



**Peter v Mokaya & another (Environment & Land Case 107 of 2021)
[2022] KEELC 14934 (KLR) (23 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14934 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT & LAND CASE 107 OF 2021**

**JM KAMAU, J
NOVEMBER 23, 2022**

BETWEEN

PRISCAH BOSIBORI PETER PLAINTIFF

AND

CECILIA NYANGARA MOKAYA 1ST DEFENDANT

JOSEPH MOKAYA MIGIRO 2ND DEFENDANT

(Formerly in the Environment & Land Court at Kisii Case No. 1081 of 2016)

RULING

- 1 The subject matter of this suit is LR No Nyansiongo/Settlement Scheme/254 which the Plaintiff claims to have bought from the original owner, Elijah O Mogaka (now deceased) 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 Plaintiffs' 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 March 21, 2012 the 2nd Defendant trespassed onto her parcel of land and damaged the entire maize crop thereon. The Plaintiffs' 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 Plaintiffs' 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 November 8, 2013, this court while being presided over by Mr Justice S Okong'o gave the following order:
- “ 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 investigate and file a Report. This was in execution of my Learned Brother J Mutungi's orders of May 21, 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 September 26, 2019 for further directions.
5. The 2 Reports were finally filed in court on October 13, 2022 and I allowed both parties to file their comments on the same. The Report reads as follows: -
6. 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.
7. 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.

Please refer to the attached Field Diagram for more details."

8. A sketch map (Diagram) was also attached to the Report. 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.
9. I hereby order 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. Secondly, the orders of my brother Okong'o J of November 8, 2013 shall remain in force until the full Hearing and determination of this suit. The parties will then take a date for the Hearing of the suit in court.

Ruling dated, signed and delivered at Nyamira this 23rd Day of November 2022.

MUGO KAMAU



JUDGE

In the Presence of: -

Court Assistant: Sibota

Plaintiff: Mr. Mayaka holding brief for Mr. Ochwangi

Defendants: Mr. Nyamwange holding brief for Mr. Nyambega

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