



**Angwenyi v Aondo & 3 others (Environment and Land Case Civil Suit
22 of 2021) [2024] KEELC 3412 (KLR) (9 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3412 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT AND LAND CASE CIVIL SUIT 22 OF 2021**

JM KAMAU, J

APRIL 9, 2024

BETWEEN

HEBISIBA BOSIBORI ANGWENYI PLAINTIFF

AND

HELLEN OGAKE AONDO 1ST DEFENDANT

THE SEVENTY DAY ADVENTIST CHURCH (E.A 2ND DEFENDANT

COUNTY SURVEYOR, NYAMIRA COUNTY 3RD DEFENDANT

THE HON. ATTORNEY GENERAL 4TH DEFENDANT

JUDGMENT

1. This suit, commenced by way of a plaint dated 9/7/2014 seeks the following prayers;
 - i. Declaration that Hebisiba Bosibori Angwenyi, now deceased was/is the lawful owner and/or proprietor of LR No.Nyansiongo Settlement Scheme/16, measures 8.5Ha.
 - ii. Declaration that the creation of LR No.Nyansiongo Settlement Scheme/1072, currently belonging to and registered in favour of the 2nd Defendant, was irregular, illegal, fraudulent and thus void
 - iii. An Order for Rectification of the registrar over and in respect of LR No.Nyansiongo Settlement Scheme/1072 and restoration of the portion thereof, of the suit property, that is, LR No.Nyansiongo Settlement Scheme/16 and/or any portion thereof.
 - iv. An Order of Eviction against the 2nd Defendant, together with her agents and/or servants from LR No.Nyansiongo Settlement Scheme/1072, which actually falls within and/or forms part of the suit property, that is, LR. No.Nyansiongo Settlement Scheme/16 and/or any portion thereof.



- v. Permanent injunction restraining the 1st and 2nd Defendants either by themselves, agents, servants and/or anyone claiming under the said Defendants from entering upon, re-entering, trespassing onto, cultivating, alienating, wasting, building structures, interfering with and/or in any other manner dealing with LR No.Nyansiongo Settlement Scheme/1072, which actually falls within and/or forms part of the suit property, that is, LR No.Nyansiongo Settlement Scheme/16 and/or any portion thereof.
 - vi. General damages for trespass
 - vii. Interest on (vii) above hereof at court rates
 - viii. Such further and/or other relief as the honourable court may deem fit and expedient so to grant.
2. The Plaintiff averred that she has been and still is the registered owner of LR No.Nyansiongo Settlement Scheme/16 having had it transferred to her on 31/8/2010 upon completion of the loan facility advanced to her by the Settlement Fund Trustees. She neighbours LR No.Nyansiongo Settlement Scheme/17 measuring 14 hectares that belongs to the 1st Defendant, legal Administratrix of the late Francis Nyaribo. The 1st Defendant in July 2002 sub-divided her parcel of land into LR Nyansiongo Settlement Scheme Nos.953,954 and 955 and later sub-divided Nyansiongo Settlement Scheme/953 into Nyansiongo Settlement Scheme/1071 and 1072 thereby creating Nyansiongo Settlement Scheme/1072 to extend to Nyansiongo Settlement Scheme/16 belonging to the Plaintiff by about 0.68 Hectares.
 3. The 1st Defendant then occupied the 0.68 hectares or thereabout and transferred Nyansiongo Settlement Scheme/1072 to the 2nd Defendant. This was done irregularly, illegally, fraudulently and in bad faith all of which were actualized by the 3rd Defendant. The 1st Defendant filed a Statement of Defence on 17/9/2014 denying the Plaintiff's claim in toto and the Plaintiff's claim that subdivisions were carried out by the late Francis Aondo Nyaribo on Nyansiongo Settlement Scheme/17 in 2002 who also applied to sub divide Nyansiongo Settlement Scheme.953 in 2004 and that she (the 1st Defendant) was never involved in the sub-divisions of Nyansiongo Settlement Scheme/1072. She further averred that Riensune SDA Church has always occupied LR No.Nyansiongo Settlement Scheme/1072 since 2004.
 4. On her part, the 2nd Defendant averred in a Defence filed on 11/8/2014 that she bought LR No.Nyansiongo Settlement Scheme/1072 and has been in occupation thereof since 1968 when it was vacant and that the same does not fall within Nyansiongo Settlement Scheme/16.
 5. On 2/8/2016 the 3rd and 4th Defendants filed a joint statement of Defence denying any allegations of fraudulent execution of transfer documents and that LR No.Nyansiongo Settlement Scheme/17 was legally and regularly sub-divided into Nyansiongo Settlement Scheme/953, 954 and 955 respectively.
 6. On 3/2/2022 the Plaintiff was amended after the death of the Plaintiff so that Ernest S. N. Angwenyi would take her part. The prayers and the substance of the suit remained the same, only that prayer (1) is to the effect that the declaration be in favour of the late Hebisiba Bosibori Angwenyi.
 - i. Declaration that Hebisiba Bosibori Angwenyi, now deceased was/is the lawful owner and/or proprietor of LR No.Nyansiongo Settlement Scheme/16, measures 8.5Ha.
 7. The hearing of the case commenced on 21/3/2022 when Ernest Samuel Nyakeri Angwenyi testified that he is the son of the late Hebisiba Bosibori Angwenyi who died on 22/8/2021 after she had instituted this case, being the registered owner of Nyansiongo Settlement Scheme/16 which



neighboursNyansiongo Settlement Scheme/17, the same measuring 8.5 hectares officially. When they sought to have the same sub-divided among the sons of the deceased, it was discovered that the same extends to LR No.Nyansiongo Settlement Scheme/17 belonging to the 1st Defendant by more than 6 Acre s. The LR No.Nyansiongo Settlement Scheme/16 was allocated to the deceased by Settlement Fund Trustees and she paid all the outstanding loan attached to the land after which the same was discharged and a Title Deed issued. On 26/1/2012 the District Surveyor, Nyamira visited the suit land only to find that the neighbouringNyansiongo Settlement Scheme/17 had been subdivided intoNyansiongo Settlement Scheme/953, 954 and 955 and laterNyansiongo Settlement Scheme/953 intoNyansiongo Settlement Scheme/1071 and 1072 and thatNyansiongo Settlement Scheme/1072 falls withinNyansiongo Settlement Scheme/16. This was as a result of poorly drawn mutation forms which were irregular and fraudulent. The same was transferred to the 2nd Defendant who took possession. He then produced the following bundle of documents;

1. Copy of the certificate of death of Hebisiba Bosibori Angwenyi
 2. Copy of the letters of administration Ad Litem issued to the Plaintiff vide Keroka Pmcc Succ Misc. No.E04 of 2021
 3. Copy of the area list dated 22nd January 1982
 4. Copy of the green card in respect of LR No.Nyansiongo Settlement Scheme/16
 5. Copy of the Title Deed in respect to LR No.Nyansiongo Settlement Scheme/16
 6. Copy of the certificate of official search in respect of LR No.Nyansiongo Settlement Scheme/16
 7. Copy of the green card in respect of LR No.Nyansiongo Settlement Scheme/17
 8. Copy of the green card in respect of LR No.Nyansiongo Settlement Scheme/1071
 9. Copy of green card in respect of LR No.Nyansiongo Settlement Scheme/1072.
 10. Copy of the certificate of official search in respect of LR No.Nyansiongo Settlement Scheme/1071
 11. Copy of the certificate of official search in respect of LR No.Nyansiongo Settlement Scheme/1072
 12. Copy of the Letter of the district surveyor, dated 24th February 2012
 13. Copy of the sketch map,Nyansiongo Settlement Scheme/16 &17
 14. Copy of demand notice dated 10th March 2014
 15. Copy of the report by the land registrar, Nyamira county, dated 11th November 2020.
 16. Copy of the report by the county surveyor, Nyamira county, dated 11th November, 2020
 17. The pleadings, affidavits and all other documents filed in respect of the instant suit.
8. On cross examination by Mr. Momanyi for the 4th Defendant, the Plaintiff said that in 1965 when he moved there, he was 14 years old and that there was no road of access between the 2 parcels of land and there was a boundary betweenNyansiongo Settlement Scheme/16 andNyansiongo Settlement Scheme/17. That initiallyNyansiongo Settlement Scheme/17 was 24 hectares and that the church building was put up in the 90s. He criticized the land Registrar’s Report for saying that there was a road of access between the 2 initial parcels of land.



9. When cross examined by Mr. Soire for the 2nd Defendant, Mr. Angwenyi said that according to the land registry the landNyansiongo Settlement Scheme/16 measures 8.5 hectares but on the ground, it is only slightly more than 14 Acres. He said that the church has already put up a church sanctuary. He admitted that most of the time he was away. Cross examined by Mr. Wabwire for 3rd and 4th Defendants, the witness said that their Title Deed was issued on 31/8/2010 in accordance with what was on the ground. He said that the changes were done by a Private Surveyor but not the County Surveyor and that they have never lodged a land dispute case with the Government. He further said that in 1965 there was a boundary dispute between the 2 parcels of landNyansiongo Settlement Scheme/16 andNyansiongo Settlement Scheme/17 respectively. On re-examination by his Advocate, Mr. Mulisa, Angwenyi said that the exact acreage of encroachment is 0.68 hectares,
10. After the close of the Plaintiff's case, DW1 Hellen Ogake Aondo, the 1st Defendant adopted her statement dated 17/9/2014. She testified that she married the late Pastor Francis Aondo Nyaribo in 1973 after the later lost his first wife and she was settled inNyansiongo Settlement Scheme in the neighbourhood of Hebisiba peacefully, the 2 occupyingNyansiongo Settlement Scheme/17 andNyansiongo Settlement Scheme /16 respectively. There was a clear road separating the 2 parcels and the Plaintiff, Hebisiba had fenced her land such that you could not see through the fence. Her late husband then donated 1/2 an Acre of his land to the Riensune SDA Church of which the Plaintiff and her son John Angwenyi are members. Later, the church got a further 1 Acre from her late husband but this time at the purchase price of Kshs. 300,000/= which they paid by instalments, that Pastor Francis died in 2002 before facilitating the issuing of the Title Deed to the 2nd Defendant. By this time, he had made an Application for consent for sub divisions. Her parcel was then divided into 9 sub-divisions but the Plaintiff's sons had already interfered with the boundary by planting trees on the access road. She then produced the following documents to buff up her evidence;
1. Copy of the Mutation forms in respect ofNyansiongo Settlement Scheme/17 and 953.
 2. Pictures of the church and the disputed portion of land.
 3. Letter from Momanyi Aunga & Co. Advocates to the Land Registrar dated 31/7/2014.
 4. Application for consent of land control Board to sub-divideNyansiongo Settlement Scheme/1071.
 5. A copy of certificate of official search forNyansiongo Settlement Scheme/1071.
 6. Letter of consent to sub-divideNyansiongo Settlement Scheme/1071.
 7. Mutation forms in respect ofNyansiongo Settlement Scheme/1071.
 8. Letter of consent to transferNyansiongo Settlement Scheme/2545.
 9. Letter of consent to transferNyansiongo Settlement Scheme/ 2546, 2547, 2548,2549 & 2550.
 10. Map in respect ofNyansiongo Settlement Scheme.
11. She insisted that there was an access road between the 2 parcels of land. On cross examination by Mr. Soire for the 2nd Defendant, the witness said that there was a church sanctuary on the suit land –Nyansiongo Settlement Scheme/17. On cross examination by Mr. Mulisa for the Plaintiff she said that she had already taken out letters of administration in respect of the estate of Pastor Francis Aundo Nyaribo who died in the year 2002 by which timeNyansiongo Settlement Scheme/17 was already sub-divided. On re-examination by Mr. Momanyi the 1st Defendant said that the permanent church building onNyansiongo Settlement Scheme/17 was put up in 1984.



12. DW2 Justus Gitengoria Nyaribo testified that the late Pastor Francis Nyaribo was his elder brother who owned Nyansiongo Settlement Scheme/17 where he also lived since 1965. He now stays on Nyansiongo Settlement Scheme/954 which was excised out of Nyansiongo Settlement Scheme/17. There used to be an access road separating Nyansiongo Settlement Scheme/16 and Nyansiongo Settlement Scheme/17 but which has now been interfered with. It was so wide such that a Motor Vehicle would pass through and that Pastor Nyaribo gave the church $\frac{3}{4}$ Acre in 1983 or thereabout. He further said that it was the Plaintiff's sons who planted trees on the access road thereby blocking it. Nyansiongo Settlement Scheme/17 was sub-divided into 9 parcels and the church was given a Title Deed for their land – 1 $\frac{3}{4}$ Acres.
13. DW3, Sam Osinde Nyaribo, son to the late Pastor Francis Aondo Nyaribo, who was born in 1950 testified that they moved to the scheme in 1965. He also said that their father's land Nyansiongo Settlement Scheme/17 was sub-divided into Nyansiongo Settlement Scheme/953, 954 and 955 respectively. The church then got registered as proprietor of Nyansiongo Settlement Scheme/1071 and 1072 out of Nyansiongo Settlement Scheme/953. Nyansiongo Settlement Scheme/ 1072 is not part of Nyansiongo Settlement Scheme/16. He also said that their father's land, Nyansiongo Settlement Scheme/17 was sub-divided into Nyansiongo Settlement Scheme/953, 954 and 955 respectively and the church then got registered as proprietor of Nyansiongo Settlement Scheme/1071 and 1072 out of Nyansiongo Settlement Scheme/953. Nyansiongo Settlement Scheme/1072 is not part of Nyansiongo Settlement Scheme/16. He also testified that there used to be an access road between Nyansiongo Settlement Scheme/16 and Nyansiongo Settlement Scheme/17 which is no longer there and that there is a church building on what used to be Nyansiongo Settlement Scheme/17.
14. DW4, Nelson Metuka Chweye, an elder of the 2nd Defendant testified that the 2nd Defendant has a church building on Nyansiongo Settlement Scheme/17 put up in 1984 and that between Nyansiongo Settlement Scheme/16 and Nyansiongo Settlement Scheme/17 there was a road of access.
15. The last witness, a Government Surveyor was Robert Atika Torori, who has been in Nyamira since 2011 testified that they went to the ground on 3/3/2020 after being ordered by the court. He said that according to their Report dated 11/11/2020 and using R.I.M Sheet 3 the measurements on the ground do not tally with those in the R.I.M and that the R.I.M should not be followed. The 2nd Defendant according to RIM is on Nyansiongo Settlement Scheme/16 but on the ground she is on Nyansiongo Settlement Scheme/17. He admitted on cross-examination by Mr. Momanyi for the 1st Defendant that there did not exist an access road between the 2 parcels of land Nyansiongo Settlement Scheme/16 and 17 respectively which formed the boundary between the 2.
16. On cross examination by Mr. Mulisa for the Plaintiff, the County Surveyor said he did not know whether the mutations were drawn by a Government or a Private Surveyor and that they were not able to fix the boundaries. He also said that there was encroachment. On re-examination by Mr. Ranah for the 2nd and 4th Defendants, Mr. Torori said that the church occupies Nyansiongo Settlement Scheme/1072 and that Nyansiongo Settlement Scheme/1071 belongs to the 1st Defendant.
17. This is the evidence adduced in court and after hearing the same the court retired to write judgment. The court also took into account the respective Reports of the Land Registrar and County Surveyor both dated 11/11/2020 and the respective comments thereto by counsel for all the parties. One thing that puzzles me is how a road of access created before the allotment of the parcels of land known as Nyansiongo Settlement Scheme/16 and 17 were allocated to the respective beneficiaries could disappear in thin air without trace. This was the undisputable boundary and should it not have been interfered with, we would not be where we are today. Private surveyors on the ground should be strictly guided by the R.I.M when drawing their mutations. Any subsequent sub-division(s)



must follow the initial boundaries and the County Surveyors and Land Registrars should ensure that these boundaries are adhered to strictly. It is unfortunate that the 2 Reports by the 2 offices are very confusing and were mainly a result of what the 2 were told by the parties but not a product of their professionalism. I equally fail to understand why the 2 officers never produced the R.I.M in court or even a sketch showing where the boundary should be. I also take great exceptions to the 5th Defendant's witness Robert Torori's letter dated 24/2/2012 where he said that the exercise of fixing the boundary was postponed until the time when the mutation that was used to sub divide Nyansiongo Settlement Scheme/17 was found and the same reflected on the map. The dispute herein is the boundary between Nyansiongo Settlement Scheme/16 and Nyansiongo Settlement Scheme/17 and not what came out of Nyansiongo Settlement Scheme/17 which would have been advised by the mutation form. The problem of Nyansiongo Settlement Scheme/16 and Nyansiongo Settlement Scheme/17 can only be sorted out by the R.I.M in the Land Registrar's office and the Survey of Kenya. In any case, after the sub-division of Nyansiongo Settlement Scheme/17 where did the mutation forms go? They must have been registered with the land's office in order to prepare the resultant Title Deeds. Nobody explains where they are and why the said mutation caused the current confusion. I refuse to be convinced that the said mutation forms are not available. The absence of the forms is deliberate and the 2 offices, Land Registrar and County Surveyor respectively are the main authors of the confusion on the ground. Eventually, all the mutation forms were produced in court by the Defendants. They were registered on 29/7/2022 and filed in court in September 2014. Why were they not used in November 2020 during the visit to the *Locus in Quo* i.e. Nyansiongo Settlement Scheme/16 and Nyansiongo Settlement Scheme/17. In the premises I Order for Rectification of the register over and in respect of LR No. Nyansiongo Settlement Scheme/16 & 17 so that the 2 parcels of land are restored to their original positions before any transfer of any of them was executed and before any mutations were registered in respect of any of the 2 parcels of land and in accordance with the original Map. Since the confusion, as I have observed above, was caused by the 3rd Defendant, he will bear the costs of this Suit.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 9TH DAY OF APRIL 2024

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant - Brenda

Plaintiff's Counsel - Mr. Mulisa

The 1st Defendant Counsel

The 2nd Defendant Counsel - Mr. Soire

The 3rd Defendant Counsel

