

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KISII

KISII ELCLA NO. E010 OF 2024

JACKSON SEME NYAMWEYA APPELLANT

VERSUS

DENNIS OBWOGE NYAMWEYA RESPONDENT

JUDGMENT

(Being an appeal from the judgment of Hon. P.K Mutai, Principal Magistrate, delivered on 6 March 2024 in the case Kisii MCELC No. 243 of 2018)

1. The suit from which this appeal emanates was commenced by the appellant through a plaint which was filed on 24 December 2018. In the plaint, the appellant pleaded that he was the registered proprietor of the land parcel Nyaribari Chache/Keumbu/1933 measuring 0.5 Ha (the suit land or simply parcel No.1933). He pleaded that in the month of June 2018, the respondent trespassed into this land and started erecting a structure without his permission. For that reason he sought the following orders :
 - (a) Eviction of the respondent/defendant from the land.
 - (b) A permanent injunction to restrain the respondent/defendant from the suit land
 - (c) Costs of the suit and interest.
2. The respondent entered appearance and filed defence. He admitted that the appellant was the registered proprietor of the suit land but denied that it measures 0.5 Ha; he also denied trespassing into the appellant's land.
3. The appellant filed a reply to defence where he inter alia contended that the respondent had carved out a portion measuring 0.19 ha from the suit land and asserted that the suit land measures 0.5 ha.
4. In the course of the trial, the court directed that a survey of the land be done, and a report was prepared and filed in court. I will revert to it later in this judgment.
5. PW-1 was the appellant. He testified that the respondent is his brother. He had a witness statement which he adopted as his evidence. It is more or less a replica of what is pleaded in the plaint which I have already alluded to above. In his oral evidence, he reiterated that the suit land measures 0.5 Ha and that he was given the suit land by his father. His father

owned the land parcel No. Nyaribari Chache/Keumbu/ 135 (parcel No.135) which he subdivided into two to bring forth the suit land (as parcel No. 1933) and the parcel No. 1932. He claimed that the respondent had taken a portion from his land measuring 0.19 ha. Cross-examined, he testified that the suit land was initially 0.31 ha (as shown in the mutation form of the parcel No. 135) but he contended that his father later added him more acreage to bring the suit land to 0.5 ha. He however did not have the documentation to demonstrate this which he claimed got lost during 'ethnic fighting'. He mentioned that the parcel No. 1932 has since been subdivided and that the respondent erected a fence in 2018.

6. PW -2 was Thomas Onger Oangi. He works with the survey department. He testified that on 14 August 2018, he visited the land and prepared a report on a boundary dispute. According to him, this was a land claim and not a boundary dispute and he had a report dated 14 August 2018 to that effect. In that report, he recorded that the applicant (appellant) 'is claiming land fully occupied and built up by his brother.' Cross-examined, he affirmed that the suit land and the parcel No. 1932 were carved out of the land parcel No. 135. This parcel No. 135 measured 5.82 ha. It was subdivided into the parcel No. 1932 measuring 5.2 ha and the parcel No. 1933 (the suit land) measuring 0.31 ha, in total 5.83 ha. According to him, this (difference in acreage i.e 5.82 and 5.83 ha) was not an error, as it was within the margin. He testified that his visit on the land showed buildings that were not recent.
7. With that evidence the appellant closed his case.
8. DW-1 was the respondent. His evidence was that in December 1999, their late father called his sons and informed them that he wished to sell his land to whomever was interested, in return for a rain coat, a pullover, boots and some money. He stated that he and the respondent delivered these items to their father and they were both given a portion of his land. So too, one Ronald Oyori, a son of the respondent. He also stated that one Pacifica Matongo purchased a portion, which he (respondent) was cultivating, and therefore his land does not border that of the appellant. He stated that they were living peacefully until 2018; he commenced construction of a permanent house when the respondent emerged, claiming that he was building the house on his land, and later filed suit. Cross-examined, he testified that their father died in 2009. He refuted that the title of the appellant measures 0.5 has as indicated in the green card.
9. DW -2 was Peter Gekonge Nyamweya. He is a brother of the disputants from the first house. He stated in his witness statement that his father had three houses and that the

disputants are both from the 2nd house. He reiterated the evidence of the respondent that their father wished to sell part of his land and asked for the items already mentioned in the evidence of the respondent. He did affirm that they lived peacefully until 2018 when the respondent commenced developing his house and the appellant claimed that it was on his land. Cross-examined, he testified that their father gave land to the appellant before his death i.e the suit land. According to him the other land (that of the respondent) is yet to be subdivided formally, as they have no titles, though they have their boundaries intact on the ground. With that evidence the respondent closed his case.

10. It will be recalled that I had earlier mentioned that the trial court had directed a survey of the land. From the record, there is a report dated 26 August 2022, prepared by David Lemayian, for the National County Surveyor, Kisii. That report was however not produced by any of the parties and neither do I see reference to that report in the evidence of the witnesses who testified.
11. In his judgment, the trial Magistrate pronounced himself as follows in his analysis and determination :

“Some facts are not in dispute. Parcels of land number Nyaribari Chache/Keumbu/1932 and 1933 emanated from subdivision of parcel of land number 135. It also not in dispute that the plaintiff own land parcel number Nyaribari Chache/Keumbu/1933 (sic) where he is alleging the defendant encroached into it. The land was visited by land Registrar and surveyor having been directed by court to establish and fix the common boundaries between the two parcels of land. PW-2 called by the plaintiff produced report dated 26th August 2022. Upon the visitation, it was observed as follows ;

- (i) *Parties have distorted the original boundary delineated pursuant to the subdivision of plot 135 to Kisii/Nyaribari Chache/Keumbu/1933 and 1932*
- (ii) *The plaintiff’s current ground occupation exceeds the acreage allocated by the mutation dated 23rd May 2000.*

The report prepared by land surveyor reflects the correct position and clearly there is no evidence presented to show that the Defendant has encroached onto his land. On the contrary, there is evidence that the plaintiff (sic) current ground occupation exceeds what was allocated. The plaintiff (sic) case was therefore not proved on the balance of probability and it is dismissed. This is matter involving close family members I direct each party to bear own costs.”

12. Aggrieved by the above judgment, the respondent has now preferred this appeal. I realise that he filed the appeal in person, although he was represented by M/s Bigogo Onderi & Company Advocates at the trial. It is not the most elegantly drafted Memorandum of Appeal, but from it, I can flesh out that the appellant asserts that despite the trial court finding that he was the registered proprietor of the suit land, he ignored the measurements noted in the title deed, and that the claim of trespass was not disproved.
13. When I encountered the appeal, I thought that given that the parties are brothers, they could use the services of a mediator to amicably settle their dispute. Unfortunately, the mediation failed, leaving this court with no other recourse other than to proceed with the appeal.
14. The appeal was argued through written submissions and I have taken note of the submissions filed by the appellant, and the submissions filed by Mr. Momanyi Aunga, learned counsel for the respondent. I am of the following view :
15. In a nutshell, the case of the appellant was that he owned the suit land, measuring 0.5 ha, and that the respondent had trespassed into a portion measuring 0.19 ha. That is why he asked that the respondent be evicted and be permanently restrained from the suit land. In his defence, the respondent refuted that the suit land measures 0.5 ha as claimed by the appellant. What the appellant produced as documentary evidence in support of his case was his title deed, a search, and the surveyor's report dated 14 August 2018. The title deed and the search do reflect that the acreage of the suit land is 0.5 ha. On the other hand, the respondent, inter alia produced as an exhibit the mutation form that subdivided the land parcel No. 135 into the land parcels No. 1932 and 1933 (the suit land). That mutation form was registered on 23 May 2000. From it, it is clear that the land parcel No. 135 was being subdivided into the land parcels No. 1932 measuring 5.52 Ha, and No. 1933, measuring 0.31 ha. In addition to the mutation form, the respondent also produced the copy of the green card to the parcel No. 1932 which shows its acreage as 5.52 ha, which tallies with what is in the mutation form.
16. In his evidence, the appellant testified that his father later added him more land in addition to the 0.31 ha shown in the mutation form. He however did not have any evidence to demonstrate this. Whatever the case, if indeed his father added him more land, you would expect that he would at the same time reduce the acreage of his land parcel No. 1932, so that there is an addition in one and a reduction in the other, by similar acreage. I do not see any evidence of any reduction of acreage of the parcel No. 1932 to accommodate any extra acreage to the parcel No. 1933 (the suit land). It remains a

mystery how the appellant managed to change the acreage of the suit land from 0.31 ha, which is the acreage in the mutation form, to 0.5 ha, which is now the acreage reflected in his title. It will be recalled that his evidence was that the respondent has encroached into 0.19 ha, and if you do the math, you will see that this is the exact difference between 0.5 ha, and 0.31 ha. In his report, PW-2, the surveyor, did testify that the portion of land in dispute is fully built up and occupied by the respondent and that the structures are not recent.

17. It is my opinion that the suit land cannot be one genuinely measuring 0.5 ha as claimed by the appellant. From the evidence adduced, the suit land emanated from the subdivision of the land parcel No. 135 and the registered mutation form is clear that the title ought to have been 0.31 ha. There is absolutely no evidence of the father of the disputants altering the acreage to read 0.5 ha as contended by the appellant. I have already mentioned that if at all this was done then you would expect a corresponding reduction in acreage on the parcel No. 1932, of which there is none.
18. It is my conclusion that the appellant somehow managed to alter the acreage of the suit land to reflect more land, i.e 0.5 ha, instead of the correct acreage of 0.31 ha. This could only have been through fraudulent means. I am afraid that he cannot use such trickery to now try and evict the respondent from what the respondent is rightfully in possession of. Although the learned trial Magistrate erred in stating that PW-2 had referred to a report dated 26 August 2022, when in fact PW-2 had referred to his report dated 14 August 2018, the report of 26 August 2022 never having been produced, I am unable to fault his conclusion that the case of the appellant was for dismissal.
19. So that there is no confusion on the acreage of the suit land, I order the Land Registrar, and the County Surveyor, to see to it that the suit land i.e the land parcel Nyaribari Chache/Keumbu/1933 reflects the acreage shown in the mutation form of the land parcel Nyaribari Chache/Keumbu/135, which mutation form was registered on 23 May 2000.
20. For reasons above, I find no merit in this appeal, and it is hereby dismissed. In my discretion, I make no orders as to costs as the parties are brothers.
21. Judgment accordingly.

DATED AND DELIVERED THIS 10 DAY OF FEBRUARY 2026

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Michael Oyuko – Court Assistant

Appellant acting in person – Absent

Mr. Momanyi Aunga for the respondent – Absent

Respondent also absent.