



**Kimaiti v Nyariki & another (Environment & Land Case
30 of 2021) [2022] KEELC 2631 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 2631 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT & LAND CASE 30 OF 2021**

**JM KAMAU, J
JUNE 30, 2022**

BETWEEN

ANGELINA CHEPNG'ETICH KIMAITI PLAINTIFF

AND

TOM MONG'ARE NYARIKI 1ST DEFENDANT

CHARLES KEMIGO KIMAITI 2ND DEFENDANT

JUDGMENT

1. The Plaintiff's claim is based on her averments that she is the registered proprietor of Lr No. Nyamira North Mugirango/ikonge/1642 measuring 5.458 Hectares. She alleges that the Defendants herein jointly and severally unlawfully encroached onto the aforesaid land and have continued to do so which constitutes acts of trespass thereon thus denying the Plaintiff the enjoyment of her proprietary rights over the suit land. She therefore sought for an order of eviction against the Defendants, an order directing the Land Registrar, Nyamira and District Surveyor Nyamira to determine the boundaries and beacons of the parcel of land L.r. No. Nyamira North Mugirango/ikonge/1642. She has also prayed for an injunction against the Defendants restraining them from further trespass and/or interference with the suit land. In her statement dated 1st September 2015, the Plaintiff says that she married one Kimaiti Nyabero Sibao in 1978 who later died in 1999. The late Sibao transferred to her L.r. No. Nyamira North Mugirango/ikonge/1642 measuring 5.458 Hectares which was excised from L.r. No. Nyamira North Mugirango/ikonge/407. L.r. No. Nyamira North Mugirango / Ikonge/ 1643 measuring 4.744 Hectares was likewise transferred by the deceased to the 1st Defendant. L.r. No. Nyamira North Mugirango/ikonge/1436 measuring 8.31 Hectares was given to her co-wife. Her cause of action is that the two Defendants have now encroached her portion.
3. In his Amended Statement of Defence and Counter-claim, the 2nd Defendant denies that the Plaintiff's parcel of land measures 5.458 Hectares. His contention is that the same measures 3.3 Hectares. In his counter-claim the 2nd Defendant says that his late father is the husband to the Plaintiff and he owned



L.r. No. Nyamira North Mugirango/ikonge/407 measuring 35.6 Hectares which he sub-divided in January 1997 as follows: -

- a. Nyamira North Mugirango/ikonge/1434 measuring 9.511 Hectares allocated to Benson Nyabero Sibao.
 - b. Nyamira North Mugirango/ikonge/1435 measuring 9.33 Hectares allocated to Samson Onsombi Sibao.
 - c. Nyamira North Mugirango/ikonge/1436 measuring 8.31 Hectares allocated to Charles Kemigo Kimaiti, the 2nd Defendant.
 - d. Nyamira North Mugirango/ikonge/1437 measuring 7.8 Hectares allocated to Angelina Chepng'etich Kimaiti, the Plaintiff.
4. Finally, a road of access measuring 0.649 Hectares was also curved out. The 2nd Defendant further claims that in January 1997 the Plaintiff sold 4.5 Hectares to the 1st Defendant leaving a paltry 3.3 Hectares to herself and Nyamira North Mugirango/ikonge/1437 was sub-divided into 2 with Nyamira North Mugirango/ikonge/1643, 4.5 Hectares going to the Plaintiff which ought to have been registered as Nyamira North Mugirango/ikonge/1642.
5. In his counter-claim against the Plaintiff and the 1st Defendant, the 2nd Defendant avers that the two illegally tried to interfere with the character of Nyamira North Mugirango/ikonge/1437 by causing its size to increase from 7.8 Hectares to 10.202 Hectares. He therefore prays for an order declaring that the Plaintiff is only entitled to L.R. No. Nyamira North Mugirango/ikonge/1642 measuring 3.3 Hectares only and that the Land Registrar Nyamira be ordered to rectify the Plaintiff's Titles Nyamira North Mugirango/ikonge/1642 owned by the Plaintiff and the 1st Defendant to measure 3.3 Hectares instead of 5.45 Hectares and that of the 2nd Defendant Nyamira North Mugirango/ikonge/1437 to measure 4.5 Hectares instead of 4.744 Hectares. These averments are registered in his statement dated 12th November 2015. In her reply to the 2nd Defendant's Defence and Defence to his counter-claim dated 14th December 2021, the Plaintiff repeats the contents of the Plaint.
6. On his part, the 1st Defendant in his Amended Defence and Reply to the 2nd Defendant's claim refutes all the allegations against him made by both the Plaintiff and the 2nd Defendant and prays that the 2nd Defendant's counter-claim be dismissed with costs to him.
7. In his Statement dated 7th January 2022 the 1st Defendant repeated his averments contained in the Defence and counter-claim and added that he purchased the parcel of land Nyamira North Mugirango/ikonge/1643 from the Plaintiff on 11th January 1999 at a cost of Kshs. 1,406,340/= and that the same measures 4.744 Hectares, 11.7 Acres and that he took immediate possession and planted 5 Acres of tea. He has therefore been in occupation for the last 22 years. There is a home therein where his brother, Evans Morara resides. On 20th July 2017 Lady Justice Onyango ordered that the Land Registrar and County Surveyor, Nyamira do visit the suit lands and delineate the boundaries thereof in accordance with Sections 18 and 19 of the Land Registration Act, 2012 and file a Report within 90 days. This Report was consequently filed and the same is dated 8th December 2020 but having been contested the Honourable Judge ordered that the matter goes for full trial with either or both parties being at liberty to call the Land Registrar and County Surveyor as witnesses to shed more light on the contents of the Report which now forms part of the court record.
8. When the matter came up for hearing the Deputy Land Registrar, Nyamira, George Kariuki Maina was the first to testify. He referred to the Report from his office dated 8th December 2020 and said that there are variances between what is on the ground and what is indicated in the Title Deeds with



the Title Deeds showing bigger sizes than what is the actual sizes on the ground. This affects all the 3 parties. He said that Parcel Nos. Nyamira North Mugirango/ikonge/1436 and 1437 are separated by an access road and that there cannot be any issue of encroachment because the two portions are on opposite sides of the access road and that the beacons are all intact and which were shown to them. He completed his evidence in chief by producing his Report that incorporates that of his counterpart in the survey docket. On cross examination by Mr. Juma for the 1st Defendant, Mr. Maina said that each of the parties knows his acreage of land with the 1st Defendant's L.r. No. Nyamira North Mugirango/ikonge/1643 occupying 10.73 Acres on the ground instead of the 11.723 Acres shown on the original Title Deed therefore losing approximately 1.5 Acres. He recommended a correction and/or rectification of the Title Deeds in order to have them reflect the actual sizes on the ground.

9. On cross examination from Mr. Omotto for the 2nd Defendant, the Land Registrar said that to carry out the exercise, the history of the land was very crucial and that L.r. No. Nyamira North Mugirango/ikonge/1436 And 1437 Respectively Originated From Nyamira North Mugirango/ikonge/407 And That According To The Mutations Nyamira North Mugirango/ikonge/1436 Measures 8.31 Hectares And Nyamira North Mugirango/ikonge/1437 7.8 Hectares. He also said that since the last visit that was made by the two officials all the parties have stuck to their parcels of land as shown by the two officers. He concluded by saying that all the parties were present during the visit.
10. Angelina Chepng'etich Kimaiti, the Plaintiff adopted her statement of 15th September 2015 and said that she is the registered proprietor of L.r. Nyamira North Mugirango/ikonge/1642 measuring 5.484 Hectares and that the 2nd Defendant is her step-son. She said that when the Land Registrar and County Surveyor, Nyamira visited the *locus in quo* they established that she occupies 2.8 Hectares which falls short of what is in the Title Deed and that she is ready to have the Title Deed rectified to reflect what is on the ground. She then produced a copy of the Title Deed in respect of Nyamira North Mugirango/ikonge/1642, A copy of the official search in respect to the same and a copy of an order from Nyamira SRM Court Miscellaneous Application Number 9 of 2004 being an award from the Land Disputes Tribunal, Ekerenyo. In cross examination by Mr. Juma for the 1st Defendant Ms. Kimati said that she knew the 1st Defendant who bought L.R. Nyamira North Mugirango/ Ikonge/1643 from her late husband on 11th January 1999 being 11.7 Acres and she signed the sale agreement as the vendor and the 1st Defendant was issued with his Title Deed, he planted tea and put up a house and has occupied the land for the last 23 years. The 1st Defendant then surrendered a portion of his land as a road access and has never encroached on anybody's land. He further said that it is the 2nd Defendant who has encroached onto his land. On cross examination by Mr. Omotto for the 2nd Defendant the Plaintiff said that she has not sold any part of her portions of land and could not practically do so because she is yet to get a Title Deed in respect of the same. On re-examination, she said that she is comfortable with the boundaries, on the ground.
11. Pw3 Francis Oganda, Deputy County Surveyor Nyamira produced the Surveyor's Report dated 8/12/2020 and confirmed that on the ground the land sizes are smaller than what is indicated on the Title Deed, but that the ground speaks louder than the Title Deeds and what ought to be rectified is the Title Deeds because it is not humanly possible to rectify the ground.
12. On cross examination by Mr. Juma Mr. Oganda said that parcel number 1643 measures 17.23 Acres. When answering a question from Mr. Omotto the Deputy County Surveyor said that although he was not the author of the Surveyor's Report, he was relying on the report as it is and that before writing the Report, the Surveyor and Land Registrar always look at the history and since the custodians of the mutation forms are the Land Registrar and the County Surveyor, this is not a difficult task.



13. Dw1 Mr. Tom Mong'are a KDF officer for over 30 years adopted his written statement dated 7/1/2022 as his evidence in chief. He said he holds Title in respect of L.R. No. Nyamira North Mugirango/ikonge/1643 indicating 4.744 Hectares 10.23 Acres as the size of the land but when the Land Registrar and County Surveyor came to the land they found the land to be short by 1.5 Acres but that he is contented with what is on the ground and is ready to have the Title Deed rectified to reflect the position on the ground. He said he has been on the suit land for over 22 years where he has planted tea. He produced the Title Deed as an exhibit in court and said that when the land was excised from L.r. Nyamira North Mugirango/ikonge/407 he was not in the county but his brother, who has been staying on the land was present and has even put up a home on the land. He finally said that he did surrender an access road. On cross examination by Mr. Ochoki for the Plaintiff he denied ever having encroached on any of the other parties' land and that he is okay with what is on the ground. On cross examination by Mr. Omotto for the 2nd Defendant, Mr. Nyariki said that he was ready to take what is on the ground and not what is on paper since the latter is non-existent and that he occupied the land immediately upon purchase and immediately planted tea thereon. On re-examination he reiterated that the land was sold to him by the Plaintiff.
14. Dw2 Charles Kemigo Kimaiti, a farmer also took oath and adopted his statement dated 12/11/2015 as his evidence in chief. He said that his parcel of land used to be 8.7 Hectares and that he does not agree with the Land Registrar's Report dated 5th December 2020 nor that of the County Surveyor. He says that he belongs to the 2nd house of the late Kimaiti Nyabero Sibao which was given parcel number L.R. Nyamira North Mugirango/ikonge/1436 Measuring 8.31 Hectares And That His Father Owned L.r. Nyamira North Mugirango/ikonge/407 which measured 35.6 Hectares and that he is not ready to have his land reduced to 5.94 Hectares and as his counter-claim shows he is desirous that his piece of land is restored to its initial acreage. He then produced a copy of the mutation form in respect of L.R. No Nyamira North Mugirango/ikonge 1437 Dated 19th February 1999, Copy Of Certificate Of Lease In Respect To Nyamira North Mugirango/ikonge 1436 dated 22nd February 2000, copy of proceedings in Civil Case No. 0801902 of 2004 before Ekerenyo Land Disputes Tribunal Board dated 25th August 2004, a copy of the Green Card for L.r. No. North Mugirango/ikonge 1437 In The Name Of The Plaintiff, A Copy Of The Mutation Form In Respect To Land Parcel Number North Mugirango/ikonge/407 dated 15th December 1966 and finally a copy of a letter to the County Land Registrar Nyamira dated the 9th October 2020. On cross examination by Mr. Ochoki, Dw2 said that his parcel of land is Nyamira North Mugirango/ikonge/1436 Which is about 8.31 Hectares at the moment and that the Plaintiff's land ought to be 3.3 Hectares and that she was favoured by the Land Registrar. On the ground the Plaintiff has 2.8 Hectares while the 1st Defendant has 4.14 Hectares. He acknowledged that the Plaintiff's land is smaller than it ought to be. He also admitted that he is ready to have his land equally reduced. While answering questions from Mr. Juma for the 1st Defendant, the witness said that it is true the 1st Defendant indeed bought land from the Plaintiff on 11/1/1999 which is now on the ground No. Nyamira North Mugirango/ikonge/1643 And That He Bought 11.7 Acres Which Was Excised Out of Nyamira North Mugirango/ Ikonge/407 And That Nyamira North Mugirango/ikonge/1643 Came From The Plaintiff's Nyamira North Mugirango/ikonge/1437. He complained that the 1st Defendant's land encroaches onto his land but the Plaintiff and the 1st Defendant conspired with the Land Registrar to defraud him something he never complained to the police but he filed a matter at the Lands Dispute Tribunal against the Plaintiff but the 1st Defendant was not a party. On re-examination by his Counsel, the 2nd Defendant said he was not present when the agreement dated 11th January 1999 was executed.
15. Dw3 – Josephat Gesage Mokoro, a Government Surveyor based in Nyamira came to court and produced mutation forms in respect of on the ground No. Nyamira North Mugirango/ikonge/1437



And Nyamira North Mugirango/ Ikonge/407 And Also Stated That He Filed A Report Concerning The Boundary Dispute Between Parcel Number Nyamira North Mugirango/ikonge/1436 And Nyamira North Mugirango/ikonge/1437 Respectively. He Said That According To The Initial Mutation Forms Of The Original Nyamira North Mugirango/ikonge/407 from which one of the two parcels of land originated, the same measured 36.6 Hectares.

16. The sub-divisions that came from Nyamira North Mugirango/ikonge/407 Were Four as follows: -Nyamira North Mugirango/ikonge/1434 – 9.511 HectaresNyamira North Mugirango/ikonge/1435 – 9.33 HectaresNyamira North Mugirango/ikonge/1436 – 8.31 HectaresNyamira North Mugirango/ikonge/1437 – 7.8 Hectares
17. making a total of 34.951 Hectares which mutation was duly registered by a qualified and licensed Surveyor, Arch Surveyors and the same was scientifically generated and has never been altered. But the latter mutation from the same Surveyors, Nyamira North Mugirango/ikonge/1437now measures 10.202 Hectares. The same has also been registered with the Lands office. What is on the mutation is not what is on the ground. The variations must have been occasioned by the Private Surveyor who carried out the survey work. He finally produced the Mutation Forms in respect of Nyamira North Mugirango/ikonge/1437 And Nyamira North Mugirango/ikonge/407. On Cross Examination By Mr. Ochoki For The Plaintiff, Mr. Kimaiti said that from the markings of beacons on the ground all the parties have lost some land and that the Land Registrar asked the parties to surrender their Title Deeds to him so that the same could be rectified to reflect the reality on the ground. He also said that the Plaintiff's acreage on the ground is 2.87 Hectares while her Title Deed reads 5.45 Hectares. He further said that this is a uniform discrepancy for all the parties in the suit meaning that there must therefore have been a mistake in the preparation of the Title Documents. He said that parties should maintain what is on the ground. On cross examination by Mr. Oburu for the 1st Defendant, the Surveyor said that he personally visited the site and established the boundaries and that the beacons had not been tampered with. In the case of Nyamira North Mugirango /ikonge/1643, the discrepancy is 1.5 Acres and that it is not possible for the 1st Defendant to get more land. There has been no encroachment. While answering questions from Mr. Omotto in re-examination Mr. Mokoro said that the problem currently faced by the parties in the suit emanated from the second mutation in parcel number Nyamira North Mugirango/ikonge/1437. After realizing that the second mutation was faulty, the office of the County Surveyor went back to the first mutation to mark the boundaries which had been tampered with after the second mutation.
18. After the conclusion of the case I invited the parties to file written submissions and only the Appellant did so which I have considered.
19. I am satisfied that the Land Registrar and the surveyor duly exercised their mandate under the provisions of the *Land Registration Act*, 2012. Their report is well supported and the markings of the new boundaries accepted by all the parties. I accordingly accept their findings as well. I would also borrow the words of the Government Surveyor, Mr. Mokoro that the ground speaks louder than the Title Deeds and what ought to be rectified is the Title Deeds because it is not humanly possible to rectify the ground. This court cannot multiply the acreage on the ground. But the Title Deeds can be rectified accordingly.
20. What now remains is for all the parties herein to surrender their respective Title Deeds to the Land Registrar, Nyamira for the same to be rectified to conform with the reality on the ground. I so order.
21. I make no orders as to costs.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS ON THIS 30TH DAY OF JUNE 2022.



MUGO KAMAU

JUDGE

In the Presence of:

Court Assistant: Sibota

Plaintiff: Mr. Ochoki

Defendants: Ms. Obura & Mr. Omotto

