



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**

**CIVIL SUIT NO. 31 OF 2002**

**LAWRENCE SESE MOSIGISI ..... PLAINTIFF**

**VERSUS**

**THE SETTLEMENT FUND TRUSTEES ..... 1<sup>ST</sup> DEFENDANT**

**DANIEL NYANGOKA MOTURI ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

By an amended plaint filed on 2<sup>nd</sup> May, 2002 and subsequently re-amended and filed on 25<sup>th</sup> May, 2009, the plaintiff stated that in or about 1965 he purchased from the 1<sup>st</sup> defendant a parcel of land measuring 187 acres being **Land Parcel No. Kisii/Gesima Settlement/60** and took possession of the same immediately thereafter. The land had several developments comprising of a tea plantation, stores, houses, milking shed, servant quarters and planted various types of trees. The tea plantation covers 4.5 acres or thereabout. The plaintiff has also made other developments and subdivided the said parcel of land among his family members.

The plaintiff further stated that the 2<sup>nd</sup> defendant purchased from the 1<sup>st</sup> defendant the adjoining parcel of land which comprised of 5 acres of tea plantation bordering his tea plantation. The plaintiff stated that the two parcels of land were shown in the **Registry Index Map No. TPA/77/168 dated 22<sup>nd</sup> December, 1964** but the 1<sup>st</sup> defendant purported to amend the map thereafter by drawing another **Registry Index Map No. 4/13/3/6 in 1985** which erroneously appropriated part of his land to appear as though it belonged to the defendant. He stated that in or about 1996 he caused his parcel of land to be subdivided into 3 portions known as **Kisii/Gesima Settlement Scheme/362,363 and 364**, though it was still charged to the 1<sup>st</sup> defendant. The subdivisions were registered in the 1<sup>st</sup> defendant's name. In the course of the subdivision exercise is when he discovered that the Registry Index Map (**RIM**) drawn in 1985 had erroneously re-located his 4.5 acres under tea bushes from his land to the defendant's parcel of land and a title deed had been issued to the 2<sup>nd</sup> defendant. Upon obtaining a title deed, the 2<sup>nd</sup> defendant was now laying a claim over the 4.5 acre parcel of land, despite the fact that he (the plaintiff) has been in possession of the same since 1965.

The plaintiff prayed for judgment as hereunder:

- (a) **An order declaring Registry Index Map No. 4/13/6 drawn in 1985 as erroneous and that the same be rectified to represent the true boundary marks on the ground between his parcels of land Nos. Kisii Gesima Settlement Scheme/362, 363, 364 and the second defendant's parcel of land as per the Registry Index Map No. TPA/77/168 of 22<sup>nd</sup> December, 1964.**
  
- (b) **Transfer of 4.5 acres tea plantation from the 2<sup>nd</sup> defendant to himself as the lawful owner thereof.**

(c) **A permanent injunction to restrain the 2<sup>nd</sup> defendant by himself, his agents, servants and/or employees from interfering with his parcel of land.**

(d) **An order to compel the 2<sup>nd</sup> defendant to sign all the necessary documents to effect transfer of the said parcel of land to him (the plaintiff) and in default the Executive officer of this court to execute the same.**

(e) **General damages.**

(f) **Costs of the suit.**

The 1<sup>st</sup> defendant stated in his statement of defence that in 1965 the plaintiff did not purchase the land in question but was allocated the same subject to completion of repayment of a loan that had been advanced to him. Under **section 175** of the **Agriculture Act** the issue of development of the land could not arise until the plaintiff's charge over the land was discharged by the 1<sup>st</sup> defendant and a title deed issued to the plaintiff. The 1<sup>st</sup> defendant further stated that the 2<sup>nd</sup> defendant did not purchase 5 acres of the adjoining land comprising of a tea plantation but the actual position was that the 2<sup>nd</sup> defendant purchased 7.5 hectares of land being Land Parcel **No. Kisii/Gesima Settlement/61**.

The 1<sup>st</sup> defendant denied that the two parcels of land had ever been represented in Registry Index Map No. TPA/77/168 dated 22<sup>nd</sup> December 1964. The said drawing is a sketch map and not an index map as alleged by the plaintiff, 1<sup>st</sup> defendant stated. The 1<sup>st</sup> defendant further stated that although the said map could have been a Registry Index Map, the same could not have been registered since Gesima Settlement Scheme was registered after the year 1980. The aforesaid sketch map was not intended to show boundaries and even if it were so intended, it clearly shows that the disputed land is part of Land Parcel Kisii/Gesima Settlement Scheme/61 which belongs to the 2<sup>nd</sup> defendant. It further stated that the sketch map shows that between the two parcels of land there is a stream which is usually regarded as a boundary and no brace is drawn thereon to indicate continuation of land parcel No. 60 into the disputed land where there exists braces indicating that it is part of land parcel No. Kisii/Gesima Settlement Scheme/61.

The 1<sup>st</sup> defendant denied having ever amended the alleged 1964 map by drawing Registry Index Map No. 4/131/3/6 as alleged. The true position is that the Registered Index Map No. 4/131/3/6 of 1985 is the final map drawn after all factors had been taken into account including the aerial sketch maps, all of which indicated that the disputed land is part of the 2<sup>nd</sup> defendant's land and not the plaintiff's.

The 2<sup>nd</sup> defendant filed a statement of defence and a counter claim. He admitted that the plaintiff is his neighbor but stated that he is not aware of the acreage of the plaintiff's parcel of land. He further denied that he purchased only 5 acres of land and stated that his land measures 18.75 acres. His title deed shows the right acreage of the land. He further denied that the plaintiff has all along been in occupation of the disputed part of the land. He added that the plaintiff, who was their area chief, had severally trespassed upon his land.

In his counter claim, the 2<sup>nd</sup> defendant urged the court to restrain the plaintiff by way of a permanent injunction, from trespassing onto his parcel of land Kisii/Gesima Settlement Scheme/61. He also prayed for mesne profits and general damages for trespass.

The plaintiff gave a Power of Attorney to his son, **Richard Osebe**, who testified as **PW1**. He said that the plaintiff occupied his parcel of land in 1965 when the same was allocated to him by the Settlement Fund Trustees (**SFT**). The land had several structures erected thereon. Part of the land consists of a tea plantation which occupies 4.5 acres. There were several plots that were consolidated and registered as Kisii/Gesima Settlement Scheme/60 measuring 187 acres. He produced the 1964 area map as **P. Exhibit 6**. However, in 1985 a new map was drawn which showed that the 4.5 acre tea farm was part of the 2<sup>nd</sup> defendant's parcel of land No. 61. In 1996 the 2<sup>nd</sup> defendant started laying claim over the 4.5 acre parcel of land, herein after referred to as **"the land in dispute"**. As a result of the 2<sup>nd</sup> defendant's unwarranted claim the plaintiff moved to court in 1996 and filed **HCCC No. 330 of 1996** at Kisii law courts. The suit was however withdrawn in 2001 and leave was granted to file the present suit.

After the plaintiff had fully repaid the loan to SFT, the latter subdivided the land in June 1996. Three subdivisions were created as Gesima Settlement Scheme/362, 363 and 364. The parcels of land were registered in the plaintiff's name but he refused to accept the title deeds because the land in dispute had been excluded and unlawfully given to the 2<sup>nd</sup> defendant. When the dispute was referred to

the area Land Surveyor, he said that as per the 1964 map the land in dispute was part of parcel No. 60 but in the 1985 map it was shown to be part of plot No. 61. The report by the District Surveyor was produced as **P. Exhibit 7**. The witness added that the 2<sup>nd</sup> defendant had never resided on the disputed parcel of land. He urged the court to enter judgment as prayed in the plaint.

**John Welangai, DW1**, is the **District Land Adjudication Settlement Officer, Borabu District**. He testified that in 1965 SFT made an offer to sell a parcel of land to the plaintiff. The acreage of the land was not stated. The plaintiff was granted a loan that was repayable within a period of 28 years but he has so far not repaid the same. He further testified that a final area list was prepared for Gesima Settlement Scheme in 1985. The same was produced as **D. Exhibit 2**. Parcel No. 60 measures 73 hectares (182 acres). The 2<sup>nd</sup> defendant's parcel of land measures 7.5 hectares (18.75 acres). The 2<sup>nd</sup> defendant had repaid his loan and had been issued with a title deed. The title deed for parcel No. 60 has not yet been issued.

In cross examination, the witness stated that the final area list was prepared in 1985 after all the final mapping was done. He did not have any documents showing the measurements of the two parcels of land prior to 1985.

**Dickson Okore Dulo, DW2**, was the **Land Registrar, Nyamira**, at the time he testified. He said that land parcel Gesima Settlement Scheme/60 is registered in the name of the SFT. It had been subdivided into 3 subdivisions. He produced an extract of the register (Green Card) as **D.Exh.4**. Gesima Settlement Scheme/61 is registered in the name of the second defendant.

The second defendant said that he occupied parcel No. 61 in 1964. When he was issued with a title deed after repaying the loan given to him by the SFT he realized that its actual land size was less by 4.5 acres. He asked the lands department to go to the ground and show him the exact boundaries. While waiting for the surveyors he received summons in respect of this case.

In cross examination, the second defendant stated that in 1965 when he complained to the SFT about the size of his land he was told to first complete repayment of the loan and raise the issue when the land would be legally his. He added that the boundary that separated the two parcels of land in 1965 is still in existence.

He further said that when the land was being allocated to them there was a tea plantation which was subdivided among nine people. He was given 5 acres of that tea plantation and the plaintiff got 4.5 acres. However, that portion of the tea plantation that was given to the plaintiff actually belongs to him, (the second defendant) he said. The plaintiff has been harvesting the tea bushes on the disputed portion of the land since 1965, the second defendant conceded.

**Beatrice Lishenga Wamugi, DW4**, was the **District Surveyor, Nyamira**. She produced the area map that shows parcels Nos. 60 and 61, sheet No. 4 as **D. Exh. 10**. The map was prepared in 1985.

In cross examination, the witness said that the 1964 map was a sketch, merely a guide before the final measurements were taken and a final map prepared. The 1964 map showed only provisional boundaries, she stated. She said that the disputed parcel of land was a portion of parcel No. 61 belonging to the second defendant.

The advocates for the parties did not file any list of issues for determination but they filed their respective submissions. I have carefully perused the written submissions. From the pleadings and the evidence on record the issues for determination may be summarized as hereunder:

- 1. Who is the registered proprietor of land parcel No. Kisii/Gesima Settlement Scheme/60?**
- 2. Did the plaintiff acquire the said parcel of land from the first defendant (S.F.T.) and if so when?**
- 3. Who is the registered proprietor of land parcel No. Kisii/Gesima Settlement Scheme/61 and if so, since when?**
- 4. Did the first defendant unlawfully re-draw the area map and relocate a portion of land parcel No. Kisii/Gesima Settlement Scheme/60 to Kisii/Gesima Settlement Scheme/61?**
- 5. Who is the lawful owner of the disputed parcel of land measuring 4.5 acres?**
- 6. Is the plaintiff entitled to the orders sought in his plaint?**

**7. Is the second defendant entitled to the orders sought in his counter-claim?**

**8. What orders should be made as to costs of the suit?**

I now proceed to determine the above issues as hereunder:

Issues Nos. 1 & 2

In 1965 or thereabout the plaintiff applied to SFT for a loan to purchase several parcels of land and some structures standing thereon. These several parcels of land were later on consolidated and registered as **Kisii/Gesima Settlement Scheme/60**. The loan was granted and a charge over the said land was created. The plaintiff then moved into the land sometimes in 1965. He began to harvest some tea bushes that were planted on a 4.5 acre portion of the land. There was a map of the area, No. **TPA/77/168** of 22<sup>nd</sup> December, 1964 which showed that the disputed parcel of land was part of parcel No. 60. However, there is evidence on record that this was a provisional map, the final map was drawn in 1985.

Although the plaintiff alleged that he had repaid the loan fully, he did not produce any evidence to that effect. The court expected him to avail documents like receipts issued to him by SFT and a discharge of charge in order to prove that he had repaid the loan in full. According to DW2, in 1985 when the final area list was drawn and title deeds issued, the land was registered in the name of SFT. On 24<sup>th</sup> July, 1996 the title for parcel No. 60 was closed upon subdivision of the land to create **Kisii/Gesima Settlement Scheme/362, 363 and 364**

As at the date of filing suit, there was no parcel of land known as **Kisii/Gesima Settlement Scheme/60** and when it existed it was not registered in the plaintiff's name.

Issue No.3

There is no dispute that land parcel No. Kisii/Gesima Settlement Scheme/61 measuring 7.5 hectares is registered in the second defendant's name. The registration was effected on 2<sup>nd</sup> may, 1995 when a discharge of charge was registered.

Issues Nos. 4 & 5

DW1 denied that the first defendant unlawfully redrew the area map and relocated a portion of what was hitherto land parcel **No. Kisii/Gesima Settlement Scheme/60** to **Kisii/Gesima Settlement Scheme/61**. DW4 told the court that the 1964 map was provisional and reflected provisional boundaries only. The final map was drawn in 1985 and it corresponds to the final area list. Although the 1964 provisional map showed that the disputed parcel of land measuring 4.5 acres was within parcel No. 60, the 1985 map clearly shows that the disputed land is on parcel No. 61 which is owned by the second defendant.

Issues Nos. 6 & 7

There is no doubt that the plaintiff has since 1965 been in occupation of the disputed parcel of land. But as earlier stated, though the land was believed to be a portion of the land formerly known as parcel No. 60, that is not the case. In any event, the plaintiff, having failed to prove that he repaid the loan advanced to him by SFT and evidence having been led to show that the land, which has now been subdivided into 3 subdivisions, is still registered in the name of SFT, has no capacity to claim the disputed portion of land. Although no defence of limitation of time was raised by the plaintiff against the second defendant's counterclaim, the disputed land was registered in the name of SFT until 2/5/1995 when it was registered in the second defendant's name. It is now established that the interest of SFT cannot be extinguished under the **Limitation of Actions Act, Cap 22 of the Laws of Kenya**, see **SAMUEL NDUNG'U GITU -VS- DANSON NDUNG'U & 2 OTHERS**, Civil Appeal No. 304 of 1997. The plaintiff first moved to court in 1996 when he filed **HCCC No. 330 of 1996** but that case was subsequently withdrawn and the present matter filed. In the circumstances, the plaintiff is not entitled to any of the orders sought in his plaint.

On the other hand, the second defendant, having established that the land in dispute is lawfully a portion of parcel No. 61 which is registered in his name, is entitled to the prayer of a permanent injunction to restrain the plaintiff, his servants and/or agents from trespassing onto his parcel of land. But the claims for mesne profits and general damages were not proved and I decline to grant those two prayers.

In conclusion, the plaintiff's case is dismissed with costs to the defendants. The second defendant shall have costs of his counter- claim as against the plaintiff only.

**DATED, SIGNED AND DELIVERED AT KISII THIS 16<sup>TH</sup> DAY OF SEPTEMBER, 2010.**

**D. MUSINGA  
JUDGE.**

**16/9/2010**

Before D. Musinga, J.

Mobisa – cc

Mr. Soire for Mr. Bosire for the Plaintiff

N/A for the Defendants

**Court:** Judgment delivered in open court on 16<sup>th</sup> September, 2010

**D. MUSINGA  
JUDGE.**