

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELCC NO. 195 OF 2014

JANE MWEBI PLAINTIFF

VERSUS

CHARLES OGWARO ONSOTI DEFENDANT

JUDGMENT

1. This suit was commenced through a plaint filed on 20 May 2024. The plaintiff pleaded that she is the registered owner of the Plot No. 46 Nyakoe Market whereas the defendant is the registered owner of the Plot No. 51. She claimed that in the month of January 2014, the defendant encroached into her plot No. 46 and commenced developments. In the suit she asks for orders to have the defendant permanently restrained from interfering with her Plot No. 46 , eviction, and costs.
2. The defendant filed defence and admitted being the owner of the Plot No. 51 Nyakoe Market. He asserted that he had been in occupation of the plot since the year 2000 and that it is on this Plot No. 51 that he has put up his structures.
3. On the face of it, the matter appeared like a case of mistaken identity and it was not surprising that on 30 May 2016, Mutungi J, who was then handling the matter, sought a report from the District Land Surveyor and Physical Planner Kisii County. He directed them to point out the physical locations of the Plots No. 46 and 51 Nyakoe market and prepare a layout sketch. A report dated 22 December 2016 was prepared by the national surveyor and the County Physical Planner. They found that the two plots are in different positions as per the layout plan of Nyakoe Market. Their conclusion was that the disputed plot was Plot No. 51 and their advice was that the plaintiff, as owner of the Plot No. 46, should seek guidance from the county administration on the location of her plot. The report was not agreeable to the plaintiff and the court directed the matter to proceed for hearing.
4. On 13 May 2024, before me, I thought that since Market Plots are under the County Government, the matter may be resolved if the Kisii County Government officials visit the site and make their report. This was agreeable to the parties. I ordered the Director

Survey, and Director, Physical Planning, of the County Government of Kisii, to visit the disputed site and using the plan for Nyakoe Market identify the two plots and make a comprehensive report. A report was filed, but yet again, the plaintiff contested it and therefore the matter had to proceed for hearing.

5. The plaintiff testified that she was allocated the Plot No. 46 in 1992 and was given a Plot Card. She stated that she was shown the plot on the ground and took possession. She then fenced the plot with barbed wire and put up a mabati structure to serve as a kiosk in the same year (1992). She stated that the ground remained that way until 2013 when she found the kiosk destroyed and building materials deposited by the defendant. She stated that her husband served as the surveyor of the County Council and he knew the identity of each plot. This plot, she averred, was along the Kisumu road.
6. She mentioned that the procedure for allotting plots was that one would apply, then the Allocation Committee would allocate. Her husband was the County Council surveyor and thus a member of the Allocating Committee. The two reports, earlier prepared, were put to her and she stated that she does not agree with them because they used a wrong layout plan. She refuted that where the Plot No. 46 is supposed to be is now where the County Government has put up the new Nyakoe Market stalls. She nevertheless acknowledged that she last paid rates in 2013 and the County Government is no longer accepting rate payments from her.
7. PW-2 was Prescott Mokaya Nyakango. He is husband to the plaintiff. He testified that he is a retired land surveyor. He was employed by the Gusii County Council from 1992 until 1999. His work entailed survey works, checking on market plots for allocation, and advising the Allocating Committee. He also had the role of pointing out to the allottees their land on the ground. He testified that the market plan relied upon by the defendant was not the correct one. His explanation was that the plan relied upon by the defendant was a 'Development Plan' but what the plaintiff was relying on was the 'Layout Plan' and that the correct plan for Nyakoe Market was the plaintiff's 'Layout Plan.' He testified that the plot No. 51 was not there during his tenure and he never allocated it. His wife was however allocated the Plot No. 46 which according to him was between the Plot No. 52 and 54 in the 'Layout Plan' relied upon by the plaintiff. He refuted that the Plot No. 51 is the plot immediately after Plot No. 52 as indicated in the market plan relied on by the defendant. Cross-examined, he stated that the plots did not follow a numerical sequence hence the location of the Plot No. 46 between Plot No. 52 and 54.
8. With that evidence, the plaintiff closed her case.

9. DW -1 was Thomas Ongeru Orangi, a surveyor working with the Ministry of Lands, Housing and Urban Development, based in Kisii. He has 10 years experience. He presented the report dated 22 December 2016 which was prepared by his predecessor, James Cheruiyot, and Mr. Wekesa Wanyama, the Physical Planner for the County Government. He could see that both parties claim the same land on the ground but through two different plot numbers. He testified that the disputed plot fronts the main Kisii-Kisumu road and measures 50 x 100 feet. He affirmed the findings in the report that the disputed plot is Plot No. 51 and not Plot No. 46 as claimed by the plaintiff.
10. Cross-examined, he testified that a 'Layout Plan' and a 'Development Plan' were the same thing. He testified that the Development Plan should be a replica of the Layout Plan though the Layout Plan comes out first. He could see that the 'Layout Plan' relied upon by the plaintiff was not certified but the 'Development Plan' relied on by the defendant was certified. He affirmed that it was the 'Development Plan' that was used to prepare the report and the report would have changed if it was the 'Layout Plan' that was used. He could see that the 'Layout Plan' relied on by the plaintiff was not numbering the plots in sequence and it has left blank the location of Plot No. 46.
11. DW – 2 was Dickson Okondo Nyabuto, a Land Surveyor working with the County Government of Kisii. He has worked there for 4 ½ years. He testified that Nyakoe Market is owned by the County Government of Kisii and the occupants are allottees who pay plot rent to the County Government. He presented a report dated 27 September 2024 which he prepared. He testified that what he used was the Development Plan which was certified by the Director, Land Survey of the Kisii County Government. He affirmed that the plaintiff presented what she termed as the 'Layout Plan' which he went with to the Director, and the Director advised him to use the 'Development Plan'. He could not authenticate this 'Layout Plan' relied on by the plaintiff and according to him such plan is not in their office.
12. DW – 3 was Charles Gwaro Onsoti, the defendant. He testified that he purchased the Plot No. 51 from one Chrisantus Okondo Motari for Kshs. 104,000/= on 20 March 2000 and he produced the sale agreement. They then proceeded to the County Council who effected transfer to his name. The transfer was minuted. He testified that he was shown the dimensions of the plot by County Council personnel. He had his own 'Layout Plan' which he asserted was the correct one. He testified that he has one neighbour, since the other side is the open cattle market. He thought that the Plot No. 46 was cancelled to create more space for the market.

13. With that evidence the defendant closed his case.
14. The court was of opinion that it was important to hear from the Kisii County Physical Planner before determining the case and I issued summons to him. I specifically sought address on which is the proper plan that the County Government of Kisii has and recognizes for Nyakoe Market between the 'Development Plan' produced by the Surveyors, the 'Layout Plan' produced by the plaintiff, and the 'Layout Plan' produced by the defendant. I directed the witness to attend court with what the County Government of Kisii considers to be the correct plan for Nyakoe Market identifying the numbering and location of each plot; and I also directed the Physical Planner to give his independent opinion on the location of the Plots No. 46 and 51 Nyakoe Market.
15. Cyrus Mogire Nyamache the Assistant Director, Physical Planning, County Government of Kisii, attended court. He attended court with a report dated 20 July 2025. He testified that it is the 'Development Plan' produced by the surveyors which is the only authentic layout plan for Nyakoe Market. He testified that they have no information on the Layout Plans produced by the plaintiff and defendant. He affirmed that the plaintiff was allotted the Plot No. 46 on 15 October 1992 and the Plot No. 51 was transferred to the defendant on 15 November 2000. He testified that Plot No. 46 is to the East of Nyakoe Market and on the ground there are temporary wooden stalls on it. Plot No. 51 is West of Nyakoe Market and fronts the Kisii-Oyugis main road and on it is a permanent structure. The positions of the two plots were in line with the 'Development Plan.'
16. I invited counsel to file their submissions, which they did, and I have taken them into account.
17. I will be fairly brief in my disposition because to me the issues are clear and unambiguous.
18. Both the plaintiff and the defendant claim the same land on the ground. The plaintiff believes that the land is the Plot No. 46 Nyakoe Market, whereas the defendant believes that the land is Nyakoe Market Plot No. 51. It is common ground that Nyakoe Market comprises of market plots allocated by the defunct Gusii County Council and now under the County Government of Kisii. To assert her claim on the ownership of the disputed land the plaintiff provided what she described as the correct 'Layout Plan' of Nyakoe Market. The defendant also had a different 'Layout Plan'. There was also what was titled a 'Development Plan'. These three documents are all different. The only entity that could confirm which is the correct plan was the County Government of Kisii and we had two officers from the County Government who testified. One was a Surveyor and the other

the Assistant Director Physical Planning. Both officers confirmed that what the County Government of Kisii recognises as the correct plan for Nyakoe Market is the 'Development Plan' and no other. Indeed, they could not tell where the other two plans came from and pointed out that they were not certified.

19. It is the County Government of Kisii which is in charge of the plots in Nyakoe Market and it is that County Government which has the authority to confirm which is the correct plan for Nyakoe Market. The plaintiff and defendant did not have verified plans or minutes verifying the plans that they alleged to be the plan for Nyakoe Market. I am aware that PW-2 testified that he is the one who prepared the plan that the plaintiff produced but we cannot escape the fact that there is nothing authenticating that plan. I have no reason to doubt that the plan that the County Government inherited and recognises is the 'Development Plan' and no other. I am guided that this is the proper plan to follow in determining this dispute.
20. It is clear that pursuant to the Development Plan, which is the only recognized plan, the suit land is Plot No. 51 and not Plot No. 46 as alleged by the plaintiff. Indeed, the Plot No. 46 is elsewhere within Nyakoe Market but does not front the Kisii-Oyugis-Kisumu highway. The plaintiff cannot impose on herself a plot and insist that this is where her plot should be. She can only follow the plots as identified by the County Government of Kisii. She has no reason to lay claim on the defendant's Plot No. 51 and assert that this is now her Plot No. 46. There would be chaos and anarchy if we allow for that. The plaintiff has to be satisfied with the location of her plot as shown in the Development Plan. That is the only land that she is entitled to and no other. The suit land is Plot No. 51 and it does not belong to her. It belongs to the defendant.
21. The long and short of it is that I find no substance in the case of the plaintiff and it is hereby dismissed with costs to the defendant.
22. Judgment accordingly.

DATED AND DELIVERED THIS 9 DAY OF DECEMBER 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Ms. Nyaenya instructed by M/s Bosire Gichana & Company Advocates for the plaintiff

Mr. Bigogo instructed by M/s Bigogo Onderi & Company Advocates

Court Assistant – David Ochieng