

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KISII
ELCLA NO. E023 OF 2024

JOB MONGARE (Suing as Administrator of the Estate of the late RICHARD MONGARE OGAMBA) APPELLANT

VERSUS

SAMWEL ANDREW NYAGAKA MWARO 1ST RESPONDENT

HELLEN MORAA MAINA 2ND RESPONDENT

LAND REGISTRAR, KISII COUNTY 3RD RESPONDENT

HON. ATTORNEY GENERAL 4TH RESPONDENT

JUDGMENT

(Being an appeal against the ruling of Hon. C.A Ocharo, Chief Magistrate, delivered on 28 May 2024 in the suit Kisii MCELC No. 124 of 2019)

1. The suit from which this appeal emanates was commenced by Samwel Andrew Nyagaka Mwaro, the 1st respondent herein, through a plaint filed on 22 August 2019. He amended that plaint upon being granted leave on 3 October 2020. In his pleadings, he avers to be the registered proprietor of the land parcel Kisii/Central Kitutu/Ikuruma/1076 (parcel No. 1076) measuring 0.31 ha after buying the land from one Joseph Maina Onsomu (now deceased). The 1st respondent pleaded that he is however not in occupation of this land parcel No. 1076 but in occupation of the land parcel Kisii/Central Kitutu/Ikuruma/92 (parcel No.92) and that the registered proprietor of this land parcel No. 92 was in occupation of the land parcel No. 1076. This land parcel No. 92 was registered in the name of Richard Mongare Ogamba, the original 1st defendant in the amended plaint. He died before the case was concluded and was substituted by the appellant herein, Job Bongongo Mongare as administrator of his estate. It was pleaded that both the 1st respondent and the deceased 1st defendant had purchased land from one Joseph Maina Onsomu who pointed out to them the portions that they settled in. The 1st respondent pleaded that it was due to a mix-up that he ended up having a title reading No.1076 while he was in occupation of the land parcel No. 92, and the original 1st defendant ended up

with a title reading parcel No. 92 while he was in occupation of the parcel No. 1076. Joseph Maina Onsomu is the deceased husband of Hellen Moraa Maina, the 2nd defendant/respondent. It was pleaded that the 2nd respondent had trespassed into the land of the plaintiff/1st respondent and commenced construction of a building. In the plaint, the 1st respondent asked for an order of resurvey so that his title No. 1076 is matched to the land that he occupies i.e parcel No. 92. In the alternative he asked for subdivision of the parcel No. 92 and transfer of a portion measuring 0.31 ha to him. In the alternative he asked for eviction of the 1st and 2nd defendants from the land he occupies adjusted to 0.31 ha. He also asked for a permanent injunction to restrain the defendants from the land he occupies.

2. The original 1st defendant (now represented by the appellant) filed a defence. He admitted that he acquired an interest measuring 1.0 ha from Maina Onsomu (Mr. Onsomu) in 1982, but denied any mix-up in survey.
3. The 2nd defendant/respondent filed defence wherein she pleaded that the 1st respondent bought a small portion from her husband and got title to the parcel No.1076 measuring 0.31 ha. She contended that the 1st respondent has trespassed and uses a portion of her late husband's land parcel No. 92. She also alleged that the original 1st defendant had trespassed and altered the title of the parcel No.92 into his name without following succession. She filed a counterclaim where she reiterated that the plaintiff/1st respondent had trespassed into the parcel No.92 and she asked that he be evicted. She also reiterated that the original 1st defendant had trespassed into the land of her late husband and altered title into his name. She asked that his title be cancelled and he be evicted. She also asked for orders that she be registered as proprietor of the parcel No. 92 and a parcel No.1095 (which I am not sure of its relation to the other parcels in the dispute).
4. I need to mention at this stage that the land parcel No. 1076 came to be after a land parcel No. 128 was subdivided into two, i.e parcel No. 1075 and No.1076. The parcel No. 1075 remained in the name of Mr. Onsomu (deceased) and the title to the parcel No. 1076 was registered in the name of the 1st respondent. I observe that among the list of documents filed by the 2nd respondent are documents indicating that the parcel No. 1075 was further subdivided into the parcels No. 1455 and 1456 both of which are in the name of Mr. Onsomu.
5. The court directed the District Surveyor to prepare a report on the dispute of the parties and the Surveyor visited the parcels of land and filed a report dated 16 October 2023. In that report, he observed that the 1st respondent (as plaintiff) was indeed issued with title to

the parcel No. 1076 but the land is occupied by the 2nd defendant/respondent (wife of Mr. Onsomu). He also found that the parcel No. 92 is registered in name of the original 1st defendant (Richard). He observed that Richard was using the original parcel No.128. He saw that the position claimed by the plaintiff/1st respondent is part of parcel No. 92. He also observed that the land currently being utilized by the original 1st defendant is within the parcel No. 1076. He concluded that the original 1st defendant, despite being registered as proprietor of the parcel No. 92, was using the parcels No. 1075 and 1076.

6. When the matter came up before the trial court on 21 November 2023, Mr. Nyangacha, learned counsel for the plaintiff/1st respondent, stated from the bar that he has no problem with this report and that it can be adopted as the judgment of the court. Mr. Begi, learned counsel for the 1st defendant, stated that his client was deceased whereas Mr. Sagwe, learned counsel for the 3rd defendant, stated that he has not seen the report. There followed an application to substitute the deceased 1st defendant which was allowed on 30 January 2024. The next time the matter came up was on 28 February 2024 when Mr. Begi stated that he has a report from a private surveyor which he wished to file before making comments. A report prepared by Mashariki Geosurveys Limited, and dated 19 February 2024, was later filed. That report confirmed that the plaintiff/1st respondent was occupying a portion of the land parcel No. 92 despite having title to the parcel No.1076. It also verified that the family of the original 1st defendant (Richard) was occupying the parcels No. 1075 and 1076. I see no mention in that report of the occupation of the 2nd respondent.
7. On 2 April 2024, the court directed parties to file submissions and reserved ruling for 28 May 2024. It would appear that only counsel for the plaintiff/1st respondent filed submissions. The court subsequently delivered the impugned ruling on 28 May 2024. In that ruling, she concluded that the two reports support the plaintiff's suit and that there is indeed a mix-up on the ground. She continued to hold that though the 2nd defendant/respondent counterclaimed against the 1st defendant, she failed to present any evidence to prove that the registration was obtained illegally. She further held that there was no indication whatsoever of her challenging the title of the original 1st defendant since registration and that she is estopped from doing so. She proceeded to dismiss the counterclaim with no orders as to costs. She reasoned that over time courts have adopted Land Registrars' reports as judgments of the court and she found the reports credible. She proceeded to pronounce judgment in favour of the plaintiff/1st respondent as follows :

- (1) An order of re-survey be and is hereby issued to the 3rd defendant (Land Registrar) to match the plaintiff's title number Kisii/Central Kitutu/Ikuruma/1076 measuring approximately 0.31 ha on the plaintiff's physical identifiable portion of the same acreage within the 1st defendant's existing parcel No. Kisii/Central Kitutu/Ikuruma/92 as it currently appears on the map. The plaintiff shall bear the costs of this exercise.
 - (2) Upon compliance with Order 1 above, a permanent injunction restraining the 1st and 2nd defendants, their spouses, servants, children, employees, workers, assignees, lessees, tenants or any other person working under their instructions from setting foot and or trespassing on land parcel No. Kisii/Central Kitutu/Ikuruma/1076 which on the ground is on land parcel No. Kisii/Central Kitutu/Ikuruma/92 measuring approximately 0.31 ha and an order directed at the OCS Kegogi Police Station to ensure compliance and implementation.
 - (3) The plaintiff shall be awarded costs of the suit.
8. Aggrieved, the 1st defendant's legal representative has preferred this appeal on the grounds that the court erred in granting orders not sought; that the court erred in failing to appreciate the facts and that there was no privity of contract between the original 1st defendant and the plaintiff/1st respondent hence the 1st respondent had no rights over the parcel No.92; that the court erred in holding that the case was proved on a balance of probabilities; that the court erred in holding that the parcel No. 1076 was within the parcel No.92; that the court erred in finding that there was an error during survey; that the court erred in finding that the two reports were in agreement.
 9. The appeal was urged through written submissions and I have taken note of the submissions filed. I will be fairly brief in my disposition because it is clear in my mind that the court erred in merely adopting the report of the surveyors as a judgment of the court given the circumstances surrounding the dispute.
 10. It will be recalled that the case of the 1st respondent was that there was a survey mix-up and he ended up with a title reading the parcel No.1076 whereas he was in fact in occupation of the parcel No. 92 whose title was in name of the original 1st defendant. The original 1st defendant in turn was in possession of the parcel No. 1075 and 1076, despite having title to the parcel No. 92. It will also be recalled that the 2nd respondent had a counterclaim seeking cancellation of the title of the original 1st defendant which she contended had been procured fraudulently.
 11. I do not see how the issue before court could have been resolved merely by a survey report. What the survey reports did was to present the facts relating to occupation on the

ground and that is all. Those reports did not go any further to state how come the litigants ended up in possession of land to which they had no titles to. In fact, in the report prepared by Mashariki Geosurveys Limited, there was recommendation for a deeper look into the mutation forms that brought about the suit properties. Whatever the case, in the circumstances of the case, the survey reports could not be taken exclusively without the parties being given an opportunity to ventilate their respective cases. This is particularly so regarding the 2nd respondent who had a counterclaim for the cancellation of the title of the 1st defendant. She needed to be given an opportunity to be heard on her case and a decision made on merit on whether that counterclaim was justified. In her ruling, the trial court stated that though the 2nd defendant had a counterclaim, she had failed to provide evidence to prove that the registration of the original 1st defendant was obtained illegally. But how could she have come to the conclusion that the 2nd respondent has not provided any evidence when the matter had not been heard and opportunity given to the 2nd defendant/respondent to present her case ?

12. Moreover, the report of the surveyors could not be adopted as a judgment of the court because the reports made no recommendations at all. As I have elaborated they only made factual findings relating to ground occupation.
13. Now, even if the court was going to adopt the reports, there were critical issues that the court overlooked in the ruling. One is the disparity in the sizes of the parcels of land. The plaintiff/1st respondent had a title reading 0.31 ha, which is the title to the parcel No. 1076. He was in occupation of the parcel No. 92 which title reads 1.0 ha. He was therefore only going to be entitled to a portion of 0.31 ha. The court failed to pronounce itself on what should happen to the balance of the land, i.e 0.69 ha. Who was going to get title to that portion ? In fact, one of the glaring omissions in the survey reports was that there was no indication of who was in occupation of this 0.69 ha for I see absolutely no mention of the same in the reports. Was it to go to the appellant or to the 2nd respondent ? That was not canvassed. Secondly, what was to happen to the appellant ? He held title to the parcel No. 92 reading 1.0 ha. Was he also going to be entitled to land measuring 1.0 ha, and if so, from what land was he to get this 1.0 ha ? This was significant because when you look at the combined acreage of the parcels No. 1075 and 1076, they do not add up to 1.0 ha, but to 0.69 ha. The other compounding factor is that these parcels do not abut each other. The parcel No. 92 is far off, separated from the parcels No. 1075 and 1076 by a large parcel No.144 which appears to be school land. Assuming that the ruling of the court was that the appellant gets the parcel No. 1076 which he was in occupation

of, that was only land measuring 0.31 ha. How does he get his 1.0 ha as noted in the title to parcel No. 92 ? To make it more convoluted, what about the 2nd defendant/respondent ? What land was she going to be entitled to ? All this was not addressed by the lower court. The court could not merely take the word of the 1st respondent and the survey reports and not give the other parties an opportunity to state their respective cases so that a reasoned judgment could be arrived at.

14. The issue before court was in fact a fairly complex one. It needed parties to be heard. It was not a simple boundary dispute that could lead the court to simply adopt the findings in a survey report. As I have said, there was even a counterclaim for cancellation of title which could not be wished away by a wave of hand. The 2nd respondent deserved to be heard on why she thought that the title of the original 1st defendant was fraudulent and needed cancellation, for that is the very land that the court was allocating to the plaintiff/1st respondent. Similarly, the appellant also deserved to be heard.
15. I think I have said enough to demonstrate that this appeal must succeed. Consequently, I set aside the ruling of the court of 28 May 2024 and the decree that ensued pursuant to that ruling. I direct that the suit Kisii MCELC No. 124 of 2019 be remitted back to the Magistrates' court at Kisii with direction that it be heard in the usual manner with parties being given the opportunity to present their respective cases.
16. In the circumstances of this case, I make no orders as to costs.
17. Judgment accordingly.

DATED AND DELIVERED THIS 11 DAY OF MARCH 2026

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Ms. Mwangi for the appellant

No appearance on the part of M/s Nyangacha & Company Advocates for the 1st respondent

No appearance on the part of M/s S.M Sagwe & Company Advocates for the 2nd respondent

No appearance on the part of the State Law Office for the 3rd & 4th respondents

Court Assistant – Michael Oyuko