



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 367 OF 2012

**CHACHA MUTUKI KERAMBO
PLAINTIFF**

VERSUS

**THE BOARD OF
GOVERNORS**

**NYAMETABURO MIXED SEC. SCHOOL 1ST
DEFENDANT**

**NYAMETABURO HEALTH CENTRE 2ND
DEFENDANT**

**TOWN CLERK, NYAMETABURO MARKET 3RD
DEFENDANT**

**CHIEF'S OFFICE NYAMETABURO
4THDEFENDANT**

**WORLDWIDE CHURCH – NYAMETABURO..... 5TH
DEFENDANT**

**LAND REGISTRAR – KEHANCHA.....6TH
DEFENDANT**

**MWITA WANGERA..... 7TH
DEFENDANT**

**THOMAS RHOBI SIGIRIA.....
8THDEFENDANT**

**MORONYA CHACHA..... 9TH
DEFENDANT**

**KERAMBO WANGERA..... 10TH
DEFENDANT**

RHOBI BOSIRO..... 11TH

	DEFENDANT	
MWITA OMONANGA.....		12 TH
	DEFENDANT	
BURUNACHACHA		13 TH
	DEFENDANT	
CHACHA WEBUCHO.....		14 TH
	DEFENDANT	
MOSABI OCHACHA OBATIANI		15 TH
	DEFENDANT	
BACHWA NYAMOHANGA.....		16 TH
	DEFENDANT	
RASMI MACHUGU.....		17 TH
	DEFENDANT	
CHACHA OMAGIGE.....		18 TH
	DEFENDANT	
CHAGWA OJOHN.....		19 TH
	DEFENDANT	
RIOBA OMACHUGU.....		20 TH
	DEFENDANT	
JUMA MAKURI.....		21 ST
	DEFENDANT	
MWITA MAKUVI		
	22NDDEFENDANT	

JUDGMENT

1. The plaintiff brought this suit against the defendants on 9th October 2012 seeking the following reliefs:-
 - a. A declaration that the plaintiff is the owner of all that parcel of land known as LR No. Bukira/Buhirimono/334 which was sub-divided to give rise to LR No. Bukira/Buhirimono/3184 (hereinafter referred to as “the suit property”).
 - b. An order for the eviction of the defendants from the suit property.
 - c. Costs of the suit.
 - d. Any other relief the court may deem just to grant.

In his plaint dated 8th October, 2012, the plaintiff averred that; at all material times, he was the registered proprietor of LR No. Bukira/Buhirimono/3184 (“the suit property”) measuring approximately 18.5ha. The suit property is a sub-division of LR No. Bukira/Buhirimono/334 (hereinafter referred to as “Plot No. 334”) which was registered in the name of his father, one, Mutuki Kerambo, deceased. He was issued with a title deed for the suit property on 24th February 2012. Upon perusal of the said title deed, he noted that the measurement of the suit property was less than the measurement of the land that he had inherited from his deceased father. He averred

that the defendants entered the suit property without his consent or permission, and established thereon, a school, a hospital, a market and a health centre in total disregard of his rights over the property. He averred further that the defendants have proceeded with the help of the 6th defendant to obtain title deeds for the portions of the suit property which are under their forceful occupation. He contended that the said activities by the defendants on the suit property have caused him loss and suffering in that he has been deprived of the use and enjoyment of the portions of the said parcel of land which are under the defendants' occupation.

2. The suit was defended by 5th and 7th to 22nd defendants. The 2nd, 4th and 6th defendants entered appearance through the Attorney General but did not file a statement of defence. The 1st and 3rd defendants on the other hand did not enter appearance. In its statement of defence dated 13th September 2013, the 5th defendant averred that it is registered as the proprietor of all that parcel of land known as LR No. Bukira/Buhirimonono/3185 (hereinafter referred to as "Plot No. 3185") which was registered in its name on 6th March, 2012. The 5th defendant averred that it purchased Plot No.3185 from the plaintiff. The 5th defendant averred that it is a stranger to the plaintiff's claim herein which it termed as incompetent and fatally defective. In their statement of defence, the 7th to 22nd defendants admitted that the plaintiff is the registered proprietor of the suit property. They denied however that the suit property measures 18.5ha. They averred that the suit property which is a sub-division of Plot No. 334 measures 2.41ha. The 7th to 22nd defendants denied that the plaintiff is the registered proprietor of Plot No. 334 which measures 18.5ha. They averred that the 8th and 17th defendants are registered as proprietors of all those parcels of land known as LR Nos. Bukira/Buhirimonono/1559, 1315 and 3186 (hereinafter referred to as "Plot No. 1559, Plot No. 1311 and Plot No. 3186" where the context so admits) which parcels of land have no relationship or connection with the suit property which is owned by the plaintiff. The 7th to 22nd defendants denied that they have invaded the suit property. They contended that the 9th to 16th and 18th to 22nd defendants are occupying parcels of land which they acquired either from the 3rd defendant who is the owner of LR No. Bukira/Buhirimonono/430 (hereinafter referred to as "Plot No. 430") or the 8th defendant. The 7th to 22nd defendants averred that the said parcels of land are separate and distinct from the suit property and as such there is no basis upon which the reliefs sought can be issued against them.
3. When the suit came up for hearing, the plaintiff gave evidence and called no witness. The defendants on the other hand called four (4) witnesses. In his testimony, the plaintiff told the court that he is the registered proprietor of the suit property which measures 18.5ha. He stated that his complaint against the defendants concerns the boundary between the suit property and the parcels of land which are occupied by the defendants. He contended that the defendants have entered onto the suit property which is a portion of Plot No. 334 that was owned by his deceased father and which measured 18.5ha. He stated that when his father died, Plot No. 334 was sub-divided into three (3) portions. The first portion was registered in the name of his brother. The second portion in the name of his stepmother and the last portion in his name. This third portion is the suit property. He contended that the defendants are occupying a portion of the suit property and should be evicted therefrom. He also urged the court to give an order for the fixing of the boundary of the suit property. He denied selling land to any of the defendants. He produced as exhibits, a copy of the title deed for the suit property and a copy of the title deed for Plot No. 334.
4. In cross-examination, the plaintiff reiterated that Plot No. 334 that was registered in the name of his deceased father was shared between his brother, step mother and him. He stated that he was not aware of the measurement of the portion of Plot No. 334 that was allocated to him. He insisted that the defendants are occupying a portion of the land that he inherited from his deceased father. He admitted that the 7th to 22nd defendants are occupying LR No. Bukira/Buhirimonono/430 ("Plot No.430") which is registered in the name of South Nyanza County Council and on which Nyametaburo Market is situated. He however contended that the said parcel of land was carved out of Plot No. 334 that was owned by his deceased father as aforesaid. He contended that his father did not give out any portion of his land for the setting up of Nyametaburo market. The plaintiff admitted further that the 1st defendant is situated on LR No. Bukira/Buhirimonono/342("Plot No.342") which is also registered in the name of South Nyanza

- County Council. He claimed however that this parcel of land was also curved out of Plot No. 334.
5. The defendants' first witness was Samuel Nicholas Kemboi (DW1). DW1 told the court that he is the chairman of the board of management of the 1st defendant. He testified that the 1st defendant is occupying Plot No. 342 which is owned by Nyametaburo Primary School. In cross-examination, he stated that the plaintiff's father did not donate any portion of his land for the establishment of the said primary school. He denied that the 1st defendant and the said primary school are situated on Plot No. 334 that was owned by the plaintiff's father. DW1 produced as exhibit, a copy of a certificate of official search dated 4th July 2014 for Plot No. 342. The defendants' 2nd witness was Augustine Mwita Monamka (DW2). He told the court that he is the chairman of the management committee of the 2nd defendant. He is also the chairman of Nyametaburo market businessmen. He testified that the 7th to 11th and the 13th to 22nd defendants are businessmen at Nyametaburo market and that they are well known to him. He told the court that he owns a shop at Nyametaburo market where also the 7th to 11th and the 13th to 22nd defendants own shops. He stated that the said shops are situated on Plot No. 430 which is owned by South Nyanza County Council. He told the court that some of the defendants are occupying their own parcels of land. He stated that the 7th, 8th and 17th defendants own and occupy parcels of land known as LR Nos. Bukira/Buhirimono/1559, 1311 and 3186 ("Plot No. 1559", "Plot No. 1311" and "Plot No. 3186") respectively. He stated that the 15th, 16th and 20th defendants are occupying parcels of land which they purchased from the father of the 8th defendant herein, one, Sigiria. He stated that the 18th defendant is not residing at or near Nyametaburo market while the 19th defendant is not known to him. The 21st and 22nd defendants on the other hand he said are occupying parcels of land which he sold to them which land he had also acquired from Sigiria aforesaid. DW2 produced as exhibits; a certificate of official search dated 1st August 2012 on the register of Plot No. 430, a copy of a title deed dated 17th January 1994 for Plot No. 1311, a copy of a title deed dated 10th December 1997 for Plot No. 1599 and a copy of a title deed dated 8th March 2012 for Plot No. 3186.
 6. The defendants' third witness was Lameck Mochache (DW3) who was the District Land Registrar, Kuria District. He told the court that; the plaintiff is the registered owner of the suit property which is a sub-division of Plot No. 3162. Plot No. 3162 was itself a sub-division of Plot No. 334 which measured 18.5ha. Plot No. 334 was registered in the name of the plaintiff's father, Mutuki Kerambo, deceased. After the death of Mutuki Kerambo, the beneficiaries of his estate namely, the plaintiff, Nyakorema Mutuki and Mutuki Mutuki applied for a Grant of Letters of Administration in respect of his estate and had Plot No. 334 transferred and registered in their names. They thereafter applied for the partition of the said property (Plot No. 334) which application was accepted. Plot No. 334 was partitioned into three portions and separate titles were issued to each of the said beneficiaries of the estate of Mutuki Kerambo. The three titles were, LR Nos. Bukira/Buhirimono/3161, 3162 and 3163 ("Plot No. 3161, Plot No. 3162 and Plot No. 3163"). Plot No. 3161 measured 6.4ha. and was registered in the name of Nyakorema Kerambo. Plot No. 3162 which measured 2.8ha. was registered in the name of the plaintiff, Chacha Mutuki Kerambo while the last portion namely, Plot No. 3163 which measured 9.3ha. was registered in the name of Mutuki Mutuki. DW3 stated that upon obtaining a title over Plot No. 3162, the plaintiff proceeded to sub-divide the same into four (4) portions namely, LR Nos. Bukira/Buhirimono/ 3184, 3185, 3186 and 3187 ("Plot No. 3184", "Plot No. 3185", "Plot No. 3186" and "Plot No. 3187").
 7. The plaintiff thereafter sold Plot Nos. 3185, 3186 and 3187 and retained Plot No. 3184 (the suit property) in his name. Plot Nos. 3185 and 3186 were sold and transferred to the 5th and 17th defendants respectively while Plot No. 3187 was sold and transferred to one, Peter Nyabaheri who is not a party to this suit. DW3 told the court that the 1st defendant owns Plot No. 342 while the 3rd defendant is situated on Plot No. 430 which parcels of land were registered on first registration and have no relationship whatsoever with the suit property which is owned by the plaintiff. The 7th defendant on the other hand owns Plot No. 336 which also has no relationship with the suit property. DW3 stated that the suit property is separate and distinct from the parcels of land which are occupied by the defendants. He told the court that the plaintiff owns the suit property which

measures 2.41ha. and not Plot No. 334 which measured 18.5ha. and whose title was closed on partition as aforesaid. DW3 produced a number of documents as exhibits.

8. The defendants' last witness was James Gati Nyangi (DW4), a pastor with the 5th defendant. He told the court that the 5th defendant's correct name is World Wide Gospel Church of Kenya. DW4 testified that the 5th defendant is the owner of Plot No. 3185 that was sold and transferred to the 5th defendant by the plaintiff. He told the court that upon registration of the instrument of transfer, the 5th defendant was issued with a title deed for Plot No. 3185 on 6th March 2012.
9. After the close of the defendants' case, the parties informed the court that they did not wish to make closing submissions. They left the matter for the court to determine on the evidence on record. I have considered the pleadings on record and the evidence that was tendered before me by the parties in support of their respective cases. The parties did not agree on issues for determination by the court. From the pleadings and the evidence on record, the following in my view are the issues that arise for determination in this suit, namely;

Whether the plaintiff is the owner of the parcel of land known as LR No. Bukira/Buhirimono/3184 ("the suit property")?

Whether the suit property measures 18.5ha?

Whether the defendants have trespassed on the suit property?

Whether the plaintiff is the owner of the parcel of land known as LR No. Bukira/Buhirimono/334 ("Plot No. 334")?

Whether the defendants have trespassed on Plot No. 334?

Whether the plaintiff is entitled to the reliefs sought in the plaint?

10.The first issue:

The plaintiff produced in evidence a copy of the title deed for the suit property (PExh.1). The said title deed was issued on 24th February 2012. It shows that the suit property was registered in the name of the plaintiff on 23rd February 2012. It shows further that the suit property measures 2.41ha. and that it is a sub-division of Plot No. 3162. The defendants also produced in evidence a copy of the register for the suit property (DExh.21). This register confirms that Plot No. 3184 is registered in the name of the plaintiff and that it measures 2.41ha. It confirms further that the property was registered in the name of the plaintiff on 23rd February 2012 and that the plaintiff was issued with a title deed on 24th February 2012. DW3 who is the land registrar for Kuria District testified that the plaintiff is the registered owner of the suit property which measures 2.41ha.

11. Section 24 of the Land Registration Act, 2012 provides that the registration of a person as the proprietor of land shall vest upon that person the absolute ownership of the same together with all rights and privileges associated therewith. On the material before me, I am satisfied that the plaintiff is the owner of the suit property. I am of the view that the dispute over the ownership of the suit property arose when the plaintiff treated the suit property (Plot No. 3184) and Plot No. 334 as if they are one and the same. The plaintiff's interest in Plot No. 334 is dealt with elsewhere.

12.The second issue:

The plaintiff had contended in the plaint that the suit property measures 18.5ha. This contention is not supported by the evidence on record. As I have stated herein earlier, a copy of the title deed for the suit property (PExh.1) that was produced by the plaintiff in evidence shows that the same measures 2.41ha. This is confirmed by a copy of the register for the suit property (DExh.21) that was produced in evidence by the defendants. On the basis of this evidence, I am unable to agree with the plaintiff that the suit property measures 18.5ha. I am inclined to accept the evidence of

DW3 to the effect that the parcel of land that measured 18.5ha. was Plot No. 334 and not Plot No. 3184 (“the suit property”). According to DW3, Plot No. 334 was owned by the plaintiff’s father, Mutuki Kerambo, deceased. Upon the death of his father, the plaintiff, his brother and step-mother applied for Grant of Letters of Administration in respect of his estate and had Plot No. 334 partitioned into three (3) portions. The sub-division that came from Plot No. 334 were, Plot No. 3161 that was registered in the name of the plaintiff’s step mother, Nyakorema Mutuki Kerambo, Plot No. 3162 that was registered in the name of the plaintiff and Plot No. 3163 that was registered in the name of the plaintiff’s brother Mutuki Mutuki. Plot Nos. 3161, 3162 and 3163 measured 6.4ha., 2.8ha., and 9.3ha. respectively.

13. DW3 testified further that after being registered as the owner of Plot No. 3162, the plaintiff proceeded to sub-divide the said parcel of land into four (4) portions namely, Plot No. 3184 (“the suit property”) measuring 2.41ha, Plot No. 3185 measuring 0.13ha, Plot No. 3186 measuring 0.06ha and Plot No. 3187 measuring 0.04ha. The plaintiff thereafter sold Plot Nos. 3185, 3186 and 3187 and remained with Plot No. 3184 in his name. DW3 produced a copy of the register for Plot No. 334, (PExh. 22), a copy of the mutation form through which Plot No. 334 was sub-divided into three (3) portions (DExh. 13), a copy of the register for Plot No. 3162 (DExh. 23), a copy of the mutation form through which Plot No. 3162 was subdivided into four (4) portions one of which was Plot No. 3184 (the suit property) (DExh. 17) and a copy of the register for Plot No. 3184 (the suit property) (DExh. 21). These exhibits that were not contested in any material respect by the plaintiff left no doubt that the suit property measures 2.41ha and not 18.5ha. which is the measurement of Plot No. 334 from which the suit property originated. It is my finding therefore that the suit property does not and did not measure 18.5ha. as contended by the plaintiff.

14. The third issue:

Trespass is defined as any unjustified intrusion by a person on the land in the possession of another. The plaintiff has proved that he is the owner of the suit property and as such he is entitled to immediate possession and occupation thereof. The plaintiff has however not satisfied me that the defendants have entered or intruded onto the suit property without justification. The plaintiff did not place evidence of any nature in proof of the fact that the defendants are in occupation of the suit property or any portion thereof. I am satisfied from the evidence that was adduced by DW1, DW2, DW3 and DW4 that the defendants are not occupying any portion of the suit property. From the evidence on record, the defendants are occupying parcels of land which are separate and distinct from the suit property. The plaintiff has not called into question in these proceedings the validity of the titles of the said parcels of land. I cannot see any relationship between the said parcels of land and the suit property on the basis of which a trespass claim can be maintained. In the circumstances, I am not satisfied that the defendants have trespassed on the suit property.

15. The fourth and fifth issues:

Copies of, the register for Plot No. 334 (DExh. 22), the Mutation Form dated 6th December, 2011 (DExh. 13), the register for Plot No. 3161 (DExh. 24), the register for Plot No. 3162 (DExh. 23) and the register for Plot No. 3163 (DExh. 25) that were produced in evidence by the defendants have laid this issue to rest. These documents are unanimous that the register for Plot No. 334 was closed on sub-division on 28th December, 2011 and as such the said parcel of land is not in existence. The same cannot therefore be owned by the plaintiff neither can it be trespassed upon by the defendants.

16. The sixth issue:

The plaintiff has established that he is the registered owner of the suit property. I am of the view however that the plaintiff is not entitled to a declaration to that effect as against the defendants. This is because; there is no evidence that the defendants or any of them had challenged or brought to question the validity of the plaintiff’s title over the suit property. The plaintiff has also failed to prove that the defendants have infringed on any of his rights over the suit property. I find the declaration sought unjustified in the circumstances. The plaintiff is also not entitled to an order for

the eviction of the defendants from the suit property. As I have stated above, the plaintiff has failed to prove that defendants have trespassed on the said property. An eviction order cannot therefore issue. The plaintiff had also prayed that the court do grant such other or further order as it may deem fit. In the circumstances of this case, I believe that it would serve the interest of justice if an order is made for the fixing of the boundary of the suit property. The plaintiff seems not to know the boundaries of the parcels of land which originated from the sub-division of Plot No. 3162 that was initially registered in his name and this may have contributed to the institution of this suit. The fixing of the boundaries of the suit property may therefore put some of his anxieties regarding the location and dimensions of the suit property to rest.

17. Conclusion:

In conclusion, it is my finding that the plaintiff has failed to prove his claim against the defendants to the required standard. Consequently, the plaintiff's suit is dismissed with costs to the defendants. The 6th defendant (the District Land Registrar, Kuria District) shall however visit, subject to the payment of the requisite charges by the plaintiff, LR No. Bukira/Buhirimonono/3184 for the purposes of establishing and fixing its boundaries. The plaintiff shall meet the costs associated with the exercise.

Delivered, Dated and Signed at Kisii this 3rd day of July, 2015.

S.OKONG'O

JUDGE

In the presence of:

Plaintiff present in person

Mr. Ayienda for the 5th defendant

N/A for 2nd, 4th and 6th defendants

Mr. Ayienda h/b for Muniko for 7th to 22nd defendants

Milcent Court Assistant

S.OKONG'O

JUDGE