



**Nyamboga v Nyakoe & another (Civil Suit 168 of 2015)  
[2023] KEELC 558 (KLR) (1 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 558 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
CIVIL SUIT 168 OF 2015  
M SILA, J  
FEBRUARY 1, 2023**

**BETWEEN**

**JEMIMAH MORAA NYAMBOGA ..... PLAINTIFF**

**AND**

**SISILIA NYAKOE ..... 1<sup>ST</sup> DEFENDANT**

**VINCENT MAOBE NYAKOE ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. This suit was commenced through a plaint which was filed on 7 May 2015. The plaintiff pleaded to be the registered proprietor of the land parcel West Kitutu/Bogusero/2234 (the suit land) having become so registered on 23 December 1975. She averred that she took possession and carried out various activities including planting eucalyptus trees. She pleaded that the defendants subsequently laid claim to the land and filed a suit before the Mosochi Land Disputes Tribunal, being Cause No. 54 of 2011, and obtained an award in their favour. The award was however quashed by the High Court in the suit Kisii HCCC Miscellaneous Application No. 98 of 2011 (JR). The plaintiff then reverted to the suit land. She pleaded that on 29 April 2015, the defendants entered the land and proceeded to cut down the trees on a substantial portion of the land leading the plaintiff to file a complaint at Rioma Police Station. She avers that they now occupy about one acre of the suit land. In the suit, the plaintiff seeks orders to be declared the lawful proprietor of the suit land, eviction of the defendants, a permanent injunction against the defendants, special damages of Kshs. 359,118/=, general damages for trespass, costs and interest.
2. The defendants filed a defence and counterclaim. They pleaded that the plaintiff obtained registration of the suit property by way of fraud, the particulars being that the registration was done without involvement of the defendants nor members of their family, that there was no sale agreement, that there was no consent of the Land Control Board, that no succession was done before subdivision, that the plaintiff has nothing to show ownership of the land, that there is nothing to show how the plaintiff



became registered as proprietor, and that her registration is illegal. They pleaded that the plaintiff never took possession, and if she did, her possession was not peaceful. They contended that the eucalyptus trees were planted by Christopher Nyakoe Nyakoe, late husband to the 1<sup>st</sup> defendant and father to the 2<sup>nd</sup> defendant. In the counterclaim, they pleaded that the 1<sup>st</sup> defendant's father in law, one Nyakoe (hereinafter Mzee Nyakoe, deceased) owned land which later came to be registered as West Kitutu/Bogusero/648 and 649 (hereinafter simply referred to as parcels No. 648 and 649). They averred that Mzee Nyakoe had two wives, the first being Kerubo Nyakoe and the second being Sanganga Nyakoe. Kerubo Nyakoe had three daughters, being Machoka Nyakoe, Nyamusi Nyakoe and Bitutu Nyakoe. On the other hand Sanganga had two sons and one daughter being, Christopher Nyakoe, Kerongo Nyakoe and Bisieri Nyakoe. They pleaded that parcel No. 648 was registered in the name of Sanganga, while parcel No. 649 was registered in name of Kerubo. They contend that it is not clear how the land changed from the name of Kerubo to Bitutu without succession being done. They aver that the parcel No. 648 was subdivided into parcel No. 2198 in name of Stephen Roman Kerongo (son to Kerongo Nyakoe) and parcel No. 2199 in name of Daniel Omayio Ogega. They claim that it is not clear how Daniel acquired the said land. They contend that the family of Christopher Nyakoe, where they come from, has been left out. In the counterclaim, they seek orders that the suit land be declared as belonging to them, or members of the large Nyakoe family, and for the plaintiff to be evicted and be permanently restrained from the suit land.

3. The plaintiff filed a reply to defence and defence to counterclaim and joined issue with the defendants.
4. The plaintiff testified that she is a retired police officer having retired in the year 1996. Her evidence was to the effect that Mzee Nyakoe subdivided his land amongst his two houses, so that the first house of Kerubo got the parcel No. 649, and the second house of Sanganga got the parcel No. 648. Kerubo had no sons, so she gave the parcel No. 649 to her daughter Bitutu. She (the plaintiff) and one Joseph Openda (who was her cousin) separately bought the land from Kerubo and Bitutu. On her part, she purchased 1.3 acres. At the time of purchase, Mzee Nyakoe had died. They did not have a written agreement. The title came into their joint names i.e Openda and herself. They later subdivided the land between the two of them so that each person gets his/her title. Her portion became registered as the suit land, that is parcel No. 2234. At the time the land was sold to her, there were some people on the land including Christopher Nyakoe, son of Sanganga. It will be recalled that Christopher is father to the 2<sup>nd</sup> defendant and late husband to the 1<sup>st</sup> defendant. The plaintiff stated that she got title and built a house but the defendants demolished it. She had Christopher arrested in 1979 and he was subsequently evicted through a court order. She held the position that what she purchased belonged to the first house, that of Kerubo, and that Christopher's and his family's entitlement is within the parcel No. 648 for this was what was allocated to his mother (Sanganga) by Mzee Nyakoe. She testified that the children of the second house want her to vacate this land. She denied purchasing the land illegally and pointed out that she bought the land from those who held the title deed.
5. The defendants on the other hand called three witnesses. DW-1 was Vincent Maobe Nyakoe, the 2<sup>nd</sup> defendant. He is son of Christopher Nyakoe and the 1<sup>st</sup> defendant. His evidence was that they used to live in the parcel No. 649 since birth but they moved to the land registered in name of Roman Kerongo after the plaintiff demolished their houses and uprooted their coffee and sugarcane. He stated that when Mzee Nyakoe died, he left them on this land and that the trees were planted in 1972 and 1973. He stated that Bitutu got married and moved out of the suit land. He contended that before she died, he had gone to look for her and that she told him that she only sold part, and not the whole land. She promised to show him what was left but died before she could do so. In the year 2015, the plaintiff caused him to be arrested and he was charged in court but acquitted. He wants the court to nullify the title of the plaintiff and also title to parcel No. 2233. Cross-examined, he acknowledged that Mzee Nyakoe (his grandfather) had two wives, Kerubo and Sanganga. He affirmed that Kerubo



had three daughters including Bitutu. He acknowledged that Sanganga (his grandmother) became registered as proprietor of the parcel No. 648 on 28 July 1976. He however denied that his father's share is within this parcel of land and contended that his father's share is within the old parcel No. 649. He agreed that Bitutu became registered as proprietor of the parcel No. 649 on 25 May 1975. The title was then transferred to Joseph Openda and the plaintiff on 25 December 1975. On 3 April 1979, the title was closed on subdivision to the parcels No. 2233 and 2234. He acknowledged that his mother filed a claim before the Land Disputes Tribunal in 2011 which held that the land should revert back to Mzee Nyakoe. He was aware that this decision was quashed by the superior court and no appeal to the Court of Appeal was filed. They also filed Kisii HCCC Petition No. 12 of 2014 claiming the same land but which suit was struck out. The land they currently live in is parcel No. 2198 in name of Roman Kerongo, who is his cousin.

6. DW-2 was the 1<sup>st</sup> plaintiff. She is wife to Christopher Nyakoe. She stated that she has eight children. She testified that the plaintiff demolished their house which was on the suit land while her husband was away at work in Kisumu. When he came back he had him arrested. Thereafter they moved to a portion of land belonging to Sanganga's last born son, Kerongo Nyakoe (now deceased). It is on this land that she still resides with her son, the 2<sup>nd</sup> defendant. She denied that Mzee Nyakoe subdivided his land to his two wives as parcels No. 648 and 649. She claimed that the trees in issue were planted by her late husband, Christopher.
7. DW-3 was Samwel Nyakoe Ontiri. The 1<sup>st</sup> defendant is his cousin. He testified that he used to live on the land helping the 1<sup>st</sup> defendant until the plaintiff came to the land in 1977 and demolished their houses. He also claimed that the trees on the land were planted by Christopher.
8. DW-4 was Eunice Nyaboke Nyakoe who is daughter to the 1<sup>st</sup> defendant and brother to the 2<sup>nd</sup> defendant. She is the first born in the house. She was in class 5 when their house was destroyed. Her father was not there but when he came back he was arrested. At that time she was young and did not know what was happening. She also stated that the trees on the land were planted by her father. She has two brothers who live in neighbouring land. She denied that Mzee Nyakoe distributed his land to his two wives.
9. With the above evidence, the defendants closed their case.
10. I invited counsel to file submissions, which they did, and I have taken account of the same before arriving at my decision.
11. The history of the land is well articulated in the pleadings and in the evidence of the parties but I think it is worth repeating. Mzee Nyakoe owned the larger parcel of land from where the suit land was hived off before it was adjudicated and registered. He had two wives, Kerubo and Sanganga. Mzee Nyakoe subdivided the land that he owned into two portions, one which he assigned to his first wife, Kerubo, and the second portion to his second wife, Sanganga. These two portions are what became registered as parcels No. 648 and 649. Kerubo did not have any sons but bore three daughters. There was evidence led that two of her daughters died, leaving only Bitutu. Kerubo must have been comfortable with the land that was assigned to her being registered in name of her daughter, Bitutu, for the record shows that Bitutu is the first registered proprietor of the parcel No. 649, having become so registered on 25 May 1975. Bitutu got married, and I think owing to that fact, she opted to sell the parcel No. 649 and move out of the land. She sold it to Joseph Openda and the plaintiff in separate transactions. This parcel No. 649 was then transferred to the name of Joseph Openda and the plaintiff, and they became registered as joint proprietors on 23 December 1975. They later subdivided the land so that each could have distinct title for his/her own portion. The parcel No. 649 was hence subdivided into the parcels No. 2233 and 2234, the former being registered in the name of Joseph Openda, and the latter in the



name of the plaintiff on 3 April 1979. The plaintiff moved to take possession of her land and evicted the occupants, who appear to have been Christopher and his family, and it is Christopher's same family which comprises the defendants herein. This was about the year 1979 or thereabouts. After they were evicted, they moved to land where Christopher's mother was staying, which I believe is the original parcel No. 648. Matters appeared to have rested until the family of Christopher started agitating for the land around about the year 2011 and the 1<sup>st</sup> defendant filed a claim before the Mosocho Land Disputes Tribunal, being Claim No. 54 of 2011. I have seen that in her evidence before the tribunal, Sisilia, the 1<sup>st</sup> defendant, averred that they were asking for the suit land because Kerubo's house got land that was bigger than that given to the second house of Sanganga. They wanted it surrendered so that it can be divided equally. They succeeded before the Tribunal but this award was quashed by this court in a judgment delivered on 27 September 2013, in Kisii HCCC Miscellaneous Application No. 98 of 2011. Despite this judgment, the defendants continued agitating for the land and moved in. They cut trees and commenced some cultivation which led the plaintiff to file this suit.

12. It is claimed by the defendants that the plaintiff obtained registration of the land through fraud. In their pleadings, it will be recalled that the defendants claimed that the plaintiff obtained registration by fraud as the family of the defendants was not involved, and that no succession was done. In my opinion, the family of the defendants need not have been involved as the land did not belong to them as this was land registered in name of Bitutu. On the claim that no succession was done, there needed to be none. The land was registered in the name of Bitutu and she sold the land while she was still alive. There is thus no succession to talk about before the transfer of the land to the plaintiffs. If the defendants are talking about succession of the estate of Mzee Nyakoe, then they are mistaken, as Mzee Nyakoe already distributed his estate to Kerubo and Sanganga, and there was nothing left for purposes of succession. I have assessed how the plaintiff acquired the land and I have found no evidence of fraud. The plaintiff purchased the land together with Joseph Openda from the previous registered proprietor, who was Bitutu. The plaintiff is an innocent purchaser for value. I in fact wonder why the defendants contend that the plaintiff got registered by way of fraud yet they do not seem to have any issue with the manner in which Joseph Openda also got proprietorship, despite the registration of the plaintiff being done simultaneously with that of Joseph Openda.
13. From what I see, the agitation by the defendants for the suit land is anchored on the contention that Mzee Nyakoe did not subdivide his land equally between his two wives. It is true that Mzee Nyakoe did not subdivide his land equally between his two houses but this is no basis for the defendants seeking title to the plaintiff's land. We may never know the wisdom behind Mzee Nyakoe's distribution of land amongst his two houses but that was his wish. I have no evidence before me that anybody complained about the manner in which Mzee Nyakoe distributed his land when Mzee Nyakoe was still alive. The defendants belong to the house of Sanganga who were assigned the land parcel No. 648. There is no evidence that Sanganga ever complained about the way Mzee Nyakoe apportioned land between his two wives. Indeed, I can see that Sanganga proceeded to take over the parcel No. 648 and even subdivided it into two parcels, being parcels No. 2198 and 2199, and she sold the latter to a Mr. Daniel Omayio Ogega. Even Christopher, son to Mzee Nyakoe and Sanganga, never filed any suit against his father, or against the plaintiff or Joseph Openda, claiming any portion of the parcel No. 649. In fact, it appears that the defendants starting contending that they have rights over the suit land after the death of Christopher. My view is that if the defendants have any rights, then it will be within the land parcel No. 648, not within the land parcel No. 649, or its subdivisions which include the suit land. I am aware that in their pleadings they contend that they do not know how Daniel Omayio purchased part of the parcel No. 648 but that is not a matter within the purview of this suit.
14. Counsel for the defendants, in his submissions, attempted to attack the title of the plaintiff by claiming that she has not produced any sale agreement or consent of the Land Control Board. He also submitted



that the defendants cannot be evicted because they were born on the land. These submissions hold no water. The sale of the land to the plaintiff is not contested. In any event, there was no complaint coming from Bitutu that she never sold the land. Whether or not there is a written contract, or even consent of the Land Control Board displayed, is completely immaterial for the circumstances of this case. Even assuming that there were lapses (and I have found none) the defendants would have no locus to raise them as they have no rights over the land. It is like claiming that my neighbor has no title because he does not have a sale agreement, yet I have no right over my neighbour's land. On the issue that the defendants were born on the land, the fact that one is born on certain land does not make that land his by right. Rights to land are not acquired because one has been born on the particular land. If that were so, we could all claim the land in the hospitals that we were born in, or claim land where we were raised even if our parents were only tenants. It was also contended that the defendants have all along been on the land. That is not what the evidence shows. Even the defendants themselves acknowledged in their evidence that they were evicted in the year 1979. They only came back to the land after the Land Disputes Tribunal had ruled in their favour, and this is just about the year 2015 before this case was filed. It cannot be argued that they were in continuous occupation of the land and that the claim of the plaintiff is therefore time barred. In fact, if the defendants had any right (and for the avoidance of doubt I have found that they have no right over the suit land) it is their claim which would be time barred by dint of section 7 of the *Limitation of Actions Act*, which provides as follows :-

1. Actions to recover land

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person

15. Assuming that they had any right to the suit their claim would be time barred, coming more than 12 years after the plaintiff had obtained registration in her name. It will be recalled that the plaintiff first became registered as proprietor of the parcel No. 649 jointly with Mr. Openda in the year 1975, about 40 years to the filing of their counterclaim herein. The plaintiff got title to the suit land in the year 1979. This counterclaim of the defendants is filed in the year 2015, more than 35 years after the plaintiff has obtained title. Thus, if the defendants had any right to the land, their right of action accrued, latest, in the year 1979 and they are therefore well out of time.
16. Counsel for the defendants also made reference to the *Matrimonial Property Act*, Act No. 49 of 2013, as giving the defendants mandate to contest the manner in which Mzee Nyakoe subdivided his land. It doesn't help the defendants. The *Matrimonial Property Act*, 2013 was not there in the year 1975 when Mzee Nyakoe distributed his land to his two wives and reference to it is completely misplaced.
17. There was a big issue raised about trees on the land especially the mature the eucalyptus trees. The plaintiff of course accused the defendants of unlawfully cutting these trees. The rejoinder of the defendants was that these were trees planted by their late father and they have a right over them. Whether or not the trees were planted by Christopher does not give the defendants any right to them. Trees are affixed to the land and the principle of *quic quid plantantur solo solo cedit* applies, that is whatever is affixed and attached to the land goes with the land. In other words, so long as it is the plaintiff who is entitled to the land, she is also entitled to all plants, trees, and everything that is on the soil that comprises that land, and this is irrespective of whoever planted them. The defendants have absolutely no basis for cutting down these trees or claiming the same.
18. The plaintiff has displayed title to the land. The evidence demonstrates that she purchased the land. I have seen no evidence of any fraud in the manner in which she obtained registration of title from Bitutu Nyakoe. As I have mentioned earlier, no complaint was ever raised by Bitutu or her successors



in the manner in which the plaintiff and Joseph Openda got title. As registered proprietor of the suit land, it is the plaintiff who is the one who is entitled to exercise proprietary rights over the suit land. This is enshrined in section 24 of the [Land Registration Act, 2012](#), which provides as follows :-

24. Interest conferred by registration.
- Subject to this Act -
- a. the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
  - b. the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.
19. From the above, it is the plaintiff who is vested with all rights over the suit land. These rights include the right of ingress and egress, the right of use, and the right to profit from the produce of the land including trees or other vegetation therein. The defendants have not demonstrated any right over the suit property and they are trespassers. In the event that they are still in occupation of part or the whole of the land, I issue an order for them to vacate the said land, and to do so no later than 30 days from the date hereof. In default they be evicted from the land. The defendants and/or their servants/agents or other persons claiming under them, are also hereby restrained by an order of permanent injunction from entering, cultivating, harvesting trees or in any other way dealing with the suit land.
20. In the suit the plaintiff claimed special damages of Kshs. 359, 118/= being Kshs. 341, 412/- as value of the cut trees and Kshs. 17,706/- being assessment fees. I have seen the assessment report which valued the trees and also the receipt paid for assessment. Thus this claim is not only pleaded but also proved. I proceed to award the special damages in the sum of Kshs. 359,118/= jointly and severally against the defendants. This amount to attract interest from the time that this suit was filed to the time that full payment will be made.
21. The plaintiff also sought general damages for trespass. The defendants had no right to enter the land. In fact, they appear to me to have done so by force and not by any order of court. They were aware that the decision of the Land Disputes Tribunal which was in their favour had been quashed. Without moving court for an order to have the land, they instead opted to move in by force. Such conduct cannot be condoned. They will therefore pay general damages for trespass, which I assess at Kshs. 300,000/= payable jointly and/or severally by the defendants. This amount to attract interest from the time of this judgment till payment in full.
22. There is no substance in the counterclaim and it is hereby dismissed.
23. Costs will follow the event. I award costs of this suit and also of the counterclaim to the plaintiff in the main suit, jointly and/or severally against the defendants, at court rates, and the same to attract interest from the date of this judgment till satisfaction in full.
24. Judgment accordingly.

**DATED AND DELIVERED THIS 1<sup>ST</sup> DAY OF FEBRUARY 2023**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**



AT KISII

