



**Gichana & 2 others v Mogoi & 3 others; Angwenyi (Applicant) (Environment & Land Case 110 of 2021) [2023] KEELC 17249 (KLR) (8 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17249 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA  
ENVIRONMENT & LAND CASE 110 OF 2021**

**JM KAMAU, J**

**MAY 8, 2023**

**BETWEEN**

**AGNES MORAA GICHANA ..... 1<sup>ST</sup> PLAINTIFF**

**AGNES MORAA GICHANA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**CHARLES GICHANA ANGWENYI ..... APPLICANT**

**AND**

**GRACE MORAA MOGOI ..... 1<sup>ST</sup> DEFENDANT**

**GRACE MORAA MOGOI ..... 2<sup>ND</sup> DEFENDANT**

**FRANCIS NYAGAKA ONCHOKA ..... 3<sup>RD</sup> DEFENDANT**

**FRANCIS NYAGAKA ONCHOKA ..... 4<sup>TH</sup> DEFENDANT**

**AND**

**CHARLES GICHANA ANGWENYI ..... APPLICANT**

**RULING**

1. Following the Judgment read and delivered in court on 05/12/2022 and the same condensed in the Decree issued on 14/02/2023 as follows: -
  1. The upshot of the above is that all the transactions effected on Gesima Settlement Scheme/107 and is subsequent divisions between 14/03/ and 24/11/2014 were all made contrary to court orders in Kisii High Court Miscellaneous Civil Application No. 12 of 2001 that the Land Registrar, Nyamira do cancel all the entries made between 14/03/2001 and 24/11/2014 (inclusive) and since 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.

2. The Court declared the Plaintiff the bona fide proprietor of the parcel of land known as Gesima Settlement Scheme/ 107. As to the parcel of Land L.R. NO. Gesima Settlement Scheme/887 the same having been cancelled just as the other 10 sub-divisions that were curved out of Gesima Settlement Scheme/107 the Title Deed should be surrendered to the Land Registrar, Nyamira forthwith.
  3. 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, construction, wasting or otherwise howsoever manner interfering with Land Parcel No. Nyansiongo Settlement Scheme/107
  4. A declaration that Land Parcel Number Nyansiongo Settlement Scheme/887 does not exist and the County Land Registrar – Nyamira County be directed to cancel or close the register.
  5. Costs and interest.
2. On 20/12/2022, the Defendants/Judgment Debtors applied to this court for the following orders: -
    - a. That the Application be certified urgent and the same be heard *ex-parte* at first instance.
    - b. That pending the hearing inter-partes of this Application there be a stay of execution of the Decree/Judgment dated 05/12/2022.
    - c. That there be a stay of execution of the Decree/Judgment dated 05/12/2022 of this court pending the hearing and determination of the intended appeal.
    - d. Costs of this application be provided for.
  3. The grounds upon which the Application is made are that the Applicants intend to appeal against the Judgment of 05/12/2022 and that the Defendants are apprehensive that they stand a serious risk of eviction if the Decree is not stayed and that the developments carried out on the suit land where the Applicants have settled since 2001 stand the risk of destruction.
  4. The 2<sup>nd</sup> Defendant depones that he stands the risk of being evicted from the suit land. He claims that “they” have been in occupation of part of the suit land since 2001 and have erected a homestead comprising of permanent and semi-permanent structures and that there is a tea farm and trees thereon and the other portion is set aside for grazing. However, he does not say who planted the trees and tea. He says that if the 2 are evicted from the suit land, then they stand to suffer serious loss and undue hardship and also that the intended appeal would be rendered a mere academic exercise.
  5. In the response and opposition to the Application through the Replying Affidavit sworn on 20/02/2023, the Decree Holder depones that she is the one who planted the tea bushes and trees on the suit land and that she is the current registered holder of the suit land and further that the Applicants have not provided security for the due performance of the Decree.
  6. It is interesting to note that the 2<sup>nd</sup> Defendant is the one swearing the Supporting Affidavit in support of the Notice of Motion seeking the stay yet the Decree is mainly against the 1<sup>st</sup> Defendant who claimed to be the registered owner of the suit land together with her 2 children and indeed the cancelled certificate of Title reveals so. The 2<sup>nd</sup> Defendant only comes in as the person who takes care of the said land. He also doubles as the 1<sup>st</sup> Defendant’s father. I am yet to understand why the 1<sup>st</sup> Defendant is not the one swearing the Affidavit.



7. Both parties filed written Submissions which I have considered. It is important to note from the onset that the parcel No. L.R. NO. Nyansiongo/settlement/887 does not exist at all. The same was cancelled and reverted to Gesima Settlement Scheme/107 and ceased to exist on 24/07/2002. Anybody holding a Title Deed to the same is in possession of just a piece of paper. Where the Defendants occupy today is part of Gesima Settlement Scheme/107 over which they seek stay of execution pending appeal in the court of Appeal of Kenya.
8. It is the Applicant's Constitutional right to file an Appeal against the Judgment. The party filing appeal must always try to cushion himself against any loss as he pursues his appeal lest it ends up becoming an academic exercise should he win. However, an intending Appellant must ensure that the subject matter he is pursuing remains intact until the appeal is heard and determined. This is what the Applicants are seeking in this Application.
9. Unfortunately, the import of the Supporting Affidavit of the 2<sup>nd</sup> Defendant is that he in particular should remain on the portion of the suit land he occupies today and continue picking the tea thereon which he has not said was planted by himself or his Co-Defendant. On the contrary, the Respondent has deponed that she is the one who planted the tea bushes before the 2<sup>nd</sup> Applicant took possession of the land.
10. It is important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question or of the failure to do so. In other words, the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. I am therefore unable to grant the prayer of non-eviction. However, the Applicants are hereby granted 30 Days from today to vacate from the suit premises.
11. The only thing I am prepared to do is to order that the Decree Holder does not dispose of the portion occupied by the Defendants i.e. the 5.5 Acres out of parcel No. Gesima Settlement Scheme/107. Since the 5.5 Acres occupied by the Defendants is part of the bigger portion of land and it is on record that there have been confrontations in the past, it is to be anticipated that the 2 parties cannot exist harmoniously in the same neighbourhood. This is informed by the behaviour of the Defendants herein who in spite of a court order, they still went ahead to bury the body of the late Peter Mogoi on the suit land.
12. As to the body of the late Peter Mogoi on the suit land, even without going into other fears, the idea of exhuming a body is very painful to say the least and the same should await the final result of the ultimate appellate Court. If the Decree Holder proceeds in execution of the Decree at hand and the deceased's body exhumed and buried elsewhere and then the Applicants succeed on appeal, then it means that the body may have to be exhumed for the second time to be reburied where it is lying now. And I don't know what would happen if the Appellants are successful in the instant appeal and then this Court's Decision is upset by the Court of Appeal on a second Appeal. We should respect the departed and I order that the Respondent does not interfere with the grave of the deceased and/or the body therein until further orders of the court. The said grave should be left intact but should the Applicants wish to visit it for whatever reasons, they Must seek orders from the court to do so. I also wish to warn the parties herein that to exhume the body from the land, a court order is requisite.

**RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 8TH DAY OF MAY 2023.**



**MUGO KAMAU**

**JUDGE**

**In the Presence of: -**

**Court Assistant: Sibota**

**Plaintiff: Mr. Gichana holding brief for Mr. Momanyi**

**Defendants: Mr. Soire**

