



**Oichoe & another v Gera & another (Environment & Land Case  
834 of 2016) [2023] KEELC 20290 (KLR) (3 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20290 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND CASE 834 OF 2016**

**M SILA, J**

**OCTOBER 3, 2023**

**BETWEEN**

**SAMWEL MISATI OICHOE ..... 1<sup>ST</sup> PLAINTIFF**

**JOSHUA MOGUSU OICHOE ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**CHARLES MAYAKA GERA ..... 1<sup>ST</sup> DEFENDANT**

**HENRY MOSOTI GERA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**A. Introduction and Pleadings**

1. The plaintiffs commenced this suit through a plaint filed on 21 May 2012 wherein they sued one Maria Nyaitondi Gera (Maria) as the sole defendant. In that plaint, the plaintiffs pleaded that they are the proprietors of the land parcel Majoge/Boochi/4658 (the suit land). They averred that Maria was the proprietor of the land parcel Majoge/Boochi/428 but complained that she had trespassed and occupied the whole of their land. In the suit, they inter alia asked for orders for her eviction. Maria filed a defence on 27 June 2012. In it, she pleaded that she had purchased the disputed land from one Michael Misati in 1970 when it was registered as land parcel Majoge/Boochi/4206 measuring 0.22 Ha. She contended that this land was secretly subdivided on 11 August 2011 and registered in the names of the grandsons of the said Michael Misati. She averred that she had done extensive developments on the suit land and had mature tea which she delivered to Ogembo Tea Factory on harvesting. She pleaded that she had filed the case Kisii HCCC No 189 of 2012 (OS) seeking title to the suit land by way of adverse possession. Maria died shortly thereafter on 30 September 2012. There was no substitution and the matter lay quiet until 9 July 2015 when the plaintiffs filed an application dated 24 June 2015 seeking leave to amend the plaint. In that application, the plaintiffs pointed out that they had sued Maria for trespass but she died and the trespass abated. They contended that the sons of Maria had subsequently



trespassed into the land. They wished to amend the plaint to now have the said sons as defendants in the suit. The application to amend was allowed and an amended plaint was filed on 25 September 2015.

2. The amended plaint struck out the name of Maria from the suit and now sued Charles Mayaka Gera and Henry Mosoti Gera as the new defendants. In the amended plaint, it is pleaded that after Maria died, the trespass abated but on 4 June 2015, the new defendants entered the suit land and started cultivating it. In the amended plaint, the plaintiffs seek the following orders (slightly paraphrased for brevity) :-
  - i. Declaration that they are the lawful and registered proprietors of LR No Majoge/Boochi/4658.
  - ii. An order of eviction do issue against the defendants from the suit land.
  - iii. A permanent injunction against the defendants to restrain them from the suit land.
  - iv. General damages for trespass.
  - v. Costs of the suit.
  - vi. Interest on (iv) and (v) above.
  - vii. Such further relief that the court may deem fit and expedient to grant.
3. On 11 April 2016, the plaintiffs withdrew the suit against the 2<sup>nd</sup> defendant Henry Mosoti Gera leaving Charles Mayaka Gera as the sole defendant. I will refer to him hereinafter as ‘the defendant’.
4. No appearance nor defence was filed by the defendant and on 23 April 2018, the matter proceeded for hearing ex parte before Mutungi J, when the 1<sup>st</sup> plaintiff testified. Upon hearing his evidence, the good judge thought that the issue may relate to a boundary dispute between the land parcels Majoge/Boochi/4658 and Majoge/Boochi/428. He made an order for the Land Registrar and District Surveyor Kisii to visit the ground and make a report. The ground was duly visited on 18 July 2018 and a report dated 25 July 2018 was filed. That report more or less provided that there is no visible boundary between the two land parcels and that they have literally been reduced into one on the ground. The report also observed that the ground area is 0.47 Ha which was more than the combined registered area of the two parcels (the title to the suit land ie parcel No 4658 reads 0.22 Ha whereas the title to the parcel No 428 reads 0.4 Ha). That report further recommended that the registers of the two parcels should be amended so as to read 0.27 and 0.2 Ha respectively.
5. Before directions could be taken on the way forward, given that report, the defendant filed an application dated 17 September 2018 through the law firm of M/s Nyagaka, Mosota, Isaboke, Kerosi Ondieki & Associates Advocates, seeking orders to set aside the proceedings of 23 April 2018 and also suspend the report of the Land Registrar on the basis that it was compiled without the defendant’s involvement. The application was heard and ruling delivered on 27 September 2019. The final orders made were as follows :-
  - i. The order issued on 23 April 2018 directing the Land Registrar and Surveyor Kisii County to delineate and fix the boundaries between land parcel Majoge/Boochi/428 and 4658 was set aside.
  - ii. The report by the Land Registrar and Surveyor dated 25 July 2018 was set aside and ordered expunged from the record.
  - iii. The suit be heard afresh on merits.



- iv. Each party to bear their own costs of the application.
6. It will be observed from the above that the court directed the matter to be heard afresh and expunged the report dated 25 July 2018.
7. On 29 May 2021, the law firm of M/s Nyagaka, Mosota, Isaboke, Kerosi Ondieki & Associates Advocates, filed, on behalf of the defendant, a list of documents and a list of witnesses with witness statements attached. Still, however, no defence was filed on behalf of the defendant.
8. It is on the above foundation that the matter proceeded for hearing.

## **B. Evidence of the Parties**

9. The plaintiff testified on 17 March 2021 before my predecessor, Onyango J. He testified that they had filed suit against Maria owing to her trespass and that they thereafter sued Charles and Denis. He testified that the suit land, parcel No 4658, was originally registered in the name of his grandmother, Nyambaba Misati who transferred the parcel to them (plaintiffs). He testified that before Maria died in September 2012, she was using the whole of the suit land without their consent. He stated that they have never used the land since 2011 (sic) and have suffered loss. Cross-examined, he affirmed that the defendants were registered as proprietors of the land parcel No 428 since 1984 and that it measures 0.4 Ha. He himself was born in 1982. He acknowledged that there was tea on the disputed land which the defendants are plucking. He thought that it was his grandmother who planted the tea but he never saw her nor his father pluck this tea. He also affirmed that there are houses therein belonging to Charles and that there are grevillea and blue gum trees. He did not know who planted these trees. He explained that the suit land was a subdivision of parcel No 4206 which was subdivided into the parcels No 4656, 4657 and 4658. He was not present when the mutation was done as it was prepared by his late grandmother. His father is Thomas Oichoe Misati and he belonged to a religion which thought that the world is coming to an end. He acknowledged that he sold a portion of his land before and after the year 2000 though he denied that any portion of the suit land was sold by their father. He was cross-examined on the report of 25 July 2018 but denied that they are claiming land that does not exist on the ground. He affirmed that there was a road separating where they stay and the land where there is grown tea, which tea is picked by the defendant. Re-examined, he affirmed that this tea is on the suit land.
10. In his evidence, the defendant confirmed that he was son to the late Maria and that Maria held the title to the land parcel No 428 which is a first title upon adjudication. She purchased it from one Ondara Misati. He testified that they lived on this land since their mother got title in the year 1984 and that this land is on the upper side of the road. They have never subdivided the land. He testified that on this land they have their houses, toilets, wells, mature trees, and tea planted by his late mother. He stated that the plaintiffs have done nothing on this land and what they claim is actually within the defendant's title. He faulted the mutation form for the parcel No 4206 and pointed out that it is not signed by the Land Registrar. He was cross-examined and he reiterated that the tea is planted in their land and not the plaintiffs' land. He stated that his only interest is to protect his title to parcel No 428.
11. DW-2 was Livingstone Ntabo Misati. His evidence was to confirm that Maria bought the land parcel No 428 from Ondara Misati who was his father. He stated that she is the one who planted the tea therein and that what she purchased is now being used by the defendant.
12. With the above evidence the defence closed its case.
13. I invited counsel to file written submissions, which they did, and I have taken these into consideration before arriving at my decision.



14. In a nutshell, the plaintiffs allege that the defendant has trespassed into their land parcel No 4658. The position of the defendant is that he occupies the land parcel No. 428 which is registered in the name of his late mother, Maria Nyaitondi (the original defendant). This position of the defendant is the same position that his late mother held while she was still alive and a party to this suit. What the court thus needs to determine is first to distinguish the two land parcels then make a decision on which parcel the defendant occupies.
15. The evidence shows that the land parcel No 428 is a first registration after adjudication and it measures 0.4 Ha. On the other hand, the land parcel No. 4658 (measuring 0.22 Ha in the title) is a result of subdivision of the land parcel No 4206 which was subdivided into three parcels sometime in the year 2010 to bring forth the land parcels No 4656, 4657 and 4658; it is apparent that the dispute herein arose after this subdivision. The parcel No 4658 is detached from the two parcels No 4656 and 4657 as between them is a road. That is why the suit land (parcel No 4658) is sometimes described by the evidence of the parties as ‘the land on the upper side’ and the parcels No 4656 and 4657 as the land parcels on ‘the lower side.’ The parcel No 428 is also on ‘the upper side’ and what I discern is that the same land that the suit land falls is also the same land that the land parcel No 428 covers. In essence, the two parcels overlap.
16. It will be recalled that the land parcel No 428 measures 0.4 Ha. The land in dispute, parcel No 4658, covers 0.22 Ha, but for all intents and purposes, this 0.22 Ha, is within the 0.4 Ha which comprises of the land parcel No 428. This fact is revealed in the survey report of 25 July 2018. That report disclosed that the total acreage on this upper side (described as the total ground area) is 0.47 Ha meaning that it could not accommodate, on the ground, the combined acreage of the parcel No 4658 and the parcel No 428 which is 0.62 Ha. What was proposed by the Land Registrar and Surveyor in that report was to have the two titles split so that the parcel No 428 would end up with an acreage of 0.2 Ha and the suit land to have 0.27 Ha. However, it will be recalled that the parcel No 428 is a first registration upon adjudication and its acreage ought not to be affected at all. It must have, for a long time, shared boundaries with the original land parcel from which the suit land emanated from which is the parcel No 4206. This parcel No 4206 also cannot have been an original number, and must have itself resulted from a subdivision, as it does not follow the sequence of the parcel No 428. In my opinion, the problem arose as a result of improper subdivisions leading up to the parcel No 4658, the consequence being that this land parcel No 4658 ended up, on ground, occupying land belonging to the parcel No 428. Judgment cannot be given in favour of the plaintiff without severely affecting the parcel No 428 and compromising its acreage, which from the explanation I have offered above, would be manifestly unjust and ill-advised.
17. My finding is that this land on ‘the upper side’, alleged to be the suit land, is actually the land parcel No 428, for which the defendant has every right to occupy. Indeed, the evidence shows that the defendant and his ancestors have occupied this land for a very long time, at least from the time of adjudication. There is mature tea planted therein which the defendant and his predecessors planted and have been picking. The plaintiffs themselves confirm that they are not the ones who planted this tea and they have not been plucking it. There are also mature trees not planted by the plaintiffs. On this land there are also homesteads of the defendant. Even if the plaintiffs had a case, their case would have been time barred for the defendant and his predecessors have been occupying this land at least since its creation in 1984.
18. The long and short of it is that the plaintiffs have failed to prove their case to the required standard and their case is hereby dismissed. But, I will go further, for the existence of this land parcel No 4658 on the map is only going to cause confusion. I direct the Land Registrar, Kisii, to cancel this title to the parcel No 4658 and cause the amendment of the map so that the ‘upper side’, that is the land across



the road from the parcels No 4656 and 4657, where this parcel No 4658 is noted to lie, is encompassed in the parcel No 428.

19. The last issue is costs. There was technically no defence filed and thus there will be no orders as to costs.
20. Judgment accordingly.

**DATED AND DELIVERED AT KISII THIS 3 DAY OF OCTOBER 2023**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT KISII**

