



Ototo (Suing on Behalf of the Estate of Thomas Ototo Ayonga – Deceased) v Bichang’a & 2 others (Environment and Land Appeal E003 of 2021) [2022] KEELC 2896 (KLR) (7 July 2022) (Judgment)

Neutral citation: [2022] KEELC 2896 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT AND LAND APPEAL E003 OF 2021**

JM KAMAU, J

JULY 7, 2022

BETWEEN

**ISAKA NYAKUNDI OTOTO APPELLANT
SUING ON BEHALF OF THE ESTATE OF THOMAS OTOTO AYONGA –
DECEASED**

AND

**GEOFFREY ARUMBA BICHANG’A 1ST RESPONDENT
EDWIN NYAKUNDI BICHANG’A 2ND RESPONDENT
COUNTY LAND REGISTRAR, NYAMIRA 3RD RESPONDENT**

*(Being an Appeal against the Judgement of Hon. M. C. Nyigei –
PM Nyamira dated and delivered on the 10th day of November
2021 in the original Nyamira CM ELC Case No. 54 of 2019)*

JUDGMENT

1. By a plaint dated August 2, 2019 the appellant Isaka Nyakundi suing on behalf of the estate of Thomas Ototo Ayonga filed a suit against the defendants, the registered proprietors of the parcel of land known as LR No Central Kitutu/Mwabosire/374, a portion of which he says the deceased entered into an oral agreement with the late Bichang’a Geoffrey in 1963 to lease the same for a period of 23 years where he planted tea and after he passed on the 1st & 2nd defendants took over the estate and started managing it. The same was renewed from time to time with the last renewal in 2003 for a further period of 8 years to end in 2010. In 2011 Thomas Ototo Ayonga also passed on and the respective widows of the deceased persons started wrangling over the land with Getange’s wife claiming that her husband had already bought the parcel of land from the late Ayonga but Ayonga’s widow maintained that it was a lease and that the late Getange now had a title deed being LR No Central Kitutu/Mwabosire/373



which has now been sub-divided but that this could not be practically achievable since the mother title was still with the plaintiff. The 3rd defendant cancelled the title deed to the suit property illegally and without the consent and/or knowledge of the estate of Thomas Ototo Ayonga. He therefore prayed for the following orders: -

- (a) A permanent injunction restraining the 1st and 2nd defendants, either by themselves, or through their servants, agents, or any one acting under their authority from interfering with the plaintiff's and other dependants of the deceased's possession and quiet enjoyment of all that parcel of land known as Central Kitutu/Mwabosire/374 or any part of it.
 - (b) General and punitive damages for trespass.
 - (c) Cost of the suit and
 - (d) Interest on (a) (b) and (c) above at the courts rates until payment in full.”
2. The defendants never entered appearance nor defended the suit and therefore the same proceeded for hearing undefended and a judgement was read and delivered dismissing the plaintiff's suit.
 3. On a first appeal the appellate court should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence which I now wish to embark on.
 4. In his evidence in chief, the plaintiff said that the suit land LR No Central Kitutu/ Mwabosire/374 belonged to his late father Thomas Ototo Ayonga who was issued with a title deed in 2003. He produced a copy of the title deed in respect to the same which was issued on August 7, 2003 to the deceased. The same measures 2.4 Acres and the Land Registrar wrote a letter to that effect on January 24, 2019. A search conducted on August 13, 2018 showed that LR No Central Kitutu/ MWABOSIRE/ 373 measuring 1.21 acres belonged to Bichang'a Getange since February 14, 1969 and a title deed was issued on April 2, 1991 but a caution was registered against the land on May 9, 2018 in favour of Edwin Nyakundi Moses and Geoffrey Arumba Bichang'a, the 1st & 2nd defendants respectively. The documents produced are a copy of official search in respect of LR No Central Kitutu/ Mwabosire/ 374 dated February 21, 2019 showing that the land belonged to Thomas Ototo Ayonga same measuring 2.4 Acres but according to an official search dated November 28, 2018 it belonged to Isaka Nyakundi Ototo and Samson Nyakundi Ototo, a copy of a statement recorded to the police by Maria Sigara Bichang'a and Green Cards and Mutation Form in respect of LR No Central Kitutu/ Mwabosire/372, with Menga Nyakundi as the registered proprietor. He said that his father leased ½ of the land to another person for 10 years but that the lease was not reduced in writing. The lessee died in 2007 but his widow and children started claiming that they had bought the land from the witness' late father. They did not produce any title deed in this regard. The title deed in respect to LR No Central Kitutu/ Mwabosire/374 is still with the Land Registrar pending succession. The plaintiff also testified that he was sued in Criminal Case No 107 of 2019, Nyamira with the 1st & 2nd defendants' mother Maria Sigara Bichang'a being the complainant for and placed on CSO for three (3) months. LR No Central Kitutu/ Mwabosire/373 which belongs to Marungu Nyakundi is on the upper side but the same has been sub-divided and sold to 7 different people. LR No Central Kitutu/ Mwabosire/374 has not been sub-divided. He was not given the mutation for LR No Central Kitutu/ Mwabosire/373 with no reasons for this. A private surveyor confirmed that what is occupied by the plaintiff's father's family is about ½ of what is indicated in the title deed. He concluded his testimony by producing the valuers report dated July 17, 2019 and prayed for 5 million as compensation for trespass and the costs



of the case. The 3rd defendant is on record as having written to the plaintiff on January 24, 1919 stating that he was in possession of the title deed in respect LR No Central Kitutu/ Mwabosire/374.

5. The County Land Registrar, Nyamira Mr Martin Mutua testified as Pw2 and produced a sketch showing that LR No Central Kitutu/Mwabosire/374 measures 2.4 Hectares and that LR No Central Kitutu/Mwabosire/373 goes all the way downstream to the river. He also said that both parcels have existed since 1969 with the numbers being issued during adjudication. He said that his office kept the title deed for LR No Central Kitutu/Mwabosire/374 registered in the name of Thomas (supposedly Thomas Ototo Ayonga) upon the death of the latter on April 30, 2018. Land parcel number Central Kitutu/Mwabosire/374 was never sub-divided. Land number Central Kitutu/Mwabosire/373 measures 1.2 Hectares i.e 2.96 Acres while Central Kitutu/ Mwabosire/374 measures 0.85 hectares i.e. 2.1 Acres.
6. These are the facts from the pleadings, the written statements of the plaintiff and the evidence tendered in court by the two witnesses which as I pointed out earlier I am bound by law to reconsider this being a first appeal.
7. As to the claim of a permanent injunction restraining the 1st and 2nd defendants from interfering with the plaintiff's and other dependants of the deceased's estate of quiet enjoyment of the parcel of land known as Central Kitutu/Mwabosire/374 or any part thereof, the Land Registrar Mr Martin Mutua who testified as Pw2 and who is the custodian of all title documents in the county at page 11 of the court proceedings said as follows: -

.....These 2 parcels exist. Parcel number Central Kitutu/Mwabosire/374 existed from 1969. Letter dated January 24, 2021 is from our offices. Central Kitutu/Mwabosire/374 registered to Thomas was surrendered upon his death on April 30, 2018. The office was misled that the parties had done succession so we called for the surrender of the title. Central Kitutu/Mwabosire/373 and 374 were numbers that were issued during adjudication. I confirm that the land parcel 374 was never sub-divided. We have also asked the parties to come for the Title to Central Kitutu/Mwabosire/374. The Title approximates the size of the land so there can be a slight variation..... Central Kitutu/Mwabosire/374 is 0.85 Hectares or 2.1 Acres..... I know that the land is 2.1 Acres.....”

8. As the custodian of title records on behalf of the Government at the county level the Land Registrar has indicated quite clearly that since 1969 the parcel of land Central Kitutu/ Mwabosire/374 belongs to the person whose estate the plaintiff represents. He even went ahead to say that he has asked the parties concerned to come for their title deed which had been kept by his office since nobody had taken out the letters of administration in respect to the estate of the deceased. This is not the same thing as saying that the estate has no beneficiaries. All that this means is that the beneficiaries of the estate were still at large and had not been legally identified.
9. In dismissing the suit, the learned trial magistrate said as follows:

..... From my understanding of the plaintiff's claim, it is obvious that he could not sue the defendants herein since they are not the legal administrators of their father's estate.....”
10. In a case where there is contradictory evidence, the primary duty of the trial court is to carefully analyse contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers. It is the legal duty of the appellate court to re-consider, re-evaluate and analyse the evidence that was before the trial court, to determine whether, on the basis of those facts, the decision of the trial court is justified.



11. Although one does not have to be an administrator to be sued for trespass, it is clear from the evidence of the Land Registrar who is the custodian of title records on behalf of the Government at the county level that since 1969 the parcel of land Central Kitutu/ Mwabosire/374 belongs to the person whose estate the plaintiff represents. It measures 0.85 Hectares i.e 2.1 acres. The title approximates the size of the land but there can be a slight variation. Land parcel number Central Kitutu/Mwabosire/374 was never sub-divided. On the other hand, parcel number Central Kitutu/ Mwabosire/ 373 measures 1.2 Hectares i.e 2.96 Acres and the same was given to Bichang'a Getange since February 14, 1969. He also said that both parcels have existed since 1969 with the numbers being issued during adjudication. However, documents from his own office do not tally with his verbal evidence in court. Whereas the abstract of the register dated June 10, 2020, the letter from the lands office, Nyamira dated January 24, 2019 both signed by Mr Mutua himself, the official searches dated November 28, 2018 and February 21, 2019 respectively, and a copy of the title deed issued on August 7, 2003, all give the acreage of Land parcel number Central Kitutu/Mwabosire/374 as 2.4 Acres, the oral evidence in court under oath is to the effect that Central Kitutu/ Mwabosire/374 measures 0.85 Hectares i.e. 2.1 Acres. Mr Mutua also owned up to the letter dated January 24, 2019.
12. The primary duty of the trial court is to carefully analyse contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers. It is the legal duty of the appellate to re-consider, re-evaluate and analyse the evidence that was before the trial court, to determine whether, on the basis of those facts, the decision of the trial court is justified.
13. The Land Registrar did not produce any documents in court but agreed with the documents filed by the plaintiff which all point out to the suit land being 2.4 Acres. But the issue before the court is that of encroachment which has been obfuscated by both the plaintiff and the Land Registrar who was his witness. He who invites a witness to testify in support of his case is bound by the evidence of that particular witness. He cannot disown it. If it contradicts his own evidence or that of his other witnesses, he only has himself to blame. The court was not party to his choice of witnesses.
14. From the evidence adduced this court is unable to tell whether land parcel number Central Kitutu/ Mwabosire/373 was excised from or has encroached onto land parcel number Central Kitutu/ Mwabosire /374. The report from geomatics services should not even have been admissible in court without the maker. However, the same did not also help the court and was of no probative value because rather than providing a solution to the problem, the author cries for help from some unknown mountains:

“ ...Area occupied is less than the registered area. Any assistance accorded will be highly appreciated.....”
15. What was so difficult in using the RIM to give an explanation as to why the land on the ground is less than on paper.
16. The allegations of fraud in the sub-division of Land parcel number Central Kitutu/ Mwabosire/374 to create land parcel number Central Kitutu/Mwabosire/373 were equally not proved (see *Ndolo v Ndolo (2008) 1 KLR (G&F) 742*) wherein the court stated that:

“.....Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases.....”



17. I agree with the trial magistrate that:

.....The plaintiff has not led any evidence to challenge or show that Bichang'a Getega acquired title to Parcel 373 through fraud or misrepresentation, illegally, unprocedurally or through some corrupt scheme. The particulars set out in paragraph 18 of the plaint are allegations that have not been proved and have been countered by documentary evidence. It is my finding that the title held by Bichang'a Getega in parcel 373 is absolute and indefeasible.....”

18. For these reasons, I find that the court below properly directed itself to the evidence placed before it and reached the correct conclusions. The appeal herein is devoid of merit and I hereby dismiss it. But since the respondent did not participate in the lower court nor at the appellate stage I will spare him the costs of this appeal.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 7TH DAY OF JULY 2022.

MUGO KAMAU

JUDGE

In the Presence of:-

Court Assistant: Sibota.

The Appellant – In person

Respondents – N/A

