



**Ongaro v Machuka & another (Environment & Land Case 660 of 2016)  
[2023] KEELC 20773 (KLR) (17 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20773 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND CASE 660 OF 2016**

**M SILA, J**

**OCTOBER 17, 2023**

**BETWEEN**

**DORIS RABERA D ONGARO ..... PLAINTIFF**

**AND**

**MICHAEL MACHUKA ..... 1<sup>ST</sup> DEFENDANT**

**PAUL MATAE MACHUKA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

(Plaintiff filing suit claiming that the defendants have trespassed on her land; defendants refuting the contention and claiming that it is actually the plaintiff who has trespassed on their parcels of land; court referring the matter to the Land Registrar and Surveyor for an analysis; report confirming that there is an overlap but only with land of the 1<sup>st</sup> defendant; consent subsequently entered compromising suit with 1<sup>st</sup> defendant so as to have his title cancelled; plaintiff however proceeding against the 2<sup>nd</sup> defendant; reports showing no overlap and no trespass by 2<sup>nd</sup> defendant; plaintiff's suit against 2<sup>nd</sup> defendant dismissed)

1. This suit was commenced through a plaint which was filed on 5 January 2012. In the plaint, the plaintiff averred that she is the registered proprietor of the land parcel South Mugirango/Nyataro/1684 measuring 0.88 hectares (the suit land). She pleaded that the 1<sup>st</sup> and 2<sup>nd</sup> defendants have trespassed into her land since 31 November 2011 (sic). In the suit, she sought an order for the eviction of the defendants and a permanent injunction to restrain them from her said land.
2. The defendants filed a joint statement of defence and counterclaim. In it, it is pleaded that the 1<sup>st</sup> defendant is the registered owner of the land parcel South Mugirango/Nyataro/2073 and the 2<sup>nd</sup> defendant the registered owner of the land parcel South Mugirango/Nyataro/2071. In the defence, the defendants denied interfering with the suit land. In the counterclaim, they contended that it is the



plaintiff who has trespassed into their parcels of land. They also asked that the plaintiff be evicted from their parcels of land and to be permanently restrained from the same.

3. The matter appeared to be a boundary dispute and the court called for reports from the Land Registrar and District Surveyor. There are actually several reports on record including one dated 4 May 2012 and another dated 19 February 2018. The report dated 4 May 2012 did confirm that the parties are claiming the same land on the ground though they have different parcel numbers. The report of 19 February 2018 elaborated that the defendants' parcels of land emanated from a subdivision of the land parcel South Mugirango/Nyataro/992 which was subdivided into the land parcels Numbers 2070 to 2076. That report proposed that the original boundaries of parcel No. 992 be identified but I do not think that this was ever done.
4. A significant development was that on 25 September 2015, the plaintiff and the 1<sup>st</sup> defendant entered into a consent compromising the dispute between them with no orders as to costs. The consent was to the effect that the 1<sup>st</sup> defendant conceded to the cancellation of his title i.e South Mugirango/Nyataro/2073 (parcel No. 2073); that the land parcel be removed from the registry index map for being non-existent on the ground and the map be amended to reflect this position. The 1<sup>st</sup> defendant also consented that he may be permanently restrained from the suit land.
5. With the above consent, what remained therefore was only the dispute between the plaintiff and the 2<sup>nd</sup> defendant. It will be recalled that the 2<sup>nd</sup> defendant is the owner of the land parcel No. 2071.
6. The plaintiff first testified on 18 December 2014 (before Okong'o J) and subsequently on 18 July 2022 (before Onyango J). Her evidence was that she owns the suit land; that she leased the suit land to the defendants in 2008 for four years; that the defendants refused to vacate the land after expiry of their lease claiming that they owned the land. In her subsequent evidence, on 18 July 2022, she testified that the 1<sup>st</sup> defendant, pursuant to the consent, has given her back her land but the 2<sup>nd</sup> defendant still continues to be on it. She produced a third surveyor's report dated 16 November 2016.
7. PW-2 was Augustino Karasi Nyauma. He also testified on 18 December 2014 before Okong'o J. He testified that his father owned the land parcel South Mugirango/Nyataro/990 and the plaintiff purchased a portion of it. He testified that the portion purchased by the plaintiff is the suit land and that she fenced it after purchase. He testified that the defendants are his cousins and they own separate land. He added that the plaintiff leased her land to the defendants and the defendants planted maize and later sugarcane but they now claim to own it. He stated that the defendants destroyed the fence put up by the plaintiff.
8. With the above evidence, the plaintiff closed her case.
9. The 2<sup>nd</sup> defendant, the sole remaining defendant, did not offer any evidence.
10. Mr. Nyasimi, learned counsel for the plaintiff, filed written submissions where he urged me to allow the plaintiff's case.
11. I have considered the said submissions together with the record before arriving at my decision.
12. The plaintiff asserts ownership of the land parcel South Mugirango/Nyataro/1684. Her case is that the defendants have trespassed on her land by claiming the same ground that comprises of her land. She had of course sued the 1<sup>st</sup> defendant as owner of the land parcel No. 2073 and the 2<sup>nd</sup> defendant as owner of the land parcel No. 2071. It will be recalled that the suit against the 1<sup>st</sup> defendant was compromised, meaning that if there exists any dispute then it will only now be against the land comprised in the parcel No. 2071.



13. I have gone through all the three reports of the Land Registrar and District Surveyor presented in this case. The first report is that dated 10 January 2012. The report avers that the plaintiff's land emanated from a subdivision of the land parcel No. 990 which bordered the land parcel No. 992. It is this parcel No. 992 which was subdivided into the parcels No. 270-276. The report was not conclusive on the issue of which party has encroached into the land of the other and it closes by stating that the parties were advised to maintain the status quo pending further directions.
14. The second report is that dated 4 May 2012. It is a fairly elaborate report. It confirms the dispute of the parties and states that the land therein is claimed by both the plaintiff and the owner of the land parcels No. 2072 and 2073. Indeed a sketch was drawn indicating the area in dispute. That sketch shows that the area in dispute is that covered by the land parcels No. 1684 (plaintiff's land) and No. 2072, 2073 and 2074. The land parcel No. 2071 (of the 2<sup>nd</sup> defendant) is located differently and the land comprised therein is not part of the land under dispute.
15. The third report is that dated 16 November 2016. It does state that the parcel No. 1684 is overlapped by the parcels No. 2073 and 2074. It concludes that the parcel No. 2073 needs to be expunged from the records and similarly proposes cancellation of the land parcel No. 2074.
16. We need to remind ourselves that the dispute between the parcels No. 1684 and 2073 was resolved. The suit herein does not mention the parcel No. 2074 and we do not know its owner. The remaining 2<sup>nd</sup> defendant is owner of parcel No. 2071. None of the reports point to any overlap between the parcel No. 1684 and 2071. Indeed before proceeding to have the matter reserved for judgment, I asked Mr. Nyasimi to consider whether his client has any case given the contents of the reports, but Mr. Nyasimi insisted that he had instructions to proceed.
17. There is no substance in the contention of the plaintiff that the 2<sup>nd</sup> defendant has trespassed into her land parcel No. 1684. There is certainly no evidence whatsoever to that effect and the reports herein are very clear that there is no dispute with the parcel No. 2071. Why the plaintiff opted to soldier on baffles me. Was she proceeding with the case just for the fun of it ?
18. Given the above, I have no option but to dismiss the plaintiff's case with costs. The defendants had a counterclaim which they appear to have abandoned. I will order the counterclaim dismissed but I make no orders as to the costs thereof, given the compromise that the 1<sup>st</sup> defendant reached with the plaintiff and for all intents and purposes the 2<sup>nd</sup> defendant never pursued whatever was left of the counterclaim.
19. Judgment accordingly.

**DATED AND DELIVERED AT KISII THIS 17 DAY OF OCTOBER 2023**

**JUSTICE MUNYAO SILA**

**JUDGE**

