



**Meshack v Ongondi (Environment & Land Case 18 of 2021)
[2023] KEELC 18018 (KLR) (5 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18018 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT & LAND CASE 18 OF 2021**

MD MWANGI, J

JUNE 5, 2023

BETWEEN

ENOCK OBURA MESHACK PLAINTIFF

AND

HUDSON ATUTI ONGONDI DEFENDANT

JUDGMENT

1. This is a case of trespass. The plaintiff, the registered proprietor of west mugirango/Siamani/5195 measuring 0.44 Hectares claims that in 2008 the defendant trespassed onto the plaintiff's parcel of land and started developing it without the plaintiff's permission. The plaintiff accordingly prays that this court grants him vacant possession of the land, besides declaring the suit land his in addition to a permanent injunction and mesne profits against the defendant. He also prays that the defendant be declared a trespasser thereon. Upon filing the suit the court, on 20/03/2014 issued an order pending the hearing and determination of the suit, restraining the defendant from ploughing, transferring, constructing or in any other way dealing with the land in any manner that may waste the said parcel of land.
2. On 01/11/2016, the defendant filed a statement of Defence denying the plaintiff's claim and averred that he has confined his activities on West Mugirango / Siamani/5994 and that the plaintiff made similar complaints to the police as a result of which the defendant was arraigned in court in Nyamira Criminal Chief Magistrate's Court being Criminal Case No. 771 of 2014 but the defendant was acquitted under section 210 of the [Criminal Procedure Code](#). He therefore prays that the suit be dismissed with costs. The plaintiff consequently filed a Reply to Defence reiterating his earlier averments in the Plaint. On 14/12/2021 the plaintiff was granted leave to amend the Plaint introducing the fact that he bought the suit property from one Hokaya Joel Konasi who had bought the property at a Public auction and obtained all the requisite consents and took possession of the same but while he was away for studies in the USA, the defendant did trespass on a part of the land measuring approximately 0.022 Hectares claiming to be his and even obtained a Title Deed for West Mugirango/



- Siamani /5994 that annexed this portion but the Land Registrar demanded the said Title Deed to be returned for cancellation. The defendant failed to return it.
3. The matter came up for hearing on 21/07/2022, when the plaintiff reiterated the averments in the amended Plaintiff and repeated the facts in his written statement and the further statement. He said that he bought West Mugirango/Siamani/ 5195 from Kokaya Joel Konasi the latter having bought it in a public auction in 2004. Before buying it he exercised due diligence. He also obtained the vital consents from the relevant authorities. The land had clearly demarcated boundaries and he immediately took possession. But when he came back to the country in 2009 having left for studies in the U.S.A in 2008 he found that the defendant had annexed 0.022 Hectares of the suit land into his West Mugirango/ Siamani/5994, demolished his permanent house and put up semi-permanent structures. The Land Registrar found that the defendant had encroached onto the plaintiff's land and asked him to return his Title Deed vide letter dated 19/05/2011 for cancellation which the defendant declined. The plaintiff claimed that the defendant had acquired title to West Mugirango/ Siamani/5994 fraudulently. To support his case, the plaintiff produced the following documents:
- i. Public Auction from Lifewood Auctioneers (K) Ltd.
 - ii. Certificates of Sale.
 - iii. Request for an order the Land Registrar Nyamira from Lifewood Auctioneers.
 - iv. Court order dated 22nd day of September, 2005.
 - v. Court order dated 6th day of April, 2005.
 - vi. Transfer of Land to Hokaya Joel Kanasi by the court.
 - vii. Transfer of the land by Hokaya Kingi Kanasi to the plaintiff herein Meshack Obuba.
 - viii. Title deed for Enock Obuba Meshack and a copy of search to that effect.
 - ix. Letter from the assistant Chief Siamani Sub-Location dated 17th day of May 2011.
 - x. Letter from the Ministry of Lands and Settlement dated May 19, 2011 calling for the surrender of title for West Mugirango/Siamani/5194.
 - xi. Surveyors Report prepared by Benard N. Motanya.
 - xii. Copy of Title Deed.
 - xiii. Copy of Survey Map for West Mugirango/Siamani/5195, 5196, 5197 Sheet 8.
 - xiv. Copy of green card for West Mugirango/Siamani/5195.
 - xv. Sketch plan for 5195.
 - xvi. Order of the court issued on March 20, 2014.
4. To support his case, Mr. Obuba produced a copy of the Title Deed in respect of West Mugirango/ Siamani/5195, a copy of search certificate dated 20/12/2013 confirming the land to be his and to be measuring 0.044 Hectares, photographs to show the development of the land and 2 copies of letters from the Land Registrar for surrender. He also produced a copy of his passport showing that he was out of the country when the defendant trespassed on his land.
5. On cross-examination by Mr. Okemwa for the defendant, Mr. Obuba said that he bought the land for Kshs. 286,000/= from Hokaya Kingi Kanasi which had a permanent house and that at the time of



- the purchase, the defendant was not in the neighbourhood. There were no bananas and no eucalyptus trees on the land. There was nappier grass and that it is true that the defendant had been acquitted of the offence of trespass.
6. On re-examination by Mr. Wesonga, the plaintiff said that the parcel of land is indicated in the 1993 Map. It had originated from Number 4740, that was sub divided into West Mugirango/Siamani/5195, 5196 and 5197. The Title to the suit land was deposited in court by Henry Mosiere who jumped bail and disappeared as a result of which the land was auctioned.
 7. After the close of the plaintiff's case the defendant, Hudson Atuti Ongondi testified that he bought West Mugirango/Siamani/5994 from Evans Henry Mosiere sometime in 2007 and he immediately took possession of the same after being shown its clearly marked boundaries. He says that he has not trespassed onto the plaintiff's land. He then produced a copy of his Title Deed for West Mugirango/Siamani/5994, letter of consent from the Land Control Board - Nyamira, an Application for the same and a copy of official search confirming the land, measuring 0.025 Hectares to belong to him.
 8. On cross-examination, the defendant said that he did not bring the Sale Agreement to court though he is in possession of one. He testified that he bought the land from One Evans Henry Mosiere and it was registered in his name in 2011. The land measures 25 x 100 feet 0.026 Hectares and he started living on it in 2000 before acquiring the Title Deed in 2011. On re-examination by his counsel, the defendant said that he settled on his land before the plaintiff took possession of his. The defendant's witness, Jephthar Atuya testified that he knows where the defendant's land is situated and that it has clearly marked boundaries and that the defendant has not trespassed onto the plaintiff's land. He also stated that the land is West Mugirango/Siamani/5994. On cross-examination, the witness who says he is now 73 years claimed to have lived in the neighbourhood, about 100 metres away since he was young and that the defendant joined the neighbourhood in 2000. Evans Mosiere, who sold the land to the defendant is the witness' cousin and he was present when the sale transaction was taking place. He also said that he has never seen the plaintiff nor does he know where his land is.
 9. Mr. George Kariuki Maina, Land Registrar, Nyamira brought Register file for West Mugirango/Siamani/5195 whose owner is Enock Obura Meshack, the plaintiff since 6/6/2007. The acreage is 0.044 Hectares and is a sub division of West Mugirango/ Siamani/4740 that was created on 10/03/1999. But West Mugirango/Siamani/5994, also a creation of West Mugirango /Siamani/4740 was created on a date that is not indicated in the Register. Its acreage is 0.0275 Hectares. It is jointly owned by Ronald Makori Atembo and Judy Mogori Okong'o. The Title Deed was issued on 12/04/2016. Hudson Atembo was the 1st registered owner of 5994 on 12/04/2008. Mr. Maina produced a letter from the land's office dated 19/05/2011 addressed to the defendant and asking him to surrender the Title to the land's office since it is a product of fraud. Mr. Maina stood by this position. On cross-examination, Mr. Maina said that only a blind Land Registrar would issue a Green Card in respect of West Mugirango/ Siamani/5994. But West Mugirango/Siamani/5195 is a clean Title. Another Title Deed was issued in 2016 in respect of West Mugirango/ Siamani/5994 to Ronald Makori Atembo and Judith Mogori Okong'o by Land Registrar Mr. Bosire. The Land Registrar Mr. Maina says that the Title Deed for West Mugirango/Siamani/5994 is suspect because the date it was opened is not indicated, it purports to be a sub division of parcel No. West Mugirang / Siamani/4740 yet the latter was sub divided on 24/02/1999 and the only resultant parcels were 5195, 5196 and 5197. 5994 was not one of them. And also the registration of Hudson Atembo as the first proprietor is irregular since it doesn't show how he became the owner thereof. Mr. Maina says that when they discussed the fraud in 2011 the register was withdrawn, so that no further registrations/transactions could be entertained. The land West Mugirango/ Siamani/5994 does not exist at all.



10. Having heard both parties, it is clear that the defendant's parcel of land West Mugirango/Siamani/5994 is suspect. It is not indicated in the parcel file when it was created or opened. It purports to be a sub division of West Mugirango / Siamani/4740 yet the parcel file for West Mugirango/Siamani/4740 which was opened on 24/02/1999 has title numbers West Mugirango/ Siamani/5195,5196 and 5197. Title number West Mugirango/ Siamani/ 5994 is not one of them. It does not show how Hudon Atembo, the 1st registered proprietor became owner thereof. When the same was discovered to be a result of fraud, the Land Registrar, Nyamira recalled the Title Deed from the defendant but who never returned the Title deed.
11. Curiously, the parcel file at the lands office immediately disappeared. The Land Registrar having concluded that the parcel number West Mugirango/Siamani/5994 does not exist at all yet he is the custodian of all land documents for all parcels of land in Nyamira County, the court cannot find otherwise. I will believe the plaintiff's case that Title No. West Mugirango/Siamani/5994 was created in the air and then superimposed on part of the plaintiff's land and I therefore find in favour of the plaintiff and grant him Judgment as prayed for in the Plaint dated 09/01/2014. I also award him the costs of the suit.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 5TH DAY OF JUNE 2023.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Sibota

plaintiff: N/A

defendant: N/A

