



Sereti & another (Suing as the Legal Representatives of the Estate of Jackson Mokaya) v Macharia & 2 others (Environment & Land Case 415 of 2013) [2025] KEELC 3900 (KLR) (14 May 2025) (Judgment)

Neutral citation: [2025] KEELC 3900 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 415 OF 2013**

M SILA, J

MAY 14, 2025

BETWEEN

ROSE MOGOI SERETI 1ST PLAINTIFF

KENNEDY OGERO MOKAYA 2ND PLAINTIFF

SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF JACKSON MOKAYA

AND

JAMES OCHANGWA MACHARIA 1ST DEFENDANT

ROBERT MACHARIA OCHANGWA 2ND DEFENDANT

COUNTY GOVERNMENT OF KISII 3RD DEFENDANT

JUDGMENT

(Suit by plaintiff claiming that a plot was illegally created between his allocated plot in Birongo Market and the main highway, and that the same encroaches into his plot; counterclaim that plaintiff has encroached into the new plot; no evidence of any encroachment into the plaintiff's plot tendered; counterclaimant stating that the encroachment by the plaintiff was dealt with and no longer exists; no law cited to demonstrate any illegality in creation of the second plot; plaintiff's suit dismissed and counterclaim overtaken by events)

1. The original plaintiff, Jackson Mokaya (now deceased), was the proprietor of the Plot No. 19 Birongo Market. This plot was initially the plot that fronted the Kisii-Keroka road and is rectangular in shape. He commenced this suit vide a plaint filed on 10 October 2013 and amended on 8 May 2015, because there was created a Plot No. 34, a triangular shaped plot, whose location was between the Plot No. 19 and the Kisii-Keroka road. This Plot No. 34 is presently registered in the name of the 2nd defendant.



In his amended plaint, he claimed that this Plot No. 34 encroached on his Plot No. 19 and that it was illegally created for the following reasons :

- I. The same was established/created without the existence of an appropriate Development Plan.
- II. The same was established/created without prior knowledge of the Business/Community people of Birongo locality and in particular the plaintiff.
- III. The same was established/created without first obtaining comments from the Business Community people of Birongo locality and in particular the plaintiff.
- IV. The availability of the said plot was not made known to the Business/Community people of Birongo locality by means of placing an advert in the Kenya Gazette.
- V. The availability of the said Plot was not made known to the Business/Community people of Birongo locality by means of placing an advert of the same in the local dailies.
- VI. The availability of the said plot was not made known to the Business/Community people of Birongo locality by mounting an advertisement of the same at the Chief's office and/or D.O office.
- VII. The 3rd defendant illegally invited the 2nd defendant to the exclusion of the Business/Community people of Birongo and the general public to apply for allocation of the said plot at large.
- VIII. The 3rd defendant approved the 2nd defendant's application for the said plot without any regard to the principles of Land Policy in Kenya as enshrined under Chapter Five, of *the Constitution* of Kenya.
- IX. The 3rd defendant wrongfully and illegally approved Building Plans for the said Plot presented by the 2nd defendant without determining their compatibility with the plaintiff's adjacent developments on Plot No.19.
- X. The 3rd defendant wrongfully and illegally approved what was otherwise a defective and incompetent application from the 2nd defendant for the allocation of the said Plot of which the 2nd defendant was privy to.
- XI. The 3rd defendant wrongfully and illegally approved what was otherwise a defective and incompetent Building Plans over the said Plot of which the 2nd defendant was privy to.
- XII. The 2nd defendant presented for approval by the 3rd defendant an application for allocation of the said plot while knowing that its creation was contra the *County Governments Act, 2012, Urban Areas and Cities Act*, The Physical Planning Act, and other related statutes.
- XIII. The 2nd defendant put up a building on the said Plot while knowing of the illegalities entailing.
- XIV. The 2nd defendant knowingly and with impunity encroached into the Plaintiff's Plot No. 19.

2. In his amended plaint, he asked for the following orders :

- a. Mandatory injunction directed at the 1st and 2nd defendants compelling them to vacate and demolish the structure encroaching on Plot No. 19 and those standing on what is known as Plot No. 34 Birongo Market and clear the rubble therefrom.
- b. A declaration as illegal and a nullity the creation of Plot No. 34 Birongo Market as well as its purported allotment to the 2nd defendant.



- c. Costs of the suit.
 - d. Any other alternative relief this Honourable Court may deem fit to grant.
3. The 1st and 2nd defendants filed defence where they denied the allegations of the plaintiff. They pleaded that the Plot No. 34 Birongo Market, came to being procedurally and legally. They had a counterclaim where it was pleaded that the plaintiff in February 2012, without permission from the County Council of Gusii, the lessor, started constructing a 7 foot roof-cape protruding into the Plot No. 34, created an illegal door facing Plot No. 34, and constructed a permanent 4 feet verandah below the 7 foot roof-cape. It was pleaded that this was with intention to annex and grab part of the Plot No. 34 belonging to the 2nd defendant. In the counterclaim they asked for orders for these structures to be demolished and a permanent injunction to restrain the plaintiff from the Plot No. 34.
 4. The 3rd defendant, the County Government of Kisii, appointed counsel but I have not seen any defence on record.
 5. The original plaintiff testified and called two witnesses. His evidence was that he was allocated the Plot No. 19 in 1958 and that this was the last plot fronting the main road. He had a building plan approved in 1958 and he constructed the said plot on the basis that there was no other plot between the said Plot No. 19 and the main Kisii-Keroka road. He averred that he did not know of the creation of the Plot No. 34 as it was not advertised. In 2012 he presented building plans which were rejected as they did not accord to the layout of Birongo Market. He claimed that there was destruction of his verandah and doors when construction commenced in the Plot No. 34 and the construction blocked his shops. He stated that the County ought to have considered his long occupation of the Plot No. 19 and that he would have bought the plot if it was up for sale. He thought that this Plot No. 34 was created on a road reserve.
 6. PW-2 was Hezron Moturi Omwenga, a retired surveyor who worked with the Gusii County Council. He retired in 1988. He testified that between 1958 and 1959 he was commissioned to demarcate the layout of Birongo Market and they did this in two phases. The first phase covered the Plots No. 1 to 22 whereas the second phase covered Plots No. 23 to 29. They provided for a road reserve, and spaces for drainage and a sewer system. According to him the Plot No. 19 was a corner plot and they could not create a plot between it and the road. He testified that he visited the Plot No. 19 and found the original layout changed and new Plots No. 33 and 34 created. He claimed that this was unlawful and that the Plot No. 34 was superimposed on the Plot No. 19. He stated that part of the Plot No. 34 is on a road reserve and has interfered with the drainage and sewage space thus creating a health problem. He testified that this Plot No. 34 has taken part of Plot No. 19 to the rear. He stated that the owner of the Plot No. 34 demolished the verandah of the Plot No 19 and the foundations of the Plot No 19 are now affected. Cross-examined, he testified that he did not understand how the Plot No. 34 was created. He however did not know what transpired after he retired in 1988. He acknowledged that as a surveyor he had no mandate to challenge creation of plots as all they do is take measurements though he did state that he understands planning regulations. He was of opinion that before creating the Plot No. 34 the owner of the Plot No. 19 ought to have been consulted as it was going to interfere with the Plot. He acknowledged that the County Council could allocate empty spaces.
 7. PW-3 was Rose Mogoi Sereti. She is a daughter to the original plaintiff and upon his death, she, together with one Kennedy Ogero Mokaya, substituted him and continued the suit on behalf of his estate. Her evidence was that her father owned the Plot No. 19 and had constructed his structures in a manner that one of the doors faced the road. In 2010, he wished to extend the structures and presented a building plan using the old layout of 1958. The plan was however rejected by the Engineer and her father told to update his building plans. She claimed that his father's tools were confiscated. In the



meantime development started on the Plot No. 34 and she stated that the construction interfered with the foundation of the existing developments in the Plot No. 19 as part of the verandah was demolished. It also blocked this Plot No. 19. She also claimed that the construction encroached into the Plot No. 19 so that it does not now measure 50 x 100 feet. She was of opinion that the Plot No. 19 should be the last plot before the road. Cross-examined, she acknowledged that the owner of the Plot No. 34 has a right to his plot as long as he does not encroach into the Plot No. 19.

8. With the above evidence the plaintiffs closed their case.
9. DW-1 was the 1st defendant. He is father of the 2nd defendant who resides in the USA. He testified that he was allocated the Plot No. 34 on 23 November 1970. In 2011, he transferred the Plot to his son, the 2nd defendant. He refuted that this Plot No. 34 has encroached into the Plot No. 19. He testified that the plaintiff had built a roof over the plot No. 34, which was removed by the Council, and a door leading into his plot was also closed, and there was thus no longer any encroachment at the time that he testified. He produced various letters from the Gusii County Council demonstrating the allotment of the Plot No. 34. He stated that the Birongo Business Community was not the entity that was engaged in issuing plots but it was the Gusii County Council. Cross-examined, he acknowledged that the Plot No. 19 came first and the Plot No. 34 came afterwards. He was questioned on the Plot Cards produced, particularly one of 2006 showing the 2nd defendant as owner, and he agreed that it was in 2006 that he gave the Plot to his son though the minutes indicate transfer in 2011.
10. DW-2 was Patrick Bitengo Achoki, the Director Physical Planning with the County Government of Kisii. He produced the Layout Plan of Birongo Market. He testified that both Plot No. 19 and 34 exist. He testified that the Plot No. 34 is triangular and fronts the Kisii-Keroka road. He testified that it does not extend to the road reserve. He testified that the developments in the Plot No.34 leave a space of 1.5 metres to the edge of the plot. He elaborated that the developments between Plot No. 19 and No. 34 are wall to wall with no space in between. He saw no encroachment between the two plots. He could not confirm when the Plot No. 34 was created.
11. With the above evidence, the defence closed their case.
12. I invited counsel to file their submissions and I have taken note of the submissions filed.
13. In his plaint, the plaintiff alleged encroachment into his plot and illegal creation of the neighbouring Plot No. 34. From the evidence however, it is clear that there is no issue regarding encroachment. There exists the Plot No. 19 which is a rectangular plot measuring 50 x 100 feet and there exists the Plot No. 34 which is a triangular parcel of land. This triangular area has never been part of the Plot No. 19. In as much as the original plaintiff and subsequent plaintiffs assert that there is encroachment by this Plot No. 34 into the Plot No. 19, there is absolutely nothing to support this claim. Indeed it was never stated by how many metres the user of the Plot No. 34 has encroached into the Plot No. 19. DW-2, the Director, Physical Planning, was categorical that there is no encroachment. There is truly no substance in the allegation of encroachment by the owner of the Plot No. 34 into the Plot No. 19.
14. What I discern is that when the original plaintiff developed his plot, he developed it as if it was the last plot, and part of his developments, i.e the roof and the verandah, went beyond the boundaries of the Plot No. 19 and into what he thought was an empty space between his plot and the road. This empty space of course turns out to be the Plot No. 34. I do not see how the plaintiffs can complain that there was demolition of the roof and verandah, as the which developments went beyond the boundaries of the Plot No. 19 and into the Plot No. 34. Unless there was an easement, and none was demonstrated to exist, the rights of the owner of the Plot No. 19 cannot extend beyond its 50 x 100 feet boundary.



15. From the documentary evidence presented, it is correct that the original layout plan of Birongo Market did not include the Plot No. 34. It would however appear that there was an amendment to include other plots, not just the Plot No. 34, for I have also seen inclusion of a Plot No. 33. There is documentary evidence from the County Council of Gusii indicating that this Plot No. 34 was allocated to the 1st defendant in 1970. The 1st defendant stated that he transferred the Plot to his son and there are minutes of 2011 pointing to allocation of this Plot No. 34 to the 2nd defendant.
16. In his amended plaint, the original plaintiff did assert that this plot No. 34 was illegally created inter alia because there was no advertisement or involvement of the Business Community. I am afraid that without pointing out to any law that was violated these remain empty claims. I have pored through the submissions of Mr. Momanyi Aunga, learned counsel for the plaintiffs, and I have seen no law cited regarding the alleged illegal creation of this Plot No. 34. Without pointing at any law that is alleged to have been violated I am afraid that I have no material to support the allegation that there was illegality in the creation of this Plot No. 34.
17. In his evidence, PW-2 claimed that this Plot No. 34 was on a road reserve and sewer. Nothing was presented to demonstrate any encroachment into the road reserve or sewer and these remain just words of mouth that have no documentary support. I also do not see how PW-2 can complain about creation of later plots that he was not involved in. Without showing any illegality in law regarding the creation of the Plot No. 34 it cannot be alleged that it was created illegally.
18. There was issue raised by Mr. Momanyi in his submissions as to whether the Plot No. 34 was transferred in 2006 or 2011 to the 2nd defendant. I see no issue whether or not it was transferred in 2006 or 2011. There is confirmation in the letter dated 10 February 2016 written by the County Secretary that the Plot No. 34 was initially allocated to the 1st defendant in 1970. To me, it matters not that whether it was transferred to the 2nd defendant in 2006 or 2011 for that does not in any way change the character of this Plot No. 34.
19. Given the foregoing, it is apparent that I do not find any merit in the claims of the plaintiffs and I hereby dismiss the plaintiffs' suit.
20. There is of course the counterclaim by the defendants. When DW-1 testified, he stated that there is no longer any encroachment by the plaintiffs. The counterclaim thus appears to have been overtaken by events and I need not make any orders on it. It is hereby dismissed for having been overtaken by events.
21. The last issue is costs. I would readily have granted the defendants costs of the suit, but when he testified, the 1st defendant stated that he will not be claiming any costs. No defence was filed by the 3rd defendant and I do not see how I can award the 3rd defendant costs in light of that fact. I will therefore make no orders as to costs on both suit and counterclaim.
22. In a nutshell, the case of the plaintiffs is dismissed and the counterclaim is overtaken by events, and given the circumstances of this case, each party to bear his/her own costs.
23. Judgment accordingly.

DATED AND DELIVERED THIS 14 DAY OF MAY 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII



Delivered in the presence of :

Mr. Momanyi Aunga for the plaintiffs

Mr. Bigogo for the 1st and 2nd defendants

Mr. Mokaya for the 3rd defendant

Court Assistant – Michael Oyuko

