

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELCA NO. E012 OF 2021

NYAKUNDI OMBEKA APPELLANT

VERSUS

HESBON MORIASO OKARI

JOHN MOSOTI (Sued as Administrators of the Estate of Samson Okari)

..... RESPONDENTS

JUDGMENT

(Being an appeal from the judgment of Hon. P.K Mutai, Senior Resident Magistrate, Kisii, delivered on 21 July 2021, in the case Kisii MCELC No. 183 of 2018 formerly Kisii ELC No. 210 of 2013)

1. The suit from which this appeal emanates was commenced by one Samson M. Okari through a plaint which was filed in the superior Environment and Land Court on 9 May 2013. Samson Okari (the original plaintiff) died on 12 July 2015 before the case could be heard and he was substituted by Hesbon Moriasi Okari and John Mosoti (the respondents herein) who continued the suit on behalf of his estate. The case of the original plaintiff was that he owned the Plot No. 7B Nyacheki Market measuring 25 x 100 feet. He complained that the appellant had encroached into part of his plot and unlawfully constructed a structure. In the plaint, he sought the following orders :
 - (a) An order for demolition of the illegal structure put up on the plaintiff's plot by the defendant.
 - (b) An order of eviction.
 - (c) An order of permanent injunction against the defendant his agents and/or servants restraining them from entering into, trespassing or in any way interfering with the plaintiff's peaceful occupation and use of his Plot No. 7B Nyacheki Market.
 - (d) Costs of the suit.
 - (e) Interest at court rates.
 - (f) Any such further relief as the court may deem fit to grant.

2. The appellant appointed counsel, entered appearance, and filed defence. He contended that the original plot, as Plot No. 7, was owned by three persons, namely Naftal Nyaberi Mangerere (Naftal), Nahashon Ombeka (Nahashon) and Andrew Tongi (Andrew), and that each owner had developed his share measuring 16.6 x 100 feet. Nahashon is the father of the appellant/defendant. It was pleaded that Naftal sold his share of 16.6 x 100 feet together with a permanent shop that he had already constructed thereon to the original plaintiff. It was further pleaded that Andrew sold his share to Nahashon, so that Nahashon now owned two portions measuring 16.6 x 100 feet (i.e his original portion and what he bought from Andrew). It was thus contended that what the original plaintiff was entitled to was only a portion measuring 16.6 x 100 feet (i.e the one third portion that was alleged to be initially owned by Naftal) which had a shop, and not a plot measuring 25 x 100 feet as claimed. It was contended that the original plaintiff obtained Plot 7B by fraud and the following particulars were pleaded :
 - (a) Deceiving the clerk of the council that he purchased a plot measuring 25 x 100 feet out of Plot No. 7.
 - (b) Failing to tell the truth that Plot No. 7 Nyakechi market was previously owned by three persons.
 - (c) Failing to inform the clerk that Plot No. 7 was measuring 50 x 100 feet and each of the three persons got 16.6 x 100 feet.
 - (d) Plaintiff's dishonesty on Plot No. 7 by altering to 7B Nyakechi Market.
 - (e) Plaintiff now claims 9 more feet unfairly and knowingly.
3. The appellant claimed damages for misrepresentation and dishonesty and asked that the original plaintiff's case be dismissed with costs.
4. I have already mentioned that the original plaintiff died and was substituted by the respondents. The order of substitution was made on 4 July 2018 and the plaint amended to effect the substitution. On 27 July 2018, Mutungi J, transferred the matter to the Magistrates' Court at Kisii for disposal.
5. Hearing commenced on 18 September 2019 before Hon. S.M Makila when the 1st respondent testified as PW-1. In a nutshell his evidence was that his father (the original plaintiff) owned the Plot No. 7B in Nyacheki Market and that the plot measured 25 x 100 feet. He testified that part of the plot, measuring 17 feet, was developed, leaving 8 feet as a walkway to access the back. He testified that the appellant had fenced this part such that the back cannot be accessed. He produced the plot card as an exhibit. Cross-examined, he testified that his father bought the plot from Naftal as a 25 x 100 feet plot and he referred

to the Plot card which shows the same measurement i.e 25 x 100 feet. He testified that when his father acquired the plot it already had a building on it. He stated that the appellant started encroaching on the land in 2003. He was not aware that the plot was originally owned by 3 persons.

6. PW -2 was Richard Oyando Okari a younger brother to the original plaintiff. His evidence was that the original plaintiff purchased the plot as a 25 x 100 feet plot from Naftal and he got a plot card. Cross-examined, he testified that the appellant owns Plot 7A.
7. PW -3 was Dennis Getange Kepha an employee of the Kisii County Government in charge of property rates within Bobasi Sub-County. He testified that the original Plot No. 7 was in name of Nahashon Ombeka and Samson Okari (original plaintiff). The name of Naftal was deleted and replaced with that of Samson Okari. He testified that the plot originally measured 50 x 100 feet, and in case of subdivision, the subdivided portions would be 'A' and 'B' each measuring 25 x 100 feet. He had the register of the plots No. 7A and 7B Nyacheki Market. According to him, Samson Okari owned Plot No. 7B and the appellant Plot No. 7A. Cross-examined, he stated that the transfer to the original plaintiff was vide Minute No. 30/12.7.1997 and he asserted that any subdivision of an original plot would result to a plot of 25 x 100 feet, though if owned by three persons, subdivision can be as agreed by the co-owners.
8. With that evidence, the respondents closed their case.
9. The appellant testified as DW-1. He relied on his witness statement wherein he inter alia stated that the original plot No. 7 was owned by three persons as pleaded in the plaint i.e Naftal, Nahashon, and Andrew Tongi, with each owning 16.6 x 100 feet of the 50 x 100 feet plot. He had the original Plot Card for this Plot No. 7. It bore the names 'Naftal Magere and Nahashon Ondika and Co'. He acknowledged that the name of Andrew Tongi was not indicated in this card but his explanation was that he was represented by the description '...and co' in the plot card. He testified that the plot was developed in 1957 by his father and Andrew Tongi, using iron sheets, with timber houses at the back. Naftal (who sold to the original plaintiff) developed using bricks on what he alleged to be his portion measuring 16.6 x 100 feet. He contended that the County Government erred in describing the portions as two of 25 x 100 feet and asserted that the correct measurement should be 16 x 100 feet. According to him, his plot measures 33 x 100 feet having purchased the share of Andrew Tongi. He however did not have a plot card. He also did not have the sale agreement between his father and Andrew Tongi where Andrew sold his alleged share.

10. DW -2 was Meshack Mariera Tongi, a son of Andrew Tongi. His evidence was that his father owned the plot together with Naftal and Nahashon. He stated that his father relinquished his share to Nahashon (father of the appellant). He elaborated that Nahashon died in 1969 while his father (Andrew) died in 1995.
11. DW-3 was Henry Nyamweya Machuka. He testified that he was a past Chairman of Nyacheki Market between 2012 and 2019. He was aged 59 years old when he testified in 2021. He stated that he knew Andrew Tongi but during his tenure he was not on the plot.
12. With the above evidence, the appellant closed his case.
13. In his judgment the trial Magistrate acknowledged that the plot was originally Plot No. 7 and referred to the original Plot card. He held that it could not be speculated that the word '...and Co' in the Plot card referred to Andrew Tongi as one of the proprietors of the Plot No. 7. He held that there was insufficient evidence to show that the plot was owned by three people. He held the view that the plot was subdivided into Plot 7A and 7B, which he found buttressed by the rates register, and that the two plots measured 25 x 100 feet. He did not find any fraud in the subdivision of the plot into two. He upheld the case of the respondents (as plaintiffs) and directed the appellant to vacate within the next 60 days or be evicted. He also granted the respondents the costs of the suit.
14. Aggrieved, the appellant has preferred this appeal contending that the trial court erred in its findings. I directed that the appeal be argued by way of written submissions but only Mr. Soire, learned counsel for the appellant, filed submissions. I have taken the same into account.
15. It will recalled that the case of the respondents was that the plot of the original plaintiff is the Plot No. 7B Nyacheki Market and that it measures 25 x 100 feet. It was also their case that the appellant has encroached into part of this plot hence the prayers to have the appellant evicted and permanently restrained. The defence of the appellant was that the original plot, as Plot No. 7, was owned by three persons, who divided the plot between themselves, so that each person's share was one measuring 16.6 x 100 feet. It was contended that the share of the third person, Andrew Tongi, was transferred to the father of the appellant, so that the appellant came to own two portions of 16.6 x 100 feet, in total 33.3 x 100 feet, whereas what the respondents ought to own is a 1/3rd portion measuring 16.6 x 100 feet. The appellant further contended that the original plaintiff fraudulently managed to cause the records of the Plot No. 7B to indicate a plot measuring 25 x 100 feet.

16. I have analysed both the documentary and oral evidence but I see nothing tangible that supports the allegations of the appellant.
17. Starting with the claim that the original Plot No. 7 was owned by three persons, there is nothing to support this contention. The original plot card, which was produced by the appellant himself, does not show the name of Andrew Tongi as an owner of the plot. That plot card bears only two names and the addition of the words 'and company.' I agree with the conclusion of the trial Magistrate, that it cannot be speculated that the addition of the words '...and company' means that Andrew Tongi was also one of the owners of the original Plot No.7. There is in fact absolutely no document whatsoever to demonstrate that Andrew Tongi was ever recognized as one of the owners of the Plot No. 7. There is no record of him paying any rates, and no record of him being addressed by the local authority as an owner of the Plot. No. 7. PW-3, an official of the County Government of Kisii, did not have any record of him as an owner of the Plot No. 7.
18. Apart from the foregoing, despite it being claimed that Andrew Tongi sold his 1/3rd share to the father of the appellant, there is no sale agreement and no record of any such sale. Neither was any witness called to affirm that he/she witnessed such sale. Even on the ground, there was no witness who stated that he could positively identify a development solely made by Andrew Tongi.
19. In those circumstances, the only reasonable conclusion that can be reached is that the plot was owned by two persons, and not three persons as alleged by the appellant.
20. There is record of Naftal disposing his half share to the original plaintiff. This was indeed confirmed by PW-3. He did testify that in such instance the two owners can subdivide their plot so that each has a plot measuring 25 x 100 feet. I am persuaded that this is precisely what happened. The original plaintiff bought the half share of one of the two owners (Naftal) so that he ended up with the Plot No. 7B and the other owner (Nahashon) kept one half of the plot which is the Plot No. 7A. Each of these two plots measure 25 x 100 feet. This was asserted by PW-3 and the evidence of PW-3 cannot be taken lightly. These are market plots which were under the defunct local authority, now succeeded by the County Government of Kisii. The County Government of Kisii as owner of the plots knows who their rate payers are. In this instance, the owner of the plots (County Government of Kisii) has confirmed that what they recognize is two plots, 7A and 7B, owned by the original plaintiff and the defendant, and each plot measures 25 x 100 feet. That evidence bears considerable weight.

21. My conclusion, just as the trial Magistrate concluded, is that truly there are only two plots each measuring 25 x 100 feet. The appellant cannot purport to extend his plot beyond 25 feet. He has no right to claim 33 or so feet as he contends. He ought to limit himself to only the width of 25 feet.
22. From the foregoing, I am not persuaded that the trial Magistrate erred. There is no merit in this appeal and it is hereby dismissed with costs. The appellant had been given 60 days to vacate in the judgment delivered on 21 July 2021. The days are now long gone. I only give him a further 14 days to demolish his structures in the portion belonging to the original plaintiff and vacate it. He should limit himself to only 25 feet as I have held above. In default the respondents are at liberty to pull down the structures on the disputed portion and evict the appellant. The appellant is also permanently restrained from interfering with the Plot No. 7B measuring 25 x 100 feet.
23. Judgment accordingly.

DATED AND DELIVERED THIS 11 DAY OF FEBRUARY 2026

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Mr. Soire for the appellant

No appearance on part of Mr. Mageto for the respondent

Court Assistant – Michael Oyuko