



Onchiri (Suing as Legal Representative of the Estate of Onchiri Kegeni) v Momanyi (Environment & Land Case 1195 of 2016) [2024] KEELC 3631 (KLR) (14 February 2024) (Judgment)

Neutral citation: [2024] KEELC 3631 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 1195 OF 2016
M SILA, J
FEBRUARY 14, 2024
(FORMERLY KISII HCCC NO. 250 OF 2010)**

BETWEEN

LAWRENCE MOSE ONCHIRI PLAINTIFF

SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF ONCHIRI KEGENI

AND

TOM MOMANYI DEFENDANT

JUDGMENT

(Plaintiff suing defendant for trespassing on his land and seeking orders of vacant possession; contention of defendant being that the title claimed by the plaintiff does not exist and that he is in possession of his land; numerous surveys of the land ordered by court all demonstrating that the plaintiff's title exists and that the defendant is in occupation; judgment entered for the plaintiff; defendant given 30 days to give vacant possession and condemned to pay general damages for trespass).

1. This suit was commenced by Onchiri Kigeni (the original plaintiff) through a plaint filed on 14 September 2010. In his suit, the original plaintiff averred to be the proprietor of the land parcel Nyaribari Chache/Birongo/543 measuring approximately 1.4 acres (the suit land or simply parcel No. 543). He pleaded that the defendant had trespassed into his land and assumed the plucking and harvesting of tea thereon without any colour of right. In the suit, the original plaintiff asked for an order of vacant possession of the suit land. The defendant filed defence wherein he denied that the original plaintiff was the registered owner of the suit land and also denied trespassing into the suit land. He asked that the suit be dismissed with costs.
2. Although it was not pleaded in the defence, it emerged that the defendant's interest (if any) lay within the land parcel Nyaribari Chache/Birongo/347 (parcel No. 347) which was registered in the name of



his late father. On 5 February 2014, the court (Okong'o J) directed the Kisii District Land Registrar, and the Kisii District Surveyor, to visit the suit land and the land parcel No. 347 and delineate the boundaries thereof. The parcels of land were visited on 3 July 2014 and a report dated 8 July 2014 was filed. The officers found as a fact that the two parcels exist on the map and on the ground. They however observed that there is no hedge/boundary separating the land parcels No. 543 and 347, and that the parcels of land are under subsistence farming. The report also found as a fact that it was the defendant who was using the suit land. The officers could not however mark the boundaries as the defendant was uncooperative. On 5 August 2014, the officers went back to the land in order to fix the boundaries but again, they could not do so and proceeded to explain themselves in a report dated 11 August 2014. In that report, it is stated that the exercise was stalled when the defendant attacked the team with a machete which he was armed with. In light of the above, on 20 April 2015 and 22 June 2015, the court made further orders to the two officers to go back and mark the boundaries of the two parcels of land and made a further order for provision of security. There is a report on record dated 16 June 2015. It states that the officers went to the ground on 21 May 2015 and yet again the defendant objected to the exercise on the basis that the surveyor was using a forged map. There was another visit on 20 July 2015 which culminated in a report dated 27 July 2015. That report, which is of the District Surveyor, reveals that during this visit, the defendant was not present, despite being served. The officers proceeded to mark the boundaries. They did find that the suit land was under subsistence farming (planted with maize, millet, banana stalks, tea plants) and blue gum trees, and there were also building bricks on the land, all belonging to the defendant. There is a more or less similar report dated 27 August 2015, alluding to the same visit, but this time signed by the Land Registrar, Kisii.

3. In the course of time, the original plaintiff died and he was substituted by Lawrence Mose Onchiri who now continues the suit on behalf of the estate of the original plaintiff. An amended plaint was filed on 15 July 2016 to demonstrate the substitution. The amended plaint also seeks an additional prayer for general damages for trespass and mesne profits. An amended defence was filed which was more or less similar to the original defence. The defendant refuted the plaintiff's claims and put him to absolute strict proof thereof.
4. It is on the basis of the above that the matter proceeded to trial.
5. PW-1 was the plaintiff. He affirmed that he is son of the original plaintiff and was pursuing the matter on behalf of his estate. He demonstrated title to show that the original plaintiff was the registered owner of the suit land. He described the defendant as a neighbour and whose father was the registered proprietor of the parcel No. 347. He averred that this parcel No. 347 is now subdivided. He produced the mutation form for this land showing that it has been subdivided into the land parcels No. 1856 and 1857. He testified that the original plaintiff occupied the suit land up to the year 2008 when the defendant chased him away. He added that they had planted tea bushes and trees. He proceeded to state that the land was fenced but the defendant removed it. He produced documents of title in name of the original plaintiff, and the adjudication records showing that the suit land was adjudicated to the original plaintiff, whereas the parcel No. 347 was adjudicated to Onchiri Iteba and Momanyi Iteba, each holding a half share. He produced the survey map showing that both parcels No. 347 and the suit land were recognized. Cross-examined he conceded that there were no pleadings stating that the original plaintiff was evicted in 2008 and he himself was not present at the time. He stated that he had bought his own land in Narok. He testified that his father was not residing on the suit land but on other land in Keumbu.
6. On his part, the defendant testified that he is son of Momanyi Iteba who died in 1972. He testified that the land parcel No. 347 was registered in the name of his father and one Onchiri Iteba, each owning a half share. He testified that he filed succession in the year 2012 and the share of his father was distributed



between himself and his brother, each getting 1.5 acres. The confirmed grant was issued on 6 March 2015 and he produced it as an exhibit. He stated that they procured title to the land parcel No. 347 and subsequently proceeded to subdivide the land to create the parcels No. 1856 and 1857. He denied encroaching into the suit land, i.e parcel No.543, and insisted that he has always been in occupation of what was the parcel No. 347. On the adjudication register, he stated that the adjudication register for parcel No. 543 appears crossed out and was also of opinion that the signatures of the Demarcation Officer in the adjudication register of parcel No. 347 and 543 appeared different. He testified that he applied for survey maps from the Survey Department and he was informed that they do not have a copy of it. He produced some letters from the Survey Department to support this position. He alleged that it was not clear how the plaintiff obtained the survey map which he had produced as an exhibit. He asserted that the plaintiff has no land where he claims. He also questioned a power of attorney that was exhibited by the plaintiff prior to him substituting the original plaintiff. Cross-examined, he inter alia testified that he has no knowledge that there exists the parcel No. 543 adjacent to the original parcel No. 347. He stated that he has sold a portion of his land to a third party. He stated that the plaintiff has never utilized the suit land which has been used by himself and his family. He claimed that the tea on the suit land was planted by his father.

7. The Land Registrar, Steve Mokaya also testified. Regarding the parcel No. 347, he confirmed that it was first adjudicated to Momanyi Iteba and Onchiri Iteba. The property was thereafter transferred to the defendant and Charles Abuga, as beneficiaries, following the confirmation of grant issued on 6 March 2015. He testified that on 29 December 2015, the parcel No. 347 was subdivided to create the parcels No. 1856 and 1857. The parcel No. 1856 was later subdivided to create parcels No. 1858 and 1859. There was a further subdivision of the parcel No. 1858 to create the parcels No. 1870 and 1871. The parcel No. 1870 was later subdivided into the parcels No. 197, 1975, and 1976. The parcels No. 1857, 1859, 1871, 1975, have been transferred to third parties and the defendant, and Charles Momanyi retains the parcels No. 1974. Regarding the suit land, which is the parcel No. 543, he confirmed that it was first registered on 19 September 1966 in the name of Onchiri Kegeni, the original plaintiff, after adjudication, and that the land measures 1.4 acres. He was cross-examined on why there is a crossing in the adjudication register of the parcel No. 543 but he could not tell why the same shows the crossing as there was nothing to indicate why the crossing is there. He did state that there are instances when there is cancellation but the records remain. The Land Registrar also took opportunity to alert the court to the fact that the transfer of the entire parcel No. 347 to the defendant and his brother may have been irregular as they were only entitled to the half share of the father and not to the whole of it. Given this information, the court (Mutungi J) formed the opinion that there is need to delineate what the two families of Momanyi and Onchiri Iteba owned within the land parcel No. 347. The Court directed a revisit of the land and for the measurements of the parcels No. 347 and 543 to be taken.
8. The ground was thus revisited on 24 September 2019 and a report dated 8 October 2019 was filed. The following were the finds of the Land Registrar and County Surveyor :

The original boundary between parcels Birongo 543 and 347 was fixed on the ground.

The applicant stated that they had lost possession of the whole parcel Birongo 543.

The size of parcel Birongo 543 was established as 1.4 acres.

The defendant objected the use of the map we had (see copy attached) instead he produced his own map. His map had completely different shapes and sizes of the suit parcels.

We were not through with measurement of original number 347 when heavy rains began.



But since the two sides we had measured on parcel 347 plus the complete measurement we had taken on 543 were tallying with the map, we positively computed the size of parcel 347 as 6 acres.

9. To the report was attached a sketch showing the parcel No. 543 being adjacent to parcel No. 347. It is as if the parcel No. 347 is a big rectangle piece and the parcel No. 543 is a smaller rectangle in one corner of the rectangle covering the parcel No. 347. The dimensions of the parcel No. 543 are shown to be 100 m X 120 metres on the longer sides and 45 X 48 metres on the shorter sides.
10. Whereas the plaintiff was happy with the report, the defendant disputed it and called for the surveyor to attend court to be cross-examined on his report. The report was produced by the successor of the Land Registrar who went to the ground.
11. After the Land Registrar had explained the report, Mr. Omagwa Angima, leaned counsel for the defendant, applied to have the defendant conduct his own survey. I gave him 30 days to do so. There is no indication that the defendant proceeded to undertake any survey within the prescribed time, and that is the last that I saw of the defendant and his counsel, for neither appeared in subsequent proceedings despite being served. I directed the hearing of the matter closed and invited counsel to file submissions. No submissions were filed by counsel for the defendant.
12. I have considered all relevant issues before coming to my disposition.
13. This is a case of trespass. The plaintiff's complaint is that the defendant has trespassed into the land parcel No. 543. It would appear that the defendant's stance is that the parcel No. 543 does not exist and that what he is in occupation of is land comprised in the former land parcel No. 347 which has now been subdivided as demonstrated in the evidence of Mr. Mokaya. The contention of the defendant that the parcel No.543 does not exist holds no water. There is ample evidence of its existence. There was produced the adjudication registers showing that both parcels No. 347 and No. 543 existed and were adjacent to each other. I am aware that the defendant, when giving evidence, cast doubt on the adjudication register of the parcel No. 543 because there appears to be a one line crossing over, which crossing however, does not have an explanation. What was produced was a copy which indeed has a one line across, but it cannot be said that the crossing means that the adjudication register was cancelled. If it was the contention of the defendant that the one line crossing means that the allocation of that number was cancelled before registration then the defendant ought to have called evidence to support that. What the evidence demonstrates is that the parcel No. 543 was duly registered and a title to it issued way back in the year 1966. I have no evidence that this title was never recognized by any quarter. In any case if the defendant thought that this title No. 543 never existed in the first place, and the land allocated to it fell on the land parcel No. 347, nothing stopped him from suing for cancellation of the title to the parcel No. 543.
14. The other bit of evidence that the defendant relied on was some letters from the District Surveyor, Kisii, which I have gone through. The letters purport to state that the Preliminary Index Diagram (the map sheet of the area) was not delivered to the office in Kisii during decentralization from Kisumu. Assuming that these letters state the correct position, does it mean that there is no map sheet for the area? It doesn't mean so. The map that was produced by the plaintiff was issued by the Survey of Kenya in Nairobi which I believe has custody of all maps in Kenya. The defendant did not call any surveyor to give evidence to refute the authenticity of this map. Neither did he produce any other alternative map of the location of the parcels of land. The only map that was produced shows that the parcels No. 543 and No. 347 are adjacent to each other. I have no evidence that this map is not the map of the area in question.



15. In any event, if the contention of the defendant is that there is no map, how did he manage to proceed and subdivide the parcel No. 347 into various other parcels ? He clearly could not proceed to effect a mutation if there was no map. The defendant is not saying that this map does not exist, because it must, if he is to support his own subdivision. The report of 8 October 2019 does show the current map with the parcel No. 347 subdivided and the parcel No. 543 still intact. It buttresses the position that the parcel No. 543 is separate and distinct from the original parcel No. 347.
16. The defendant failed to conduct his own survey meaning that there is nothing to contradict or challenge the findings of the District Land Registrar and Surveyor. The conclusion that the parcels No. 347 and 543 are different and distinct, and that the parcel No. 543 is registered in the name of the original plaintiff, has remained consistent throughout the numerous surveys that have been conducted over the years that the matter was in court. Those reports have also been consistent that it has always been the defendant who has been going out of his way to scuttle any survey of the land. Clearly his actions demonstrate a person who is attempting to go to all lengths to cover up the fact that he is trespassing and in occupation of the original plaintiff's land.
17. I am persuaded that the plaintiff has demonstrated that the defendant is illegally occupying the land registered in the name of the original plaintiff. The defendant has not demonstrated any right to occupy this land. The defendant cannot be allowed to continue occupying land which does not belong to him and continue with his acts of dispossession. I therefore give an order to the defendant to give vacant possession of the suit land within 30 days from the date of this judgment. And the defendant cannot be heard to say that the land covered by the suit land is not clear. The dimensions of this land are very clear from the sketch plan annexed to the report of 8 October 2019. It is that portion of land measuring 100m x 45m x 120m x 48m as shown in the sketch. That is the land that the defendant must give vacant possession of within the next 30 days or he be evicted.
18. Apart from the claim for vacant possession, the plaintiff in the amended plaint lodged a claim for general damages for trespass and mesne profits. I have no evidence of mesne profits and I am unable to make any order towards an award of mesne profits. But it is clear that the defendant has been in illegal occupation of the suit land and has unfairly benefited from his occupation and use. I am thus moved to make an award in general damages for trespass in the sum of Kshs. 500,000/=.
19. The plaintiff shall also have the costs of this suit.

Judgment accordingly.

DATED AND DELIVERED THIS 14TH DAY OF FEBRUARY 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT AT KISII

In the presence of: -

Mr. Anyona for the plaintiff

No Appearance on the part of M/s Omagwa Angima & Co. for the defendant and defendant also absent.

Court Assistant – Lawrence Chomba

