



**Ontweka v Ondara (Environment and Land Appeal E010 of 2022)
[2025] KEELC 3684 (KLR) (7 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 3684 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT AND LAND APPEAL E010 OF 2022**

M SILA, J

MAY 7, 2025

BETWEEN

NYATANGI ONTWEKA APPELLANT

AND

GEORGE ONDARA RESPONDENT

(Being an appeal against the decision of Hon. D. Mikoyan, Senior Principal Magistrate, delivered on 13 April 2022 in the case Ogembo SPMCC No. 186 of 2011)

JUDGMENT

(Respondent filing suit to have the appellant restrained from the suit land described as Majoge/Bokimonge/1709; appellant contending that he is on a Plot registered as Plot No. 51 Kenyena Market; in the course of trial, a report by the County Surveyor presented indicating that there does not exist any plot identified as Plot No. 51 Kenyena Market and that the disputed land is actually Majoge/Bokimonge/1709; judgment entered for the respondent; appellant now asserting that the judgment needs to be upset; no expert evidence presented by the appellant to support his claim that the disputed land is actually a Plot No. 51 Kenyena Market; evidence of the County Surveyor not overridden; appeal dismissed)

1. The suit before the Magistrates' Court was commenced by the respondent through a plaint filed on 17 November 2011. The respondent filed suit on behalf of one Josephine Moraa Ondara (Josephine) who had donated to him a power of attorney and who was said to be living in the United States of America. In the suit, the respondent averred that the land parcel Majoge/Bokimonge/1709 was owned by the said Josephine. He contended that the appellant had trespassed into the said land and in the suit he sought an order of permanent injunction to restrain the appellant from the said land.
2. The appellant's defence was that he is not on the land parcel Majoge/Bokimonge/1709 but on the Plot No. 51 Kenyena Market which he said was allocated to Elkana Ontweka and David Nyabuti in 1970.



3. In the course of the trial, the court directed the Land Registrar and County Surveyor to visit the land in dispute, which was done, and a report dated 18 December 2013 was prepared and filed.
4. Both appellant and respondent testified asserting their respective positions. The respondent called the County Surveyor, Mr. David Lemaiyan as his witness. He elaborated on his report dated 18 December 2013. In his report he found that both the appellant and respondent were claiming the same land on the ground. In his conclusion, he held the opinion that the land being claimed is actually the parcel Majoge/Bokimonge/1709. He testified that prior to the survey exercise, he had sought advise from the Kisii County Government on the position of the Kenyena Market Plots. He got a response in a letter dated 16 December 2013. That letter states that according to the records held by the Kisii County Government, the last plot is No. 50, and there does not exist a Plot No. 51 in Kenyena Market.
5. The appellant testified as the sole witness in his defence. He testified that the Plot No. 51 belongs to his father, one Elkana Ontweka Michieka. He stated that his father purchased this Plot No. 51 together with one David Nyaguti Nyapendi and they were issued with a Plot Card which he produced. He stated that the two owners are now deceased. He asserted that this Plot was given by the County Council of Gusii. To prove existence of this Plot No. 51 Kenyena Market, he produced the Plot Card, Minutes of a meeting of the Trades and Markets Committee of the County Council of Gusii held on 5 March and 3rd and 4th April 1970, a sale agreement dated 28 May 1968, some receipts, and a letter from Kenyena Market. After he had testified, an application was made to call a witness who was said to have been in charge of records of the defunct Town Council. This application was opposed and the court upheld the objection.
6. The trial court upon analysing the evidence held for the respondent i.e that the suit land is the land parcel Majoge/Bokimonge/1709. He found that the respondent had produced a title deed to the suit land to support his claim and relied on Section 24 of the Land Registration Act. He found that the documents of the appellants are not recognized in law to grant a right of ownership and that a Plot Card does not suspend the rights of a registered owner.
7. Aggrieved, the appellant has now preferred this appeal on the following grounds :
 1. That the trial Magistrate erred when he did not consider that the disputed land parcel was also registered under Kenyena Market Plot No. 51 registered in 1970 by the then County Council of Gusii.
 2. That the trial Magistrate erred in holding that the disputed portion registered in 1994 takes precedence over a Plot Card registered in 1970.
 3. That the trial Magistrate erred in barring the witness who holds records from the then County Council of Gusii to shed light on the existence of Plot No. 51.
 4. That the trial Magistrate erred when he relied on the evidence of the Land Surveyor who does not keep records of the County Council.
8. The appeal was canvassed through written submissions and I have taken note of the submissions filed.
9. The core issue is whether the disputed land is the land parcel Majoge/Bokimonge/1709 or whether it is Kenyena Market Plot No. 51. Such a dispute would need expert evidence to resolve. The respondent, as plaintiff, did call the County Land Surveyor and his evidence was categorical, that the suit land is Majoge/Bokimonge/1709 and that there is no such plot known as Kenyena Market Plot No. 51. It will be recalled that among the documents he obtained, when undertaking an investigation of the disputed land, was the letter dated 16 December 2013 from the County Government of Kisii, which affirmed



- that the last plot for Kenyena Market is the Plot No. 50 and that they do not have a Plot No. 51. Faced with that kind of evidence, the appellant needed to come with experts of his own to demonstrate that indeed this Plot No. 51 exists as he claims but he brought no witness.
10. I am aware that among the grounds of appeal is the complaint that the court declined his application to call a witness who was said to have been in charge of records of the defunct local government. I cannot fault the trial court for disallowing the application. Firstly, there was no indication in the appellant's list of witnesses that he intended to call a witness from the defunct Town Council or County Council of Gusii. The only witness listed in the appellant's list of witnesses was himself. Secondly, that application was coming at the defence stage after the respondent (as plaintiff) had already closed his case. He could not therefore be in any position to contest any new evidence that was going to be brought forth by a witness that he never knew would be called when he was giving evidence. That would have led to an unfair trial for the respondent. I am persuaded that the court exercised its discretion correctly given the circumstances of the case.
 11. The documents brought forth by the appellant cannot override the fact that the suit land is Majoge/Bokimonge/1709. A Plot Card by itself without support of a Market Layout Scheme cannot be said to be indicative of a Market Plot that actually exists under the County Government. The appellant did not produce any layout of the said Kenyena Market to prove that indeed there is a Plot No. 51 in existence as he contended. The letter dated 5 October 2009 from the County Council of Gusii, which letter alleged that there is a Plot No. 51 Kenyena Market in name of Elkana Ontweka Michieka and David Nyabuti, cannot also be taken too seriously for two reasons. First, it is contradicted by the latter correspondence dated 16 December 2013 from the County Government of Kisii. Secondly, as I have pointed out, the appellant did not produce any layout of Kenyena Market. The only way that he would have demonstrated that his letter of 5 October 2009 is reflective of the correct position would have been to produce the Market Layout Scheme.
 12. I have also analysed the other documents of the appellant. The Minutes of the Trade and Markets Committee of the County Council of Gusii, held on 5 March and 3rd and 4th April 1970, indeed show that there was an application for a new market plot by Elkanah Otweka and David Nyabuti. The minutes show that the application was approved. However, the minutes do not indicate the Plot number allotted. Indeed, this part of the minutes is blank. It cannot therefore be alleged that it is through the said minutes that a Plot No. 51 Kenyena Market was allocated to Elkanah Ontweka and David Nyabuti as claimed by the appellant. Moreover, it does not add up that the other allegation of the appellant is that this plot was purchased on 28 May 1968. If it was indeed purchased on 28 May 1968 it would mean that it existed and would not be subject of an application for allotment of a new plot in 1970. The other document, i.e the letter of 13 November 2009 from the Secretary Kenyena Market cannot be taken to be authoritative that there exists the Plot No. 51 Kenyena Market for the simple reason that the author is not the allocating authority.
 13. The evidence of the County Surveyor in the circumstances of this case was very instructive. It is him who is the custodian of maps and plots in Kisii. His word that there does not exist a Plot No. 51 Kenyena Market and that the disputed land is actually the land parcel Majoge/Bokimonge/1709 cannot be taken lightly. Bar solid evidence to counter his evidence, the only conclusion that any reasonable court can reach is that the disputed land is actually Majoge/Bokimonge/1709. That is exactly the conclusion that the trial court reached and it is also the conclusion that I arrive at.
 14. From the foregoing, it is apparent that I find no merit in this appeal. It is hereby dismissed with costs. Judgment accordingly.

DATED AND DELIVERED THIS 7 DAY OF MAY 2025



JUSTICE MUNYAO SILA
JUDGE, ENVIRONMENT AND LAND COURT
AT KISII

Delivered in presence of:

Mr. Anyona instructed by M/s Asati, Anyona & Company Advocates

Mr. Kimaiyo instructed by M/s B.N Ogari & Company Advocates

Court Assistant – David Ochieng'

