



**Thiong'o (Suing as the Legal Representative of the Estate of Michael Thiong'o Gatete) & another v Ontonyi & 3 others (Environment & Land Case 462 & 551 of 2016 (Consolidated)) [2023] KEELC 20245 (KLR) (27 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20245 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND CASE 462 & 551 OF 2016 (CONSOLIDATED)**

**M SILA, J**

**SEPTEMBER 27, 2023**

**(FORMERLY KISII HCCC NO 125 OF 2011)**

**BETWEEN**

**PETER GATETE THIONG'O (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MICHAEL THIONG'O GATETE) ..... PLAINTIFF**

**AND**

**JAMES ONTONYI ..... 1<sup>ST</sup> DEFENDANT**

**BEATRICE ONTONYI ..... 2<sup>ND</sup> DEFENDANT**

**MACHUKA ONTONYI ..... 3<sup>RD</sup> DEFENDANT**

**AS CONSOLIDATED WITH**

**ENVIRONMENT & LAND CASE 551 OF 2016**

**BETWEEN**

**MABEYA ONTONYI ..... PLAINTIFF**

**AND**

**PETER GATETE THIONG'O (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MICHAEL THIONG'O GATETE) ..... DEFENDANT**

**JUDGMENT**

(Plaintiff filing suit for eviction and narrating that he purchased the suit land in a public auction; that the defendants pleaded with him to cede a portion of it as they had nowhere to go which he did by



dividing the land into two halves; defendants however refusing to vacate the land which the plaintiff was to retain; defendants lodging a countersuit seeking the whole land; no substance in contention of the defendants and they are in fact lucky that the plaintiff only restricted himself to claiming the one half of the land that he did not relinquish; judgment entered for plaintiff (Mr. Gatete).

## **A. Introduction and Pleadings**

1. This is a consolidated judgment in respect of two suits. The first suit registered as Kisii HCCC No. 125 of 2011 (now 462/2016) was filed on 28 June 2011 by Michael Thiongo Gatete against three defendants, namely James Ontonyi, Beatrice Ontonyi and Machuka Ontonyi. In that plaint, Mr. Gatete averred that he purchased the land parcel Nyaribari Chache/B/B/Boburia/403 from Kenya Commercial Bank through a public auction. He averred that he gave the defendants notice to vacate but they pleaded with him that they have no place to go. He averred that he received several requests from the defendants to give them part of the land for a homestead, and that out of pity, he gave the defendants half the land measuring 6 acres. He pleaded that the same was surveyed and the land subdivided into two parcels with one subdivision, Nyaribari Chache/B/B/Boburia/9634 remaining to him. He pleaded that the defendants have refused to vacate this land and instead filed a case before the Land Disputes Tribunal. In the suit, he asked for orders to have the defendants ordered to give vacant possession of the said land parcel Nyaribari Chache/B/B/Boburia/9634. The defendants in this suit filed defence which they later amended on 19 December 2019. They pleaded inter alia that the land parcel Nyaribari Chache/B/B/Boburia/403 was ancestral family land where more than fifty family members live, and that though Mabeya Ontonyi was the registered proprietor, he was only a trustee and he could not purport to take a loan using the ancestral family land as security without their consent. They contended that Mr. Gatete got himself registered as proprietor through fraud and that he caused subdivision of the land parcel No. 403 without their consent and approval of the Land Control Board. They lodged a counterclaim seeking orders for a declaration that they are the rightful owners of the land parcel No. 403, an order to cancel the titles No. 9633 and 9634 and for title to revert to parcel No. 403 in their names, a permanent injunction against Mr. Gatete, and a declaration that Mr. Gatete holds the title in trust for them.
2. The second suit, was originally filed as Kisii HCCC No. 258 of 2011 (now Kisii ELC No. 551/2016). It was commenced through a plaint filed on 10 November 2011 by Mabeya Ontonyi against Michael Thiongo Gatete. In that plaint, Mabeya Ontonyi claimed to be the registered owner of the land parcel Nyaribari Chache/B/B/Boburia/403. He pleaded that he was the first registered owner of the said land having become so registered on 7 January 1971. He pleaded that on 23 June 1977, Michael Thiongo Gatete (Mr. Gatete) fraudulently got himself registered as proprietor of the said land. He pleaded that by using the local administration, he (Mabeya) was forced to give Mr. Gatete half share of the land on 20 December 2011 and that subsequently Mr. Gatete partitioned the land through a mutation dated 24 February 2011, giving rise to the land parcels No. 9633 and 9634 both measuring 2.10 hectares. In this suit, Mr. Mabeya sought orders for a declaration that the title Nyaribari Chache/B/B/Boburia/403 belongs to him and an order to cancel the resultant titles. Mr. Gatete filed a defence and counterclaim. He pleaded that he purchased the land in the open market and when Mr. Mabeya refused to transfer it to him, he filed a suit in 1977 and the court ordered Mr. Mabeya to transfer the title which was done. He pleaded that he was granted orders to evict Mr. Mabeya but the family pleaded with him and he decided to assist Mr. Mabeya by giving him half the land. In his counterclaim, Mr. Gatete asked for orders of eviction and mesne profits.
3. Mr. Gatete died on 10 December 2020 before the case commenced and he was substituted by his son and legal representative, one Peter Gatete Thiongo.



4. I earlier mentioned that these are two consolidated suits. For ease of reference, Mr. Gatete will generally be referred to as the plaintiff and the other parties (the Ontonyis) as defendants.

## **B. Evidence of the Parties**

5. PW-1 was Peter Gatete Thiongo. He testified that his late father (Mr. Gatete) purchased the land parcel Nyaribari Chache/B/B/Boburia/403 in a public auction conducted on 30 September 1975. The land measured 12 acres. He produced the receipt to demonstrate the purchase, consent of the Land Control Board dated 11 July 1977, and the transfer by chargee instrument. The transfer was lodged on 19 January 1976 and the land was thereafter registered in name of Mr. Gatete. He testified that when Mr. Gatete bought the land he found a grass thatched hut though there was no one in occupation. He liaised with the Chief to get the owner of the hut and the Assistant Chief issued him with a notice to vacate dated 26 July 1982. Vacant possession was however not given. Mr. Gatete approached the Chief to talk to the occupants. In 2010, the acting Chief of Kiogoro Location, summoned the defendants and Mr. Gatete, and a meeting was held. Mr. Gatete wished to have an amicable solution and after lengthy deliberations, the defendants pleaded with Mr. Gatete to allow them to keep 5 acres as they had nowhere to go. Mr. Gatete agreed to allow them keep 5 acres where their homesteads were and an agreement was drawn and signed. He produced it as an exhibit. He testified that when the surveyor came to carve out the 5 acres, it was found that some houses spilled over. The option was either to demolish them or for Mr. Gatete to give out more land. Mr. Gatete agreed to give an extra one acre so as to accommodate the houses and he thus ended up conceding 6 acres. Nothing was put down in writing regarding concession of this extra one acre. He stated that the defendants had no money and his father paid the survey fees. The result was that the land parcel No. 403 was subdivided into two equal halves registered as parcels No. 9633 and 9634. Mr. Gatete was to keep the parcel No. 9634 whereas the defendants were to keep the parcel No. 9633. He testified that the defendants could however not agree on who was to be registered as proprietor (thus title remained in name of Mr. Gatete). He testified that his claim is restricted to the parcel No. 9634. He added that Mabeya Ontonyi filed a suit before the Land Disputes Tribunal in 2011 and the tribunal ruled in his favour. The decision was however quashed vide Kisii Miscellaneous Civil Application (JR) No. 3 of 2012 in a judgment delivered on 10 November 2017.
6. Cross-examined, he testified that he was born in 1969. He affirmed that the land parcel No. 403 was previously registered in name of Mabeya Ontonyi. He did not know whether it was ancestral land and did not know on what basis Mabeya Ontonyi held the land. He testified that his mother was cultivating the land in the 1990s and he used to visit when he was growing up. They would till the land though they did not live here. He reiterated his evidence that the defendants requested Mr. Gatete to allow them a place to live and he agreed to allocate them half the land. He denied that Mr. Gatete used the provincial administration to intimidate the defendants. He did not know how many people are in possession of the land.
7. PW-2 was John Muhoro Thiongo. He was born in 1974. His evidence was more or less a replica of the evidence of PW-1. He was present when the subdivision of the land was done in 2011 and he met some of the family members of the defendants. The subdivision was as a result of a meeting held at the Chief's office with an aim to amicably settle the matter. He testified that when survey was done to carve out 5 acres as agreed, one house, that of Beatrice Ontonyi, fell outside the 5 acres and his father agreed to give out another one acre so as to accommodate this house. That was how the land ended up being subdivided into two equal halves each measuring 6 acres. He added that the survey exercise was cordial.
8. PW-3 was Steven Omari Nyasimi. He is a former community policing officer. He testified that on 10 February 2011 he was summoned by the Assistant Chief of Rianyamwamu Sub-Location to attend



a meeting at the home of Mabeya Ontonyi. He testified that the meeting was attended by the Chief, Clan elders, villagers and a surveyor. The purpose of the meeting was to subdivide the land parcel No. 403. He testified that survey was done and the land subdivided into two equal halves with Mabeya Ontonyi being given the portion where his homesteads were located. The work was done amicably and they finished with a word of prayer.

9. With the above evidence the plaintiff closed his case.
10. DW-1 was Naftali Mabeya Ontonyi (Mabeya Ontonyi) (the plaintiff in the suit No. 258 of 2011). He testified that he owned the land parcel No. 403. He stated that the land belonged to his grandfather and that he got title after his grandfather died. He testified that his grandfather had one wife but his father had three. He stated that the land passed from his grandfather to his father and eventually to him. He got title after the death of his father. He testified that he got registered on behalf of himself and in trust for the rest of the family. He testified that he does not know how the land came to be registered in name of Mr. Gatete. He stated that he does not recall any mutation form. He claimed not to know that he had been sued by Mr. Gatete and refuted recording a witness statement.
11. Cross-examined, he denied using the land as security for a loan. He claimed not to be aware that the land was sold by a bank. He stated that he was not aware that Mr. Gatete purchased the land. He denied signing any transfer instrument nor any Land Control Board forms. He was not aware of any transfer to Mr. Gatete. He nevertheless acknowledged that he has not reported to the police of any forgery of documents. He testified that he was not aware of being ordered by the Chief or court to vacate the land. He identified Machuka Ontonyi as his brother, whereas James and Beatrice are his children (defendants in the suit filed by Mr. Gatete). He had a wife by name of Bosibori Mabeya who he stated is now deceased. The Chief's letters of 1982 asking him to vacate were put to him and he denied seeing the letters. He denied that he approached Mr. Gatete and denied pleading with him to allow him to retain part of the land. He denied that there was agreement that his family should keep 5 acres and Mr. Gatete the rest. He admitted being at the Chief's office in Kiogoro but denied that he met Mr. Gatete or agreeing to the proposal to subdivide the land. He denied signing any agreement at the Chief's office. He stated that no surveyor came to the land to carve out 5 acres for him. He denied that Stephen Nyasimi (PW-3) came to the land. He stated that he does not know of any mutation form subdividing the land into two equal portions of 6 acres because subdivision into 5 acres would have meant some houses spilled out of his allocated land. He stated that he was not aware that the land was registered in name of Mr. Gatete. He admitted that he has never made a report that Mr. Gatete wrongly obtained title. As far as he was concerned the land is not subdivided and he stated that he is not aware of two titles having emerged upon subdivision. He admitted filing a suit at the Land Disputes Tribunal but stated that he has no knowledge of the judgment quashing the award of the tribunal. He testified that he does not know who gave Mr. Gatete the land or how the land was subdivided. He stated that those occupying the land are his people and there are homesteads on the land. He stated that he had sold some portions to some people a long time ago. He had no document to show that he owned the land as trustee. He alleged that he has never met Mr. Gatete.
12. DW-2 was James Ontonyi Mabeya, the 1<sup>st</sup> defendant in the suit filed by Mr. Gatete. He stated that he is son of Mabeya Ontonyi. He testified that his father got the land after his grandfather died and that he held the land for himself and other beneficiaries. He also relied on a pre-recorded witness statement. In it, he stated that the land belonged to his grandfather and it was transferred by transmission to his father. He stated that his grandfather had three wives, and that his father was son of the first wife, one Kemunto Ontonyi. He stated that the second wife Kwamboka Ontonyi had one son, Tirimba Ontonyi, and the third wife (Bosibori) had one son, David Machuka Ontonyi. He stated that they did not give consent to any person to use the ancestral land as security for a loan, and that being ancestral



family land, it could not be used to take a loan without the consent of all family members. He stated that he was born on the land in 1961 and lives there with his family. He added that there are 57 persons on the land. He proceeded to state that Mr. Gatete fraudulently subdivided the land. He made reference to the decision of the Land Disputes Tribunal which was in their favour.

13. Cross-examined, he testified that he came to know that the land was registered in name of Mr. Gatete when his father was summoned by the Chief. He stated that he was not aware that his father had taken a loan using the land as security. He was 14 years in 1975. He testified that at the Chief's office, those present included himself, his father, Nelson Nyambati, David Machuka, Wyclife Nyamari, Paul Ratemo, Paulina Mabeya, Beatrice and Mellen. He denied that any agreement was drawn. He denied that there was any agreement to have his father retain 5 acres of the land. It was put to him that his ID card is noted in the agreement but he denied this and gave out what he claimed to be his ID number (I observed that he had orally given out the wrong ID number and that the ID number recorded in the agreement before the Chief actually matched his ID which he had in court). He testified that he was not aware of any notices issued by the Chief in 1982 asking his father and Bosibori to vacate the land. He stated that he did not see any surveyor come to subdivide the land. He claimed that he was informed at the Chief's office that the land had been subdivided into two. He was questioned on the tribunal decision and he stated that he is not aware that it was vacated. He stated that he has not been informed that Mr. Gatete was willing to transfer to them title to the parcel No. 9633.
14. DW-3 was Beatrice Ontonyi (2<sup>nd</sup> defendant in the suit by Mr. Gatete). She is wife to DW-2. She stated that they got married in 1980 and lived in the suit land. Cross-examined, she claimed that she has never been to the Chief's office at Kiogoro and was not aware of any agreement being drawn where it was agreed that his father in law can keep 5 acres of the land. She denied placing a thumbprint in the agreement though she acknowledged that no report has been made of any forgery of her thumbprint. She stated that she has never seen a surveyor come to the land to subdivide it.
15. DW-4 was David Machuka Ontonyi (3<sup>rd</sup> defendant in the suit by Mr. Gatete). He is brother to Mabeya Ontonyi. His evidence was that the chief of Kiogoro Location called them to his office and that is when he met Mr. Gatete. He denied that they went to the Chief's office to discuss the land parcel No. 403. He mentioned those present at the Chief's office as including Peter Gatete (PW-1), Michael Thiongo (PW-2), Mabeya Ontonyi, Nelson Nyambati, David Machuka, and Beatrice Ontonyi. He denied that there was discussion on subdivision of the land so that his father gets 5 acres. He denied that any surveyors came to the land. He was aware that the land now had two titles upon subdivision and he thought that they are in name of PW-1. He denied signing the agreement at the Chief's office though he could see a signature against his name. No report has ever been made that his signature is forged.
16. With the above evidence, the defence closed its case.

### **C. Analysis and Disposition**

17. I invited counsel to file written submissions and I have taken note and considered the submissions filed by both Mr. Kilonzo for the plaintiff and Mr. Omwega for the defendants before arriving at my decision.
18. The case of the plaintiff, in a nutshell, is that Mr. Gatete purchased the suit land in a public auction in 1975. The defendants however occupied part of the land, and in order to resolve the issue amicably, Mr. Gatete agreed to a proposal that he cedes part of the land to the defendants. The intention was to cede 5 acres but because part of the homestead spilled outside the allocated 5 acres, Mr. Gatete agreed to give out 6 acres. That is why the land was subdivided equally into two portions, one to be kept by Mr. Gatete and the other by the defendants. The defendants' defence is rather ambivalent. On one



hand, Mr. Mabeya denies ever charging the land and asserted that he has no knowledge that the land was sold by the chargee. His children contend that Mr. Mabeya could not charge the land since the land was ancestral and that he was only holding it in trust for them. They all deny entering into an agreement to have the land split into two halves.

19. At the outset, I must state that I do not for one moment believe the evidence of Mr. Mabeya. He did not at all impress me as an honest witness. All he did in his evidence was deny everything, even the obvious. In fact, his own evidence was at variance with his pleadings. This has not done him any favours for what he ended up doing was to completely shatter his credibility.
20. . Be that as it may, I opt to start with the assertion that the land is ancestral land inherited by Mabeya Ontonyi. There is no concrete and reliable evidence to support this contention that the land was ancestral land. What I see from the green card and the other documents of title on record, is that Mabeya Ontonyi, was the first registered proprietor and he became so registered on 7 January 1971. There is nothing in the register to suggest that Mabeya Ontonyi became registered as trustee for any other person. There is also no evidence whatsoever that the land was previously owned by the grandfather of Mabeya Ontonyi or his father. As far as can be discerned, this was a first registration upon adjudication. If Mabeya was registered as proprietor in trust for others, this would have been discernible from the adjudication records but none was provided. Apart from lack of documentary evidence, there is no concrete oral evidence to support the claim that the land was ancestral land held in trust by Mr. Mabeya. If it was held in trust, you would expect that there be evidence of the people that the land was held in trust for, and their entitlement in terms of acreage. It was never said that out of this 12 acres, so and so was entitled to a particular acreage. In short, I am not persuaded that the land was ever ancestral land transmitted to Mabeya Ontonyi as alleged.
21. Even if I am to hold that the land was ancestral land I would still have dismissed the suit by Mabeya Ontonyi and the defendants in the suit filed by Mr. Gatete. Their contention in essence is that the charge was irregularly registered. In that event, for them to succeed, they ought to have sued the chargee for a declaration that the charge was illegally entered into. This court cannot hold that the charge was illegal without first hearing from the chargee.
22. Despite Mabeya Ontonyi claiming that he never charged the land, the evidence is glaring that he did in fact charge the land. If he never charged the land, you would expect that he would have filed suit upon being informed to vacate the land in the year 1982, for there are notices issued by the Chief demanding him to vacate the land, which notices were attached by Mabeya Ontonyi himself in his pleadings. Mr. Gatete got registered as proprietor on 23 June 1977. Mabeya Ontonyi never contested the title of Mr. Gatete from the year 1977 until Mr. Gatete filed suit to have his relatives evicted. Mr. Mabeya filed suit in November 2011, 34 years after Mr. Gatete had become registered as proprietor. His claim, if any, is clearly out of time for he had 12 years to file suit to reclaim the land following the provisions of Section 7 of the *Limitation of Actions Act*.
23. My own assessment of the evidence is that the truthful version of events is that provided by the plaintiff i.e Mr. Gatete. I am persuaded that Mr. Gatete purchased the suit land through a public auction held in 1975. He wished to settle the issue amicably with the occupants of the land and he agreed to cede part of his land for the sake of peace. I am persuaded that the parties met at the Chief's office at Kiogoro and they agreed that Mr. Gatete could cede 5 acres of his land. A document exhibiting the agreement was produced. I am persuaded that Mr. Gatete graciously agreed to cede an extra one acre so that all the homesteads of the defendants could be accommodated and that is why he subdivided the land parcel No. 403 into two equal halves of 6 acres each. In his evidence, PW-1 stated that it was his father's wish to give out half the land and he will thus restrict himself to seeking vacant possession of the land parcel No. 9634. I believe the plaintiff. I believe that Mr. Gatete went out of his way to make peace with the



defendants, and in the process, donated a chunk of his land. It is regretful that instead of being grateful to Mr. Gatete, for such a rare gesture of peace, the defendants want to spite the grace offered by Mr. Gatete. This is a classical case of a person biting the very hand that has raised him from the ground after a mighty fall. They are lucky that Mr. Gatete did not sue for the whole land for they have absolutely no legal standing to claim even an inch of the land. But Mr. Gatete, unlike the defendants, was an honest man, who kept his word; in his case, he only asked for what he has not relinquished.

24. There is no substance in the case filed by Mabeya Ontonyi and I hereby dismiss it with costs. I have no reason not to enter judgment for the legal representative of Mr. Gatete as claimed in the suit filed by Mr. Gatete. In the same vein, there is no substance in the counterclaim filed against the suit by Mr. Gatete. The counterclaim is dismissed with costs. As I have mentioned, the defendants are lucky that they were not sued for eviction from the entire 12 acres of land. I will order the defendants (meaning Mr. Mabeya Ontonyi and the defendants in the suit filed by Mr. Gatete together with their servants, and all relatives claiming under them) to immediately vacate the land parcel Nyaribari Chache/B/B/Boburia/9634. They must vacate within the next 14 days and in default the plaintiff is at liberty to forcefully evict them. I also issue an order permanently restraining the defendants from entering, being upon, or in any way disturbing the peaceful occupation of the land by the plaintiff (legal representative/s of Mr. Gatete) of this land parcel Nyaribari Chache/B/B/Boburia/9634.
25. The plaintiff (i.e legal representative of Mr. Gatete) will have the costs of both suits and the counterclaims filed therein.
26. Judgment accordingly.

**DATED AND DELIVERED AT KISII THIS 27 DAY OF SEPTEMBER 2023**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT KISII**

