



**Kwamboka v Mochere & 2 others (Environment and Land Case
447 of 2015) [2025] KEELC 5560 (KLR) (22 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5560 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT AND LAND CASE 447 OF 2015**

**M SILA, J
JULY 22, 2025**

BETWEEN

MOCHECHE KWAMBOKA PLAINTIFF

AND

SAMSON MANDERE MOCHERE 1ST DEFENDANT

EVANS MOCHUMBE OMWEGA 2ND DEFENDANT

NUNDA OMWEGA 3RD DEFENDANT

JUDGMENT

1. The plaintiff commenced this suit through a plaint filed on 1 October 2015. She pleaded to be the registered owner of the land parcel Wanjare/Bogiakumu/4393 measuring 0.08 Ha. She averred that this land emanated from subdivision of the land parcel Wanjare/Bogiakumu/3490 which was owned by the 2nd defendant, Evans Mochumbe Omwega. This land parcel No. 3490 was subdivided by the 2nd defendant to result into the land parcels 4392, 4393 and 4394. The 2nd defendant further subdivided the parcel No. 4392 into the land parcels 6148 and 6149. The parcel No. 6149 was transferred to the 1st defendant (named in the suit as Samson Mandere Mochere but his correct name is Samson Mandela Machera following the names in the title deeds) and the 2nd defendant retained the parcel No. 6148. He then subdivided it further into the land parcels No. 7260 and 7261. The 2nd defendant retained the parcel No. 7260 and transferred the parcel No. 7261 to the 1st defendant. In the plaint, the plaintiff pleaded that her land parcel No. 4393 (the suit land) borders the 1st defendant's land parcel No. 6149 on the lower side whereas her neighbour on the upper side is the parcel No. 4394 in the name of Nunda Omwega, the 3rd defendant. She pleaded that in early 2015 the 1st defendant made developments into his land parcel No. 6149 which encroached into a portion of the suit land. She engaged the County Land Registrar and Surveyor, Kisii, to resolve this boundary dispute. The findings were that the ground



measurements do not conform with the map and mutation forms and she was advised to approach court for orders of rectification and/or amendment of the registers.

2. In the plaint, she has asked for the following orders :
 - a. An order for rectification of registers for land parcels Wanjare Bogiakumu/4393, 4394, 6149, 7260, and 7261 which parcels of land were created from land parcel Wanjare/Bogiakumu/3490.
 - b. An order of eviction of the 1st defendant from the land parcel Wanjare/Bogiakumu/6149 should it be found after rectification of the register that the 1st defendant has encroached into a portion of the plaintiff's land parcel Wanjare/Bogiakumu/4393.
 - c. General damages for non-user of the suit land.
 - d. Costs.
 - e. Any other relief this court deems fit to grant.
3. The 1st defendant filed defence wherein he pleaded that he purchased the land parcels No. 6149 and 7261 respectively in 2012 and 2015 from the 2nd defendant. He pleaded that he took possession and has developed the same. He denied encroaching into the suit land. He otherwise pleaded to be a stranger to the all the other allegations in the plaint.
4. The 2nd and 3rd defendants filed a joint statement of defence. They pleaded that the 1st defendant purchased the land parcels No. 6149 and 7261. They denied having any dispute with the plaintiff on the alleged measurements or encroachment and pleaded to be strangers to the services of the County Land Registrar. They similarly denied all the other pleadings in the plaint.
5. In the year 2021, it was said that the 2nd and 3rd defendants are deceased. The plaintiff did not pursue a substitution but instead opted to withdraw the suit against the 2nd and 3rd defendants. It follows that now the suit is only left between the plaintiff and the 1st defendant. It will be recalled that the plaintiff claims to be the proprietor of the land parcel No. 4393 whereas the 1st defendant is owner of the land parcel No. 6149 and 7261. These parcels of the 1st defendant arose from subdivision of the land parcel No. 4392 that was owned by the 2nd defendant as I have explained in the first paragraph of this judgment.
6. Hearing commenced on 20 April 2021 before Onyango J. The hearing commenced before the suit against the 2nd and 3rd defendants was withdrawn. PW-1 was the plaintiff. She testified that she is a businesslady and lives in Kitale. Among the exhibits she produced was a sale agreement dated 18 March 2010 and a mutation in respect of the land parcel No. 4392. She testified that after she purchased the property she took possession, planted napier grass, and put up a fence. In 2015, her husband went to the land and found it encroached. They reported to the Land Registrar and District Surveyor who visited the land and wrote a report dated 15 August 2015.
7. She was cross-examined on the sale agreement which bore the name of Esther Kemunto Mocheche as purchaser. She testified that this was her sister and that she was buying the land on her behalf. She did not visit the land prior to the purchase. She acknowledged that when the land was bought, it was in name of the mother of the 2nd defendant who was deceased. She did not attend the Land Control Board for consent and did not know if her sister attended.



8. PW-2 was David Lemaiyan, a surveyor working with the Ministry of Lands and based at Kisii. He produced a report dated 20 August 2015. This report was prepared by the then Land Registrar, David Ndunya Omol, who was said to be deceased and Nichodemus Nyamari, a surveyor who was said to be abroad for further studies. The report outlined that the ground measurement and what is in the record do not match.
9. PW – 3 was Esther Kemunto Mocheche. She testified that she is a sister of the plaintiff. She testified that her sister wished to buy land in Kisii to put up a home but she was then working in Kitale. She found the suit land for her and she is the one who signed the sale agreement with the 2nd defendant. The sale agreement showed the measurement of the land being bought as 111 x 150 feet. She testified that the plaintiff signed the rest of the documents and title came out in her name. Cross-examined, she testified that at the time of sale the land was in name of the deceased mother of the 2nd defendant. The sale agreement was put to her and she could see that the size in the agreement is 111 x 50 feet and not 111 x 150 feet. She claimed that this could be a typing error. She could however see that the title of the suit land reads 0.08 Ha. She did not have the mutation form which brought about the suit land. She also did not have the transfer documents transferring the suit land to the plaintiff. She claimed that they were in possession between 2010 and 2013 and fenced the land with posts and barbed wire. She acknowledged that the person now in occupation was the 1st defendant.
10. With the above evidence, the plaintiff closed her case.
11. In defence, the 1st defendant testified that he is the owner of the land parcel No. 6149 and No. 7261. These parcels of land emanated from subdivision of the parcel No. 4392 owned by the 2nd defendant. He stated that this parcel No. 4392 measured 0.35 Ha. He bought the subdivision No. 6149 measuring 0.04 Ha. The 2nd defendant later subdivided what he was left with i.e parcel No. 6148 into two i.e No. 7260 and 7261. He again sold the subdivision No. 7261 to the 1st defendant. He stated that this parcel No. 7261 measures 0.23 Ha. Cross-examined, he affirmed being present during the survey exercise of 2015 and was aware that the surveyor pointed out that there was a problem which was not solved. He was cross-examined on the mutation form for the parcel No. 4392 and he could see that it showed the existence of the parcel No. 4393 (the suit land).
12. With the above evidence, the 1st defendant closed his case.
13. I felt the need to have a further survey report on the suit land and directed the Land Registrar and District Surveyor to go back to the suit land and undertake another survey. The survey was done and the report filed. The surveyor who did the exercise, Mr. Thomas Ongeru Orangi, attended court to elaborate on his report. In his report, he explained that the parcels in land in dispute trace their origin to the land parcel Wanjare/Bogiakumu/3355. This parcel No. 3355 was subdivided into three portions i.e No. 3488, 3489 and 3490. The parcel No. 3489 was further subdivided into three portions being parcels No. 3512, 3513, and 3514. The parcel No. 3490 (of the 2nd defendant measuring 0.23 Ha) was subdivided into three to produce the parcels No. 4392, 4393 and 4394 measuring 0.35 Ha, 0.08 Ha, and 0.10 Ha. According to the surveyor, this resulted in an increase in acreage from 0.23 Ha to 0.53 Ha (though my calculation gives me 0.44 ha). He was of opinion that this increase in acreage can be attributed to the subdivision of the parcel No. 3490 ignoring the existence of the parcels No. 3488, 3512, 3513, and 3514 thus creating an overlap. Any further subdivision of the parcel No. 4392 perpetuates the overlaps including the parcels No. 6149, 7260 and 7261. He could identify the suit land i.e parcel No. 4393 on the mutation and map. He found that its ground position falls within the parcels No. 7261, 3512 and 3513. Its position as per the mutation is being occupied by the 3rd defendant and there is a homestead on it. The ground position claimed by the plaintiff does not correspond with that on the mutation and the map. Regarding the parcel No. 6149 owned by the 1st defendant, he



found that it does not correspond with the map and mutation. The parcel of land as utilized by the 1st defendant overlaps with the parcel No. 3488 and 3514. The ground position per the map and mutation is being utilized by the 3rd defendant who has a homestead. Regarding the parcel No. 7261, his finding was that the ground position corresponds with what the plaintiff claims. The usage overlaps the parcels No. 3488, 3512, and 3513. The measurements overlap parcels No. 3488, 3512, 3513, 3514, 6149, and 4393. The land is used by the 1st defendant who undertakes subsistence farming and the 3rd defendant who has a homestead. The ground area of this parcel No. 7261 is 0.08 Ha contrary to the registered acreage of 0.23 Ha. He concluded as follows :

- i. The claim by the plaintiff is not supported by the existing records.
- ii. The titles and positions held by the 1st defendant varies greatly with those documented both in position and size.
- iii. The 3rd defendants occupy and utilize parcels No. 4393, 4394, 6149, 3514, and 3513.

14. Cross-examined, he testified that the plaintiff is not in occupation of what she claims to be the parcel No. 4393 and indeed occupies no ground at all. This land that the plaintiff claims is occupied by the family of the 3rd defendant. He confirmed that there are errors in what is documented vis-à-vis the positions on the ground. The sizes of the land also differ greatly. He thought that the error started when the parcel No. 3490 was subdivided. The parcel No. 3490 measured 0.23 Ha, but the total acreage of the subdivisions, in his view, is 0.53 Ha. What the plaintiff pointed to be her land on the ground corresponds to the parcels No. 7261, 3512 and 3513. He stated that the parcel No. 4393 (the suit land) is not correct. The land is occupied by the family of the 3rd defendant where there is a homestead. He acknowledged gross errors for example the depiction that parcel No. 7261 measures 0.23 Ha whereas on the ground it is 0.08 Ha. He affirmed that subdivision of the parcel No. 3490 ignored existence of the parcels No. 3488, 3512, 3513 and 3514. According to him, the errors can be rectified if there are no disputes and the remedy is for a resurvey but there must be consensus by the different title holders. He reiterated that the plaintiff points to the ground occupied by the parcel No. 7261 and that the parcel No. 4393 came earlier in time.
15. Questioned by the court, he testified that all the parcels have their origin in the land parcel No. 3355. It measured 0.45 Ha. It was subdivided into three i.e parcels No. 3488, 3489 and 3490 respectively measuring 0.13 ha, 0.09 ha, and 0.23 ha (total 0.45 ha). There was no issue with the parcels No. 3488 or 3489. This parcel No. 3489 was subdivided further into the parcels No. 3512, 3513 and 3514. The owners of these parcels are in occupation and not parties to this case. He testified that on the ground the 1st defendant occupies land measuring 0.12 Ha though his total acreage on paper is 0.27 Ha. He affirmed that the plaintiff has a title but occupies nothing on the ground.
16. Hearing closed after the surveyor had testified and I invited counsel to file their final submissions. I have taken note of the submissions filed by Mr. Soire, learned counsel for the plaintiff, and Mr. Bonuke, learned counsel for the 1st defendant. I already mentioned that the case against the 2nd and 3rd defendants was withdrawn.
17. My disposition will be brief because to me the issues have been laid bare by the evidence presented , particularly the expert evidence of the surveyors.
18. It is apparent that the genesis of the problem is the manner in which the 2nd defendant subdivided his land parcel No. 3490. This land measured 0.23 Ha. He subdivided it into three to produce the parcels No. 4392, 4393 (the suit land) , and 4394 respectively measuring 0.35 ha, 0.08 ha, and 0.01 ha, in total 0.44 Ha (though it will be recalled that the surveyor mentioned 0.53 Ha). There is of course no way that land measuring 0.23 ha could have expanded so that it can be subdivided to produce land



measuring 0.44 ha (or even 0.53 Ha). This to me was a fraudulent subdivision. The land parcel No. 4394 (measuring 0.01 Ha) is occupied by the family of the 3rd defendant who have also extended their occupation partly into what would be the suit land i.e parcel No. 4393. The next occupation is that by the 1st defendant who, according to the surveyor, occupies a total of 0.12 ha. It will be recalled that after subdividing his parcel No. 4392 the 2nd defendant remained with the parcel No. 6148 and transferred the parcel No. 6149 to the 1st defendant. He further subdivided the parcel No. 6148 into the parcels No. 7260 and 7261. He remained with the parcel No. 7260. He thus has some land in his name. According to the surveyor, if you take the measurements on paper of all these subdivisions of the parcel No. 3490, they will overlap into neighbouring parcels occupied by other persons.

19. What we have here is a situation where the plaintiff holds a paper title that has no land. It cannot have land because there was simply no land that was available for the creation of this title. The 1st defendant has two titles i.e parcel No. 6149 measuring 0.04 Ha and No. 7261 measuring 0.23 Ha. The total of this acreage is 0.27 Ha. Of course there was also no land that was sufficiently available to carve out to the 1st defendant land measuring 0.27 Ha, given that the parcel No. 3490 where these titles have their origin only measured 0.23 Ha. Indeed, what the 1st defendant occupies, as I have earlier mentioned, is only land measuring 0.12 Ha. He cannot possibly have any occupation for 0.27 Ha. But having said that there is no land upon which you can point at and say this is the parcel No. 4393.
20. It is as clear as the light of day that the subdivision of the parcel No. 3490 was improper but I cannot void it as the person who subdivided it i.e the 2nd defendant, and the other beneficiaries of the titles emanating therefrom, i.e the 3rd defendant (beneficiary of the parcel No. 4394) and the 2nd defendant himself, are no longer parties to this suit. I cannot reverse the action of the 2nd defendant without him or his estate being party to this suit. Neither can I negatively affect the 3rd defendant's title No. 4394 without him or his estate being party herein. I cannot also void the title of the 1st defendant. He of course holds titles that have acreages that are larger than his occupation on the ground, and are titles that may be subject to rectification, but I cannot void them given that he is in occupation.
21. The person who holds a title but has no land remains to be the plaintiff. I cannot give her land that does not exist. She purportedly got land from subdivision of the parcel No. 3490 but clearly the subdivision was one that was improper for it purported to produce land that was not available. I am afraid to inform the plaintiff that in the circumstances of this case, it is her title that is the one to be voided. She simply bought hot air from the 2nd plaintiff. There was no land that the 2nd defendant had which he could sell to her. He could not purport to create land that does not exist and sell it to the plaintiff. The plaintiff's remedy lay in a claim for refund and damages against the 2nd defendant. She however withdrew the claim against the 2nd defendant and I am unable to pronounce judgment in her favour for a refund and/or damages. But I will pronounce that the title that she holds is null and void and it must be cancelled. I will order the Land Registrar, Kisii to void this title to the land parcel Wanjare/Bogiakumu/4393. Its continued existence can only perpetuate more confusion and/or be used as a channel for fraud.
22. What about the titles of the 1st defendant? It is upon him to agree with his neighbours so that his title and the other titles that may be overlapping are rectified by the Land Registrar. I will not make orders on them given that all the other title holders are not parties herein.
23. It is unfortunate that the plaintiff found herself in the position that she now is. The blame was on the 2nd defendant. But she chose to withdraw the case against the 2nd defendant. I do not see how she could sustain any suit against the 1st defendant without the 2nd defendant being maintained in the case. I have no option but to dismiss her suit against the 1st defendant and it is so dismissed with costs.
24. Judgment accordingly.



DATED AND DELIVERED THIS 22 DAY OF JULY 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Mr. Soire for the plaintiff

Mr. Bonuke for the 1st defendant

Court Assistant – Michael Oyuko

