to buttress his contention that the parcel No. 347 is distinct from the parcel No. 506 and its subdivisions. He testified that the parcel No. 347 was adjudicated on 28 August 1966 whereas parcel No. 506 was adjudicated on 10 September 1966, thus



- the parcel No. 347 was adjudicated first. He also testified that the parcel No. 833 is owned by David Onsongo Mogaka, the stated 3<sup>rd</sup> plaintiff who withdrew from this suit. He mentioned that there were previous suits against the parcel No. 347 which were dismissed and he produced proceedings in the case Kisii HCCC No. 450 of 1994.
12. The State called David Lemeiyan as her witness. He was the surveyor in the Department of Lands at Kisii as at February 2023 when he testified. He testified that he executed an order of court which required him to visit the suit properties and make a report. He filed a report dated 22 November 2019. His evidence was that parcel No. 347 and parcel No. 506 were both registered on the same day, i.e 22 April 1968. Parcel No. 347 was however adjudicated earlier on 28 August 1966 whereas parcel No. 506 was adjudicated on 10 September 1966. He testified that both parcels of land are in Map Sheet No. 6 of the Registry Index Map (RIM) and there is no parcel superimposed on the other. He stated that they arose from adjudication and are first registration numbers. They exist side by side only separated by a road. He testified that the parcel No. 506 is now subdivided into the parcels No. 831 to 835 and that the parcel No. 833 measures 0.59 Ha. He explained why they do not follow in sequence. He elaborated that their disparate numbers would mean that there was an adjudication dispute. In his opinion the documents speak for themselves and the plaintiffs should remain within the former parcel No. 506. He pointed out that even the subdivisions are restricted to what was initially parcel No. 506. He was referred to sketches by the plaintiffs which purport to show that parcel No. 347 is next to parcel No. 345. He refuted this pointing out that where the plaintiff claims to be the parcel No. 347 on Map Sheet 1 is a continuation of parcel No. 345 as there is a brace. He also explained that what the plaintiffs hold are merely adjudication sketches which were before survey.
  13. With the above evidence, the defendants closed their case.
  14. I invited parties to file their submissions. The plaintiffs filed theirs and so too counsel for the 1<sup>st</sup> defendant. Mr. Wabwire for the State relied on the evidence on record.
  15. I have taken into consideration the pleadings, the evidence, the submissions on record and all relevant factors. In a nutshell, the case of the plaintiffs is that the land parcel No. 347 ought not to exist where it is indicated in the Registry Index Map (RIM), i.e Map Sheet 6, but should be elsewhere in Map Sheet No. 1 next to the parcel No. 345. This of course is refuted by the defendants whose position is that the parcels No. 347 and 506 have been in existence since adjudication as distinct parcels of land.
  16. My assessment of the evidence is that the true position is that presented by the defendants. The case of the plaintiffs is hinged on nothing more than merely pointing out that the parcel No. 347 is not, on the RIM, located next to the parcels following in the numbering sequence. The other evidence is adjudication sketches. The adjudication process was finalized and thus the adjudication sketches mean nothing as whatever issues arose therein were resolved before the RIM was prepared. The evidence is overwhelming that both parcels Central Kitutu/Mwabundusi/ 347 and Central Kitutu/Mwabundusi/506 arose during adjudication and they are both first registrations. These parcels are indicated to be in Map Sheet No. 6 of Mwabundusi Registration Section and are located side by side. They have indeed been located side by side since they were registered in the year 1968. In fact, the green cards (registers) of these two parcels of land was opened on the same day which is 22 April 1968. There is no way that this parcel No. 347 could have been part of the original parcel No. 506, and it is ridiculous to claim that the parcel No. 347 was superimposed on the land parcel No. 506, or is currently superimposed on the land parcel No. 833 or any subdivision of the original parcel No. 506.
  17. I have seen nothing wrong in the manner in which the land parcel Central Kitutu/Mwabundusi/347 was created and the allegations by the plaintiffs that the suit parcel of land was fraudulently created is extremely far-fetched. I have seen absolutely no evidence of fraud. The numbering of the said land



parcel No. 347 was very elaborately explained by the surveyor; that it was probable that there were adjudication disputes and thus a delay in issuing of some parcel numbers which were eventually issued. Even without this explanation, it wouldn't change the fact that the parcel Central Kitutu/Mwabundusi/347 is located next to the original land parcel Central Kitutu/Mwabundusi/506. It could as well have had any number and that wouldn't change anything. Irrespective of the number given to the said land, it would still remain a completely distinct and separate parcel of land from the original land parcel Central Kitutu/Mwabundusi/506.

18. It will be observed that while the original proprietor of the land parcel No. 506 was alive, no issue ever arose. If at all there was any dispute you would expect that he would have filed suit or laid claim to the land immediately the register was opened but it is apparent that he lived peacefully with his neighbor and issues only arose after his demise.
19. My honest view of the plaintiffs is that they are motivated by greed. They have noted that the neighbouring land has different numbering and they want to use that to grab the land of the 1<sup>st</sup> defendant. I am afraid that this court cannot sanction and endorse their nefarious plans. It is sad that the 1<sup>st</sup> defendant has suffered so long and has had to face numerous cases, for reason only that his land has a number that does not follow the sequence of the neighbouring parcels. It is not him who gave out numbers and he should be left to enjoy in peace his land parcel Central Kitutu/Mwabundusi/347 in the fashion and number that it is registered. I tell the 1<sup>st</sup> defendant: proceed and enjoy your land parcel Central Kitutu/Mwabundusi/347 to the fullest; be proud of the fact that it bears this special number 347; let nobody disturb your peace and enjoyment of this land merely because it bears the number 347.
20. There is absolutely no merit in the case of the plaintiffs and the two suits are hereby dismissed with costs to the defendants. Since the 3<sup>rd</sup> plaintiff in ELC No. 401 of 2013 withdrew from the matter, there will be no adverse orders against him.
21. Judgment accordingly.

**DATED AND DELIVERED AT KISII THIS 21 DAY OF JUNE 2023**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT KISII**

