



**Peter v Mokaya & another (Environment & Land Case E107 of 2021)
[2023] KEELC 21853 (KLR) (21 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21853 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT & LAND CASE E107 OF 2021
JM KAMAU, J
NOVEMBER 21, 2023**

BETWEEN

PRISCAH BOSIBOI PETER PLAINTIFF

AND

CECILIA NYANGARA MOKAYA 1ST DEFENDANT

JOSEPH MOKAYA 2ND DEFENDANT

JUDGMENT

1. The subject matter of this suit is Lr. No. Nyansiongo/settlement Scheme/524 which the Plaintiff claims to have bought from the original owner, the late Elijah O. Mogaka in 1994 and fully paid for it. The same was hived off Nyansiongo Settlement Scheme/10. The 2nd Defendant also bought a portion of land from the said Mogaka out of Nyansiongo Settlement Scheme/10. The 2nd Defendant is said to have secretly and without the knowledge of the Plaintiff caused the land to be registered in the name of the 1st Defendant. The Plaintiff is the sister-in-law to the 2nd Defendant's brother one Donald Mogaka. The Plaintiff's case is that 1.25 Acres out of Nyansiongo Settlement Scheme/524 be transferred by the 2nd Defendant to herself. The Plaintiff has no road of access to the portion she occupies and accesses it through her neighbour's land. The Plaintiff also avers that on 21/3/2012 the 2nd Defendant trespassed onto her parcel of land and damaged the entire maize crop thereon. The Plaintiff's prayers are for: -
 - a. A declaration that 1.25 acres or thereabout of that parcel of land known as Nyansiongo/settlement Scheme/524 and currently occupied by the Plaintiff including the section forcefully annexed by the Defendants in 2010/11 is her property.
 - b. An order to issue directing the Land Registrar, Nyamira District to cancel Land Title No. Nyansiongo/settlement Scheme/524 and issue the Plaintiff with a separate Title for her portion of the suit property.



- c. An order to issue directing the 2nd Defendant to pay the Plaintiff Kshs. 37,200/= being Special Damages for trespassing into and damaging the Plaintiff's entire maize crop.
 - d. An order to issue directing the 2nd Defendant to pay the Plaintiff General Damages for trespass on her portion of land parcel No. Nyansiongo/settlement Scheme/524.
 - e. An order to issue directing the Defendants jointly and severally to pay mesne profits for preventing the Plaintiff from putting to use a section of her parcel of land.
 - f. An order to issue directing the Defendants to pay the Plaintiff all monies received from KP & L CO. LTD as compensation for erecting an electric power line over her land.
 - g. A permanent injunction to issue barring the Defendants, their Agents, Employees, Servants, personal representatives or whosoever from ever trespassing into the Plaintiff's portion of Nyansiongo/settlement Scheme/524 or in any way interfering with her peaceful occupation, enjoyment and access to said portion.
 - h. Costs of the suit and interest thereon from the date of filing suit till payment in full.
 - i. Other and better relief which the Honourable Court may deem just to grant in the circumstances.
2. The Defendants filed a joint Defence on 21/1/2013 where they denied the Plaintiff's claim in toto and the 2nd Defendant averred that she acquired all interest in Title No. Nyansiongo Settlement Scheme/524 vide a Sale Agreement dated 15/12/1993 and accordingly the suit land was registered in the name of the 1st Defendant who is wife to the 2nd Defendant. The Defendants finally aver that the suit is statutorily time barred and that the same should be dismissed with costs since the reliefs sought by the Plaintiff are unavailable.
 3. On 8/11/2013, this court while being presided over by Mr. Justice S. Okong'o gave the following order:

“Pending the hearing and determination of the main suit an order do issue directing the Defendants, their Agents, Employees and/or Servants or whosoever to unconditionally re-open the only access footpath to the Plaintiffs' home on Land Parcel No. Nyansiongo Settlement Scheme/ 524.”
 4. Having visited the suit land in the presence of the Land Registrar and County Surveyor, Kisii this court ordered the 2 officers to ascertain who occupies what and file a Report. This was in execution of my Learned Brother's (J. Mutungi's) orders of 21/5/2019 as follows: -
 1. The court requires expert evidence to determine the issue of occupation.
 2. The Land Registrar, Nyamira and the County Surveyor to visit Land Parcel Nyansiongo Settlement Scheme/524 with appropriate Notice to the owner of land parcel Nyansiongo Settlement Scheme/523 which borders land parcel 524 and to establish and fix the boundaries of the two parcels of land in accordance with Section 18 and 19 of the [Land Registration Act, 2012](#).
 3. The Land Registrar/Surveyor to prepare a sketch diagram in what parcel of land the Plaintiff occupies and the extent of the occupancy. The Land Registrar/Surveyor to file a report in court within the next 90 Days from today.
 4. Mention on 26th September, 2019 for further directions.



5. The 2 Reports were finally filed in court on 13/10/2022 and I allowed both parties to file their comments on the same. The Report reads as follows: -

“Concurrently, the said Donald and Joseph also bought their respective portions (now 523 and 524) from the same vendor as the Plaintiff. The three transactions happened concurrently. Unfortunately, when the survey/subdivision was finally carried out only Donald and Joseph were issued with Title Deeds. The Plaintiff’s said parcel of land was not surveyed/registered separately. Apparently, because the Plaintiff was not directly involved in the whole transaction. Nonetheless and without knowledge of the anomaly, all the three parties took possession of their respective portions. The Plaintiff built a home on one side of her land and started cultivating on the rest. She is still in possession of the entire portion. The problem was only discovered in 2011. By then Donald and Joseph (who had acted as her Agents and under whose names the different parts of the Plaintiff’s land were registered) had already fallen out and could not cooperate to ensure that her land is registered under her name; hence this suit.

The Plaintiff’s land stretches across three registered parcels of land namely Nyansiongo Settlement Scheme/523, 524 and 522. The registered proprietors of the affected parcels are: -

Parcel (Nyansiongo Settlement Scheme)	Proprietor
523	Merceline Kwamboka Mageka
524	Cecilia Nyangara Mokaya (the 1st Defendant)
522 - Subject to Keroka Principal Magistrate Court Succession Cause No. 041 of 2022.	Elijah Ongoro Mokaya (Deceased)

The Plaintiff’s land is ascertainable because it has a live fence all round.

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6. A sketch map (Diagram) was also attached to the Report.
7. I have carefully considered the Report as well as Counsel’s comments on the same. The Report does not conclusively resolve the case. It only gives a reprieve to the parties before the Hearing and determination of the suit. The same is not a boundary dispute *per se* under Sec. 18 of the [Land Registration Act](#), No. 3 of 2012 but actual ownership and the parties will have their day in court to resolve the issue of ownership.
8. Unfortunately, the 2 officers failed to act on Justice Mutungi’s orders made on 21/5/2019 fully and particularly order No. 2 as follows:
2. The Land Registrar, Nyamira and the County Surveyor to visit Land Parcel Nyansiongo Settlement Scheme/524 with appropriate Notice to the owner of land parcel Nyansiongo Settlement Scheme/523 which borders land parcel 524 and to establish and fix the boundaries of the two parcels of land in accordance with Section 18 and 19 of the [Land Registration Act](#), 2012.



which was even more crucial than prayer No. 3 that they concentrated on. This has retrogressed the work of the Court which leaves the Judgment inconclusive.

9. I subsequently ordered that since the portion that the Plaintiff occupies at the moment has been ascertained with the same having a live fence all around, this matter will go for full Hearing and this Report will form part of the evidence during the Hearing of this suit for any party who wishes to use it.
10. The Plaintiff testified that she has resided on plot No. LR Nyansiongo Settlement Scheme/523 measuring 1 ¼ acres for more than 32 years now. The same is fenced. The 2nd Defendant is her brother in law. The Defendants are husband and wife respectively. She bought the land and paid through the bank to the 2nd Defendant's Account. In support of her case the Plaintiff produced crop damage assessment Report dated 23/3/2012 showing the total Damage to be KSh. 37,200/-. The assessment was done and the Report prepared by Borabu Division Agricultural officer Mr. Edward Mabeya. Also produced is a copy of green card showing Nyansiongo settlement scheme /524 measuring 1.4 Hectares to have had its Title Deed issued to one Cicilia Nyangara Mokaya on 15/11/2000, family meeting minutes, a letter from one Maceline Kwamboka Mongare to Baclarys Bank (K) Ltd authorizing the bank to debit Marceline Kwamboka Magare Account 4220086 with Ksh.100,000/- for the purchase of Land for her sister, the Plaintiff from Kennedy Nyambati Mogaka. The same is dated 7/12/1994. We also have a green card showing that the suit land was registered in the name of Elijah Mogaka Ongoro on 2/10/1995 and on 15/6/2000 to Cicilia Nyangara Mokaya. She said in cross examination that although Nyansiongo Settlement Scheme/524 is registered in the name of the 1st Defendant, it is hers. She also produced a number of hand written sale agreements to prove her case respectively dated 7/1/1995, 29/1/1995, 6/5/1995, 27.5.1995, 11/7/1995, 29.4/1996, 28/6/1996, 3/8/1996, 28/8/1996, 24/9/1996, 30/10/1996, 24/1/1997, 21/2/1999 and 4/8/1995.
11. Pw2 Superintendent of Police Michere Ndege testified that the specimen signatures have slight variations which is normal. But he said that his
12. Report was disadvantaged because he was not given the original documents yet photocopies can be manipulated.
13. Pw3 – Donald Onsongo Mogaka testified that the Plaintiff is her sister in law just as the 1st Defendant is. He said that they came to discover that there was foul play when Kenya power and Lighting Company Limited was compensating Land owners in the area for placing the power line through the land and the Plaintiff was not among the beneficiaries. He said that the Plaintiff was entitled to a portion of Nyansiongo Settlement Scheme/524.
14. The 1st Defendant testified that she bought Nyansiongo settlement scheme/524 from one Elijah Ongaro and the same was transferred to her by the said Elijah Ongaro and that the Plaintiff has been on Nyansiongo settlement /523 since 1997. She produced a copy of the Title Deed in respect of Nyamira/Nyansiongo/524 registered in her name. the land is 1.4 hectares and the same was issued on 15/11/2000. There is also an agreement of sale dated 15/12/1993 showing that the land from one Elijah Ongaro Mogaka was sold to her by Joseph Mokaya Migiro for Ksh. 170,000/-. There is a receipt for Ksh. 800/- from Makini Abobo & Co. Advocates for the said sale Agreement. There is also a handwritten agreement between Kennedy N. Mogaka and Joseph M. Migiro for 40,000/- dated 20/7/1994. She also produced a certificate of official search for the suit land being Nyansiongo settlement scheme/524 which is 1.40 hectares. The land belongs to the 1st Defendant since 15/6/2000. She also produced the green card and letter of consent from Nyansiongo Land Control Board.
15. Finally, the 1st Defendant also produced a sketch map. She said that the Plaintiff's land is Nyansiongo settlement/523 and that she should not encroach on her land. Prisca's home is on Nyansiongo



Settlement Scheme/523. Dw2 reinforced the 1st Defendant's evidence and said that the Plaintiff is sister to his brother's wife. He also admitted that all land have access to the main road.

16. Both the Land Registrar and County Surveyor, Nyamira confirmed in their Report dated 13/10/2022 that failure to have the Plaintiff registered over the Parcel of land she occupies was a mistake which can be rectified without necessarily affecting the physical occupation of the parties' respective portions. The 2 sides of divide bought their respective parcels of land from one person, Elijah Mogaka Ongaro. But the Plaintiff was not issued with a Title Deed. The Land Registrar concluded his Report by testifying that the Plaintiff's land stretches across 3 registered parcels of land viz. Nyansiongo settlement scheme 523, 524 and 522 with 523 belonging to Marceline Kwamboka Mogaka and 524 to the 1st Defendant. He concluded that the Plaintiff's land is ascertainable because it has a live fence around it.
17. No Special Damages were specifically pleaded and same were not proved and therefore prayers numbers (e) and (f) are disallowed. Prayer number (c) in the Plaint though specifically pleaded was not proved. As to all the other prayers I order that the Land Registrar, Nyamira do ascertain the land belonging to the Plaintiff on the ground and file a Report in court showing the dimensions and delimitations of each of the Plaintiff's land Nyansiongo Settlement Scheme/523 before issuing her with a Title Deed to the same since it is clear that she bought land from the person who sold part of the land to the 1st Defendant but who did not transfer the land to the Plaintiff.
18. I further order that the Land Registrar and County Surveyor, Nyamira do visit the parcel of land known as Nyansiongo Settlement Scheme/523 on a date to be communicated to the Plaintiff for purposes of ascertaining the boundary of the said parcel of land. A Report attaching a sketch map and a R.I.M. shall then be filed in Court within the next 45 days from the date of this Judgment.
19. I will not make orders as to costs since this is a family dispute.

JUDGMENT DATED AND DELIVERED AT NYAMIRA THIS 21ST DAY OF NOVEMBER 2023.

MUGO KAMAU

JUDGE

In the Presence of: -

Mr. Ochwangi for the Plaintiff.

Ms. Ireri for the Defendants.

