



Gichana v Mogoi & another; Angwenyi (Applicant) (Environment & Land Case 110 of 2021) [2022] KEELC 15169 (KLR) (5 December 2022) (Judgment)

Neutral citation: [2022] KEELC 15169 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA

ENVIRONMENT & LAND CASE 110 OF 2021

JM KAMAU, J

DECEMBER 5, 2022

(FORMERLY AT ENVIRONMENT AND LAND COURT AT KISII ELC CASE NO. 5 OF 2019)

BETWEEN

AGNES MORAA GICHANA PLAINTIFF

AND

GRACE MORAA MOGOI 1ST DEFENDANT

FRANCIS NYAGAKA ONCHOKA 2ND DEFENDANT

AND

CHARLES GICHANA ANGWENYI APPLICANT

(Formerly at Environment and Land Court at Kisii ELC Case No. 5 of 2019)

JUDGMENT

- 1 In a suit filed in Court on 12/3/2010 vide a Plaint of even date and amended on October 13, 2021 which amended Plaint was filed in court on October 18, 2021 and finally re-amended on 22/7/2022, the Plaintiff avers that she has been in possession and occupation of LR No Nyansiongo/Settlement Scheme/107 that was given to her as a gift by her husband, One Charles Gichana Angwenyi in the year 1966 which was and is still her matrimonial home. After acquiring the land, she carried out developments thereon which included planting of trees and tea bushes and she also put up her residence on the land being assisted by her aforesaid husband. Since the land had some loan with the Settlement Fund Trustees she did contribute substantially in the repayment of the said loan. Sometime in October 2000, the Plaintiff got wind that her husband, who died a few after the close of this case, intended to sell a portion of the suit land and she quickly placed a caution against the Title to the land on 1/11/2000. But on 15/2/2001, Borabu Land Disputes Tribunal Case No 9 of 2001 ordered the said caution be removed. In spite of a Judicial Review order staying the removal of the said caution made on



13/3/2001 in the High Court Kisii Judicial Review Cause No 12 of 2001 the said caution was removed by the Land Registrar, Nyamira. The land was unlawfully sub-divided after the fraudulent removal of the caution. The land was then sub-divided into Nyansiongo Settlement Scheme/884, 885, 886, 887, 893, 894, 895, 896, 897 and 898 all in the name of Charles Gichana Angwenyi and Nyansiongo Settlement Scheme/887 measuring 5.5 Acres in the name of Peter Mogoi who participated in a transfer stained with deception. The court once more placed an order prohibiting any further transfer of the land. The orders of the removal of the caution by Borabu Land Disputes Tribunal was finally quashed by the High Court in Kisii High Court Miscellaneous Suit No 12 of 2001. On 24/7/2012 the court ordered that all the consequential orders resultant on the proceedings and Decision of Borabu Land Disputes Tribunal be vacated as a result of which all the parcels that had been created from Nyansiongo Settlement Scheme/107 were to be cancelled. When the said Peter Mogoi died on 2010 the Plaintiff learnt of it and went to Court to restrain his burial on Nyansiongo Settlement Scheme/887 but that notwithstanding the body of the late Peter Mogoi was buried on the suit land in spite of an Order in Keroka Senior Resident Magistrate's Court Civil Case No 104 of 2010 made on 15/3/2010. The Defendants have unlawfully continued to occupy the suit property.

2. Consequently, the Plaintiff prays for the following orders: -
 - a. Eviction and permanent injunction restraining the Defendants by themselves, their Servants, Agents and/or Workmen or any other person claiming through them from entering, alienating, cultivating constructing, wasting or otherwise howsoever manner interfering with Land Parcel No Gesima Settlement Scheme/107.
 - b. A declaration that Land Parcel Number Gesima Settlement Scheme/887 does not exist and the County Land Registrar – Nyamira County be directed to cancel or close the register.
 - c. Damages including general damages for trespass, mesne profit, Compensatory Damages, Exemplary Damages, Punitive Damages and Special Damages.
 - d. Costs and interest
 - e. Any other and further relief that this Honourable Court may deem fit and just to grant.
3. Both Defendants denied the claim vide their statement of Defence dated November 15, 2021 which was filed in court on November 16, 2021. They averred that LR No Nyansiongo Settlement Scheme/107 was and is still registered in the name of Charles Gichana Angwenyi and that sometime in 2000 the latter sold to the 1st Defendant's husband 5.5 Acres out of the suit land and the portion was registered as Nyansiongo Settlement Scheme/887 but deny all other averments of malpractices contained in the Plaint. On 22/3/2022, Charles Gichana Angwenyi was allowed to participate as a third party in the suit but he never rose into action. The Amended Plaint was also re-amended on 22/7/2022 pursuant to leave granted by the court on 29/9/2021.
4. The Hearing of the suit commenced on 4/5/2022 with the Plaintiff, Agnes Moraa Gichana taking to the witness box. She described herself as the wife of Charles Gichana Angwenyi. She said that Parcel Number Nyansiongo Settlement Scheme/107 measuring 7.8 Hectares belongs to her. Her husband had tried to sell the land on which she had settled since 1966. She testified that although it was registered in the name of her husband, she had assisted him in repaying the loan owed to the Settlement Fund Trustees. She said that she developed the land by planting trees and tea and she had also kept cows. She testified that without involving her, her husband sold a portion of the land to one Peter Mogoi (Deceased), the husband to the 1st Defendant in October 2000. She said that she got this information from her co-wife, Grace Gichana. This was in 2000 after she registered a caution against the entire land and her husband unlawfully removed it. She said that she has 3 daughters and 9 sons who depend



on the land. In the strength of the Land Disputes Tribunal in Borabu Case No 9 of 2001 filed by her husband, the Tribunal held that the caution she had placed on the suit land be removed. But the High Court in Kisii High Court Miscellaneous Suit No 12 of 2001 stayed this order on 13/3/2001 and finally quashed it on 24/7/2002. On 13/3/2001 all the orders made in the Tribunal were stayed. The stay order was duly served upon the Land Registrar, Nyamira, the Executive Officer Keroka Principal Magistrates Court, District Officer, Borabu and Borabu Land Disputes Tribunal. With intent to defeat this order, Mutation Forms were presented for registration on 14/3/2001, registered the same day and Title Deeds for the sub-divisions issued the same day. The Mutation Forms were then purportedly amended on 20/3/2001. Later, Borabu Division Land Control Board issued a letter of consent on 17/3/2001 in disregard of the order issued upon its Chairman, the District Officer who also doubled as the Land Disputes Tribunal's chairman. The Land was then sub-divided into Nyansiongo Settlement Scheme/884, 885, 886, 887, 893, 894, 895, 896, 897 and 898 all registered in the name of Charles Gichana Angwenyi and Nyansiongo Settlement Scheme/887 came out in the name of Peter Mogoi. Peter Mogoi then rushed to Keroka Senior Principal Magistrate's Court in and obtained *ex parte* orders restraining the Plaintiff herein from entering the suit land. These orders were granted conclusively at the *ex-parte* stage and in spite of the Judicial Review Proceedings pending in the High Court, Kisii. The suit in the lower Court was ultimately dismissed for want of prosecution. The said Peter Mogoi eventually died on 10/3/2010 and on 15/3/2010, the court in Keroka Senior Resident Magistrate's Court Civil Case No. 104 of 2010 restrained the 1st Defendant from burying the remains of the Deceased on the suit land but this was disobeyed and the burial took place at 6.00a.m. on the suit land with hired youths taking charge.

5 The Defendants in the lower Court (Keroka) were cited for contempt of court and the 2nd Defendant herein convicted, sentenced and fined Kshs 10,000/= in default of which he was to serve a 2 months' imprisonment. On 22/2/2016, in Kisii ELC Constitutional Petition No 4 of 2013, the court held that the Petitioner (the 1st Defendant herein) has no right to the suit property that deserves any protection. She concluded her testimony by claiming that she has lost tea averaging 49 kilometres per month since the year 2010. To wind up her testimony. The Plaintiff produced the following documents: -

1. Certified Copy of the Register.
2. Tribunal Award.
3. Order issued on the 13th day of March, 2001 in Kisii HC Misc 12 of 2001.
4. Order issued on March 26, 2001 in Kisii Misc. Application No 12 of 2001.
5. Mutation Form.
6. Letter of Consent of Land Control Board.
7. Judgment dated July 24, 2002 in Kisii HC Misc No 12 of 2001.
8. Order given on July 24, 2002 in Kisii HC Misc No 12 of 2001.
9. Order issued on March 15, 2010 in Keroka PMCC No 104 of 2010.
10. Notices from Nyamira District Land Registrar dated December 21, 2012.
11. Kisii ELC PET No 4 of 2013 Between Grace Moraa Mogoi and Ogamba Gichana.
12. Judgment in Kisii ELC PET No 4 of 2013.
13. Decree in Kisii ELC PET No 4 of 2013.



14. Affidavit by Kennedy Bosire Gichana.
 15. Power of Attorney.
 16. Advice Slip for November, 2021.
- 6 On cross examination by Mr Soire, the Plaintiff said that although the suit land was allocated to her husband, she used to contribute towards the repayment of the loan and that she was not included in the sale transaction. And on re-examination the Plaintiff said that before the sale there were gum trees on the suit land. While answering questions from the Court, the Plaintiff said that although she didn't know how much the 2 of them paid in total, her husband contributed more and that the suit property is jointly owned, that she got married in 1964 and the land was allotted to her husband subsequent to 1964.
- 7 PW2 – Kennedy Bosire Gichana, an Advocate of the High Court of Kenya, testified that the Plaintiff is his mother. He testified that the 1st registration of the land was in favour of the Settlement Fund Trustees on 21/5/1982. It was transferred to his father Charles Gichana Angwenyi on October 22, 1984 who gave the land to the Plaintiff in mid 60s and in particular, in 1966. On the land are pyrethrum, tea, animals, maize and beans. He testified that the total loan was Kshs 28,000/=. The land was sold to Mogoi for Kshs 3,125,000/=. Having testified that all the sub-divisions out of Nyansiongo Settlement Scheme /107 were cancelled and same re-instated to the initial number, Mr Gichana said that in Kisii High Court Petition number 4 of 2013 filed by the Deceased's wife (1st Defendant), the Court held that the land Nyansiongo Settlement Scheme /887 did not belong to the said 1st Defendant and therefore she could not be afforded Court protection.
- 8 On cross-examination by Mr Soire, the witness said that when the other 9 Title Deeds were cancelled, Title No Nyansiongo Settlement Scheme /887 was not cancelled and that Mogoi cut down wattle trees on a 2 ½ Acre portion thereof.
- 9 On re-examination Mr Gichana said that the cancellation of the new Titles was carried out on 8/5/2013 and that on December 21, 2012 the land Registrar wrote to Mr Peter Mogoi asking him to surrender the Title Deed in respect of Nyansiongo Settlement Scheme /887.
- 10 After the close of the Plaintiff's case PW1 Francis Nyagaka Onchoka, father to the 1st Defendant testified that he was involved in the transaction between the late Peter Mogoi and Charles Gichana Angwenyi. He was given a cheque of Kshs. 1.4 Million in 2010 by Mogoi for the last instalment which he delivered to the vendor, Mr Gichana before Mogoi died and was buried on the suit land. He said that Mogoi planted trees, bananas, tea and maize on the suit land. He said that he knew the sale agreement was entered into on October 31, 2000 for 5 ½ Acres at Kshs 3,125,000/= which was fully paid and that Peter Mogoi was given vacant possession of Nyansiongo Settlement Scheme /887 by the Vendor, Charles Gichana Agwenyi, and has extensively developed the land.
- 11 On cross- examination by Mr Momanyi, the 2nd Defendant said that he was not aware of the Court order barring them from burying Peter Mogoi on the suit land. He even denied having paid any fines for contempt of Court at Keroka Senior Resident Magistrate's Court but he later admitted having been arrested by police and taken to Keroka Principal Magistrate's Court where he was fined Kshs 10,000/= but cannot tell why he was fined. He said that he was also not aware that the 1st Defendant had equally been cited for the same offence. He said that he delivers tea from the suit land to the Buying Centre directly in in his account, No 0212. He concluded his evidence by saying that the suit land belongs to the 1st Defendant who was given by her late husband before he passed away.



- 12 On re-examination by Mr Soire Francis Nyagaka said that he delivers the tea on behalf of the 1st Defendant, pays the farm workers and gives the balance to his daughter, the 1st Defendant.
- 13 DW2 Grace Moraa Mogoi the 1st Defendant testified in Court after she pleaded guilty to contempt of Court for having buried her husband Peter Mogoi on the suit land contrary to a Court Order in Keroka Senior Resident Magistrate's Court Civil Case No 104 of 2010. However, the Court pardoned her and did not fine or jail her. She then produced the following documents to prove her case:
1. General Power of Attorney in favour of Francis Nyagaka Onchoka No 2407 registered in Kisii on 20/2/2013.
 2. Agreement of sale dated October 31, 2000.
 3. Certified copy of official search in respect of LR No Nyansiongo Settlement Scheme /887.
- 14 She testified that the 2nd Defendant is her father, she is the widow of the late Peter Mogoi and that her late husband bought the suit land from Mr Charles Gichana Angwenyi which now belongs to her after she obtained probate over her husband's Estate. She assigned to her father the role of taking care of the land and supervising the workers on the suit land where she grows tea and the same is delivered at Nyansiongo Tea Factory in her father's Account.
- 15 On cross-examination by Mr Momanyi, the witness said that at the time of the sale there was no caution placed on the suit land and that she was not aware of the Land Disputes Tribunal case. She further said that she was not aware of any order from Keroka Principal Magistrate's Court barring her from burying her late husband on the suit land. She said that Mzee Charles Gichana attended her husband's burial, showed the mourners a copy of the Title Deed in favour of Peter Mogoi and gave her a go ahead to bury his body on the land. She also said that she was unaware of Keroka Principal Magistrate's Court Civil Case Number 60 of 2001 between her late husband and the Plaintiff and that her Petition in Kisii High Court Petition Number 4 of 2013 was dismissed for lack of capacity on her part and that she was not aware that her Title Deed had already been cancelled but that she was aware of the letter recalling for surrender of Title to Nyansiongo Settlement Scheme /887 which came after her late husband had already died.
- 16 On re-examination by Mr Soire, the 1st Defendant said that the suit land Nyansiongo Settlement Scheme /887 is now in the name of herself and that of her 2 children.
- 17 The last witness to testify was Mr Martin Osano, the Land Registrar, Nyamira. He testified that parcel number Nyansiongo Settlement Scheme/887 Came From Nyansiongo Settlement Scheme /107 which was among 11 sub-divisions all of which were cancelled following a Court order dated 24/7/2002 in Kisii High Court Miscellaneous Civil Application No 12 of 2001.
- 18 There was also another case HCCC No 110 of 2021 involving Nyansiongo Settlement Scheme/887. He said that entry number 6 on parcel No Nyansiongo Settlement Scheme/107 is a restriction and that the order of 24/7/2002 did not exempt Nyansiongo Settlement Scheme/887 from cancellation. Nyansiongo Settlement Scheme/887 therefore ceased to exist on 24/7/2002. It exists today by mistake because the order of 24/7/2002 returned all the sub-divisions to Nyansiongo Settlement Scheme/107. After the cancellation of all the sub-divisions the land reverted to Nyansiongo Settlement Scheme/107 in the name of the Plaintiff's husband, Charles Gichana Angwenyi. He then produced in Court the records pertaining to the land in question. On cross examination by Mr. Soire, the Land Registrar said that the land Nyansiongo Settlement Scheme/107 was the property of Charles Gichana Angwenyi until 7/7/2022 and that the Land Control Board, Borabu gave the consent to transfer the land to the



Plaintiff on 10/5/2022 which application for consent is dated 9/5/2022. The caution registered in favour of the Plaintiff on 1/11/2000 was removed on 14/3/2001.

- 19 On re-examination by Mr Momanyi the witness said that as for the transfer effected on 7/7/2022 the parties had signed the transfer forms before the transfer was effected. While answering questions from the Court, the witness concluded by saying that he advised the parties to pay a minimal fee of Kshs 30,000/= for the transfer since it was between a husband and wife and there was a receipt for the payment.
- 20 Having heard all the parties in this case and looked at the documents produced in Court, I have reached a conclusion that according to the Title Abstract, the property known as LR No Nyansiongo Settlement Scheme /107 measuring 19.5 Acres was first registered in the name of Settlement Fund Trustees of PO Box 30450, Nairobi on 21/5/1982. The same was transferred to Charles Gichana Angwenyi on October 22, 1984 and the land certificate issued to him on the same day. On 1/11/2000 a caution was placed on the Title by one Agnes Moraa Gichana of PO Box 10 Nyansiongo claiming a beneficiary interest. On 14/3/2001 the Land Registrar removed the caution (No 4) with the following remarks:

“ See Court Order Civil Suit No 12 of 2001”

- 21 Contemporaneously, the Title Deed was closed on sub-division to create Nyansiongo Settlement Scheme/878,893,844,895,896,897,898, 858,885,886 and 887. Save Nyansiongo Settlement Scheme/887 all the other Titles were issued in the name of Charles Gichana Angwenyi on the same date (14/3/2001). Similarly, on the said date Title Number Nyansiongo Settlement Scheme/887 was transferred to one Peter Mogoi of PO BOX 40418, Mombasa and holder of Identity Card Number 2093081 and the Title Deed issued the same day. On November 24, 2014 Land parcel No LR Nyansiongo Settlement Scheme/887 was transmitted to Grace Moraa Mogoi (1st Defendant) and Mary Nyaboke Nyagaka of Identity Card Number 10660714 and 2720581 respectively vide “cause Number 156/013”. On the same date the same was transferred to Grace Moraa Mogoi (1st Defendant and Abner Mwebi Mogoi and Elijah Ngara Mogoi (both minors). As for all the other Titles, the Abstract shows that they were cancelled vide a Court order in Miscellaneous Civil Application No 12 of 2001 at Kisii High Court on 8/5/2013. It is the Plaintiff’s unshaken evidence that when she placed a caution over Title Number Gesima Settlement Scheme/107 on 1/11/2001 the same was ordered to be removed on 14/3/2001 by the order of Borabu Land Disputes Tribunal in Tribunal Case Number 9 of 2001. The order from Borabu Land Disputes Tribunal that was being stayed is to be read at the end of the minutes of the Tribunal dated 15/2/2001 as follows:

“ Order

This court grants Charles Gichana 5.5 Acres as shown in the Surveyor’s Sketch Plan and recommended that the caution application that had been filed in the Land’s Office be dismissed with costs.”

- 22 But the said order was stayed on 14/3/2001 and all the parties served. But curiously, the caution was removed the same day, 14/3/2001 allegedly vide civil suit number 12 of 2001. The Title Abstract does not indicate from which court the order emanated, the date of the order nor whether the order was from the High Court, ELC Court, subordinate court or from a Tribunal. As a matter of fact, if the order was the one from Kisii High Court, Miscellaneous Civil Application Number 12 of 2001 then the same meant the opposite of what the land Registrar did. The order dated 13/3/2001 read:



1. “That leave be and is hereby granted to Agnes Moraa Gichana to apply for an order of certiorari to remove into this court and to quash therefore the proceedings and decisions by the Borabu Land Disputes Tribunal in Tribunal case number 9 of 2001.
 2. That the leave so granted to Agnes Moraa Gichana do operate as a stay of proceedings and implementation of the decision of the said Borabu Land Disputes Tribunal issued pursuant to the Tribunal case number 9 of 2001 aforesaid.”
- 23 Was the Tribunal “order” termed as a recommendation ever made a decree of any subordinate court as was the law in accordance with the Land Disputes Tribunal Act Number 18 of 1990 (now repealed)? How then could the Land Registrar have acted upon it. In any case, the Tribunal was not seized with jurisdiction to deal with the matter before it. Furthermore, the law is very clear on who can place a caution, how a caution is placed, the effect of registration of a caution and how the same is removed. The same was provided for under the existing law at the time, the *Land Registration Act* Cap 300 Laws of Kenya (now repealed) and was also carried over to the current law, the *Land Registration Act*, No 3 of 2012:

24 Section 71 provides the people who can place a caution over land as:

“Any person who—

1.
 - (a) claims the right, whether contractual or otherwise, to obtain an interest in any land, lease or charge, capable of creation by an instrument registrable under this Act;
 - (b) is entitled to a license; or
 - c. has made an application for a bankruptcy order against the proprietor of any registered land, lease or charge.

A caution may either—

- 2)
 - (a) forbid the registration of dispositions and the making of entries;
or
 - (b) forbid the registration of dispositions and the making of entries to the extent expressed in the caution.
- (5) Subject to this section, the caution shall be registered in the appropriate register.”

Under Section 72 Notice and effect of caution.

- “1. The Registrar shall give notice, in writing, of a caution to the proprietor whose land, lease or charge is affected by the caution.
2. A disposition that is inconsistent with the caution shall not be registered while the caution is still registered except with the consent of the cautioner or by the order of the court.



Under Section 73 of the Act on “Withdrawal and removal of caution”:

1. A caution may be withdrawn by the cautioner or removed by order of the court or, subject to subsection (2), by order of the Registrar.
2. The Registrar, on the application of any person interested, may serve notice on the cautioner warning the cautioner that the caution will be removed at the expiration of the time stated in the notice.
3. If a cautioner has not raised any objection at the expiry of the time stated, the Registrar may remove the caution.
4. If the cautioner objects to the removal of the caution, the cautioner shall notify the Registrar, in writing, of the objection within the time specified in the notice, and the Registrar shall, after giving the parties an opportunity of being heard, make such order as the Registrar considers fit, and may in the order provide for the payment of costs.
5. After the expiry of thirty days from the date of the registration of a transfer by a chargee in exercise of the chargee’s power of sale under the law relating to land, the Registrar shall remove any caution that purports to prohibit any dealing by the chargee that was registered after the charge by virtue of which the transfer has been effected.
6. On the withdrawal or removal of a caution, its registration shall be cancelled, and any liability of the cautioner previously incurred under Section 74 shall not be affected by the cancellation.”

25 Even assuming that the same was lawfully removed, which is not the case, the Vendor and Purchaser then had to present an Application to the Land Control Board for consent to have the land sub-divided into the 11 parcels. After the same was granted, the land had to be sub-divided and registered before going back to the Board to apply for consent to transfer the Parcel Number Gesima Settlement Scheme/887 to Peter Mogoi. But the sub-divisions were all done the same day and Title No Gesima Settlement Scheme/107 cancelled and the 11 Sub-Titles opened and at the same time Gesima Settlement Scheme/887 registered in the name of Charles Gichana Angwenyi and simultaneously and spontaneously transferred to Peter Mogoi. This sounds more of fiction than reality. Kenyans going through the documents at the lands office that gave rise to Gesima Settlement Scheme /887 and the transfer of the same to Mr Mogoi must be left pondering over the “efficiency” of the Land Registrar behind this. The whole exercise was fraudulent. The marks of fraud are left all over.

26 The 1st Defendant and her witness, her own father, did not disprove this fraudulent transaction in their evidence. Above all, the whole exercise of removing caution placed on 1/11/2000, without which no further entries would have been made on the register was done in the face of an order from the High court barring the removal of the said caution and which the Land Registrar opted to treat as a piece of plain paper which had been blown by the wind and which found its way on his desk but which was of no value but to be thrown into the dustbin. The order of 13/3/2001 from Kisii High Court Miscellaneous Civil Application No 12 of 2001 ought to have halted all transactions in this matter with effect from 13/3/2001. Although the order is shown to have been issued by the Deputy Registrar Kisii High Court on 7/3/2002, the Land Registrar had already acted on it on 14/3/2001, the day after it was issued but acted on it in the contrary. The letter of consent given to Charles Gichana Angwenyi to transfer Gesima Settlement Scheme /887 was allegedly issued by Borabu Land Control



- Board on 17/3/2002, 3 days after the transfer had been effected and a Title Deed issued to Peter Mogoi on 14/3/2001. How then do you describe this other than a fraudulent act? No Land Registrar worth his Name would transfer a parcel of land, issue a Title Deed and then ask the parties to go for consent to effect the transfer in retrospect.
- 27 On 24/7/2002 the orders granted on 13/3/2001 in Kisii High Court Miscellaneous Civil Application No 12 of 2001 were confirmed as a consequence of which the caution placed against Gesima Settlement Scheme/107 was to be restored.
- 28 On 15/4/2016, the Environment and Land Court Kisii in Petition No 4 of 2013 dismissed the 1st Defendant's prayer for a Declaration that:
- “The Honourable Court be pleased to declare that LR No Nyansiongo Scheme/887 belongs to the Estate of the late Peter Mogoi and the Respondent (Ogamba Gichana) by himself, his Agents, Heirs, Employees, or any person acting on his behalf howsoever be and is hereby restrained from trespassing, wasting, or in any other manner whatsoever interfering with the same.”
- 29 Before the hearing of this case took place Peter Mogoi died and a case was filed in Keroka Senior Resident Magistrate's Court civil suit No 104 of 2010 with the Plaintiff and the 1st Defendant herein being the Plaintiff and Defendant respectively where an order was issued on 25/3/2010 as follows:
- “A temporary injunction do and is hereby issued against the Defendant/Respondent herself, her agents, servants and/or any other person claiming through her restraining them from burying the remains of the late Peter Mogoi (the 1st Defendant's husband) on land parcel No Nyansiongo Settlement Scheme/107 and/or its resultant parcel No Nyansiongo Settlement Scheme/887 and/or otherwise howsoever manner interfere with the same pending the hearing of this application inter-parties.”
- 30 The 1st Defendant was served with the order but in total disobedience of the same, she went ahead and buried the Deceased on the suit land at 6.00 a.m. with the assistance of her father, Francis Nyagaka Onchoka (the 2nd Defendant) who hired some posse of youths. The 2nd Defendant was convicted by the court and fined Kshs 10,000/= which he paid. On her part, the 1st Defendant disappeared and since she had to testify in this case, she registered a General Power of Attorney in Kisii in favour of the 2nd Defendant who is her father. This was obviously meant to avoid her being arrested for contempt of contempt when she set foot in the precincts of the Court. Eventually, after being ordered to appear in court, she pleaded guilty of contempt of court and was pardoned by the court on 23/6/2022. The question I wish to ask the 1st Defendant and her father is, is it not unwise to bury the deceased on the suit land when there is an ownership dispute and you are not sure that the dispute will be determined in your favour? Would you rather the Court will later issue an order of exhumation of the body, flattening of the grave or it would be wise to bury the body elsewhere and if successful you then get an order to exhume the body and transfer it to the land in dispute, if it must be buried there. I do not know who gave litigants the impression that if they bury a body in a land in dispute they get a better claim of ownership over the land.
- 31 I also wish to comment on the credibility of the 2nd Defendant's evidence. He told the court that he was not aware of the contempt of court proceedings in Keroka Senior Resident Magistrate's Civil Suit No 104 of 2010 but the proceedings in the case brings out a totally difficult picture. But when put to



task in cross-examination he admitted that he was indeed fined Kshs 10,000/= He also had the audacity to testify that:

“.....I was given a cheque of Kshs 1.4 Million in 2010 by Mogoi for the last instalment which he delivered to the vendor, Mr Gichana before Mogoi died.....”

32 This cannot be true. I wish to take Judicial Notice that in 2009 a Notice was placed by the Central Bank of Kenya on clearance of cheques. The Central Bank of Kenya issued a Notice that with effect from October 1, 2009, the limit set for value clearing of cheques had been capped at Kshs. 1million, USD 35,000 EUR 30,000 and GBP 15,000 and no cheque above that amount would be processed through the Nairobi Automated Clearing House from October 1, 2009. The Notice read as follows:

“.....The public is hereby notified that Central Bank of Kenya and the Kenya Bankers Association have jointly agreed to stop processing high value payments using Cheques and Electronic Funds Transfers (EFTs) of Kenya Shillings one (1) million and above through the Nairobi Automated Clearing House with effect from October 1, 2009.....”

33 It is apparent that the 2 Defendants herein do not take court orders seriously. This explains why in spite of court orders in place they still penetrated the lands office and registered all the illegal transactions. It is not only the Land Registrar’s Office and the late Peter Mogoi who were involved. The 1st Defendant cannot escape blame. Why do I say so? According to the Land Registrar’s evidence, all the 11 sub-divisions out of Gesima Settlement Scheme/107 were cancelled vide a Court Order dated 24/7/2002 in Kisii High Court Miscellaneous Civil Application No 12 of 2001. There was a restriction (No 6) and Entry No 7 is also a cancellation of Entries Nos 3 to 6 (inclusive) which included the removal of the caution registered on 14/3/2001 and the sub-divisions of the 11 parcels. There was also an earlier order on 26/3/2001 that issued an inhibition restricting any further dealings with land parcel Number Gesima Settlement Scheme /107 and/or any of the subsequent sub-division(s). This obviously included land parcel number Gesima Settlement Scheme/887. The Land Registrar further said that the order of 24/7/2002 in Kisii High Court Misc Civil Application did not exempt Gesima Settlement Scheme/887. He said that Gesima Settlement Scheme/887 therefore ceased to exist on 24/7/2002. It only exists today by mistake because the order of 24/7/2002 cancelled all the 11 sub-divisions out of Gesima Settlement Scheme/107. He said that when the sub-divisions were cancelled the land reverted back to Gesima Settlement Scheme/107 which has now been registered in the name of the Plaintiff. This registration was effected on 7/7/2022 and Title Deed issued on the same date after the cancellations of Entries 3 to 6 on 8/5/2013. The same also followed a letter from the Land Registrar, Nyamira dated 21/12/2012 to Peter Mogoi asking him to surrender the Title Deed in respect of Gesima Settlement Scheme/887. Although by then the said Peter Mogoi was dead, the 1st Defendant said that the letter reached her. That notwithstanding, the 1st Defendant nevertheless used the same Title Deed for succession purposes.

34 The rights of a proprietor are enshrined under Section 25 of the Act as follows:

“The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever.....”



35 Section 26 provides that:

1. The certificate of title issued by the Registrar upon registration, or to a Purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, -except-
 - a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."

36 The *Black's Law dictionary* defines fraud as follows:

"A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment."

37 In the case of *Alice Chemutai Too – Vs – Nickson Kipkurui Korir & 2 Others* [2015] e KLR Justice Sila Munyao held that:

"It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. "

38 Section 80 (1) of the *Land Registration Act* No 3 of 2012 provides as follows:

"Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake."

39 In *RG Patel vs Lalji Makanji* (1957) EA 314 the court expressed itself as follows:

"Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require prove beyond reasonable doubt, something more than a mere balance of probabilities is required"

40 The threshold of proof of fraud and/or participation of the same on the part of the Defendants herein has been met. The above transactions that involve the removal of a caution on the face of a court order to the contrary, sub-division of agricultural land without consent of the land control board as is required under the law and transfer of land without consent of the land control board have been proved on the required standard and are all fraudulent actions.

41 Among the documents produced by the Land Registrar in respect to the transfer of Gesima Settlement Scheme /107 to the Plaintiff herein on 7/7/2022 include the Transfer Forms from Gichana Angwenyi to the Plaintiff herein same dated 21/3/2022, copies of PIN Certificate for both the transferor and



transferee, copies of their Identity Cards, a copy of transfer of interest, Entry Register, a copy of receipt for transfer fee and a copy of deposit fee of Kshs 30,000/= being in respect of Stamp Duty for the transfer. The Land Registrar testified that he could not trace similar documents for the other transactions in favour of the late Peter Mogoi. This then compares genuine transactions with fraudulent ones. One wonders whether there are 2 Land Registries in Nyamira because there are still transactions going on in Gesima Settlement Scheme/887 some as late as 24/11/2014 even after the same was cancelled and reverted to Gesima Settlement Scheme/107.

42 The upshot of the above is that all the transactions effected on Gesima Settlement Scheme/107 and its subsequent divisions between 14/3/2001 and November 24, 2014 were all made contrary to Court Orders in Kisii High Court Miscellaneous Civil Application No 12 of 2001 and are hereby declared null and void *ab initio*. The Court agrees with earlier orders particularly the orders of 24/7/2002, in Kisii High Court Miscellaneous Civil Application No 12 of 2001 that the Land Registrar, Nyamira do cancel all the entries made between 14/3/2001 and 24/11/2014 (inclusive) and since all the sub-divisions created from Gesima Settlement Scheme/107 have already reverted to Gesima Settlement Scheme/107 and the Register of the same has been rectified to read the name of the Plaintiff herein, the Court declares the Plaintiff the *bona fide* proprietor of the parcel of land known as Gesima Settlement Scheme /107. As to the Parcel of Land LR No Gesima Settlement Scheme/887 the same having been cancelled just as the other 10 sub-divisions that were carved out of Gesima Settlement Scheme/107 the Title Deed should be surrendered to the Land Registrar, Nyamira forthwith. In addition, the Plaintiff shall also have Judgment in terms of Prayers numbers (a), (b) and (d) of the re-amended Plaint dated and filed in court on 22/7/2022. Prayer Number (c) in the Re-amended Plaint is disallowed. Before I pen off and in view of what has transpired since this wrangle began, with the Defendants and the late Peter Mongoi, the Land Registrar, Nyamira and Borabu Land Control Board disregarding Court orders and flexing their muscles with latitude, I wish to caution all the parties concerned that this country is governed by the Rule of Law and this time the Court will ensure that its orders are followed to the letter regardless of one's status. I hope all the parties in this case will choose to follow the rule of law to govern their conduct and not the law of the jungle. These principles cannot stand together. They are as opposite as God and mammon and whoever holds to the one must despise the other. Between physical might and law let's see which one succeeds this time. If any party is dissatisfied with this judgment, there is an avenue for appeal. There are 3 Judges of a higher rank waiting to evaluate my Decision and even 7 more to scrutinize it again if the threshold is met to file a second Appeal to the Supreme Court of Kenya. Nobody should be tempted to use his position in society to disobey the law to which we all have a constitutional duty to obey and more so as the parties herein are all senior citizens of this country and I therefore implore on them to teach younger generations why our forefathers fought for self-governance and why Kenyans clamored for the 2010 Constitution which protects individual rights to property, including private property.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 5TH DAY OF DECEMBER 2022.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Sibota

Plaintiff: Mr. Momanyi

Defendants: Mr. Soire

