



**Mukaisi v Ichukia & 2 others (Environment and Land Case  
10 of 2009) [2025] KEELC 5587 (KLR) (22 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5587 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT AND LAND CASE 10 OF 2009**

**FO NYAGAKA, J  
JULY 22, 2025**

**BETWEEN**

**FRANCIS ESUSA MUKAISI ..... PLAINTIFF**

**AND**

**GEORGE KOIGI ICHUKIA ..... 1<sup>ST</sup> DEFENDANT**

**LUCY NJAMBI MURAYA ..... 2<sup>ND</sup> DEFENDANT**

**NASHON KHWATENGE ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. By way of an Amended Complaint dated 24/09/2018, the Plaintiff seeks the following orders;
  - a. A declaration that the about 1.5 Acres encroached upon jointly by the Defendants herein belongs to the deceased Mukaisi Isinza and for the part of the estate for distribution by the Plaintiff to the deceased's beneficiaries and that the Defendants are joint trespassers to the parcel no. Bungoma/Tongaren/825 in the aforesaid terms and an order that the Defendants jointly do move out of the encroached upon portion and failing which forceful eviction do issue and a permanent injunction to restrain any further trespass.
2. The Defendant entered appearance and filed his statement of defence. It was dated 04/02/2009. There was no amended statement defence that was filed after the amended complaint. He denied the allegations in the Complaint.
3. The matter proceeded for hearing on 09/10/2019 with the evidence of the Plaintiff.

**The Plaintiff's Case**

4. The Plaintiff testified as PW1. He testified that he was the son to Mukaisi Isinza who had 18.5 acres of Land LR No. Bungoma/Tongaren 1232 part of which he sold to pay an SFT Loan. That on



26/09/1989, he sold one and a half acres to George Koigi Ichukia, the 1<sup>st</sup> Defendant, for Kshs. 37,500/- which agreement he was a witness to. He produced a copy of the agreement as P-Exh.1. Additionally, his father sold 2.5 Acres to the 1<sup>st</sup> Defendant on 17/07/1992, which copy of the agreement he produced as P-Exh.2. His father then sold the 1<sup>st</sup> Defendant one acre on 17/03/1993, and he produced the agreement as P-Exh. 5 bringing the total sold to 5 acres. The Plaintiff produced the application for consent to transfer dated 27/10/89 for 1.5 acres as P-Exh.4, a further application dated 26/09/89 for 3.5 acres as P-Exh.4 (b) and a search he conducted for plot no. 665 as P-Exh.5, which showed the 1<sup>st</sup> Defendant was registered for 0.6 Ha on 13/07/1993.

5. In his testimony, the Plaintiff stated that the land was further sub divided and two plots emerged and his father remained the owner of Plot no. 825 of 5.35 ha. He produced the search as P-Exh.5. He stated that there was also plot no. 826 which was transferred to the 1<sup>st</sup> Defendant. However, when he conducted a search, he found that it was transferred to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and he had a problem with that. He produced the search for plot 826 as P-Exh 5.
6. He testified further that he got the mutation that was used to subdivide plot 232 in his fathers' name. That the approximate area is 8.5 Acres or 7.4 Ha and it was subdivided into two portions; 661 (6.75Ha) and 662(0.6 Ha). He produced a copy of the sketch map that was drawn of the sub division as P-Exh 6(a). He further stated that later on, a mutation was done for plot 661 dividing it into two portions; Plot 825 (5.35 Ha) and 826 (1.4 Ha) and a sketch prepared which he produced as P-Exh 6(b).
7. The Plaintiff testified that the 1<sup>st</sup> Defendant was sued because the plot sold from 232 was 5 acres but he had annexed a further 1.5 Acres, which began in 1995. He stated that his father demarcated the land for him but they were farming a larger acreage. He attempted to talk to the 1<sup>st</sup> Defendant about this issue and he refused. He then went to the chief who called them both and asked the Plaintiff to get a Map which he went and obtained from Kakamega. The map showed the 1<sup>st</sup> subdivision was No. 662 and the additional 3.5 acres in plot 826, while theirs his father's remained being 825. He produced the RIM as P-Exh 7.
8. The Plaintiff further stated that he had the County Surveyor visit the property in the presence of the chief. He was shown that the 1<sup>st</sup> Defendant had encroached into his land and the surveyor said he would prepare a report in one month. The surveyor could not testify in time as required. Thus, PW1 was recalled to continue with the testimony.
9. It was the Plaintiff's further testimony that he received the report by the Bungoma County Surveyor which was made on 16/10/2023. He stated that on the date the surveyor was on the land, there were 13 people present including Tom Mukaisi and Patricia Wamboi Koigi who is the administrator of the estate. Further, that the surveyor stated that his land had been encroached upon by 0.4 Acres. He produced the report as PMFI-9.
10. On cross-examination, he stated that the surveyor's report does not support that George had encroached on 1.5 acres and that it showed it was 0.4 acres. Further, that the boundary between plot 825 and 826 has existed since 1993 and that the late Mukaisi did not register any complaint with the encroachment until his death. He further stated that a survey was done in 1993 and the boundaries between the parcels are not occupied by a waterway. He clarified that the parcel 232 is the one that had waterways on both sides.
11. PW2 was Hellen Mbayaki who stated that she was standing in for her predecessor, Matthew Maruti who was on transfer. He had conducted the site visit on 16/10/2024. She stated that the parcel known as Bungoma/Tongaren/232 was transferred from the settlement trust to Mukaisi Isunza on 13/07/1993 and measured about 7.4 Ha. He then subdivided the land on 13/07/1993 to give rise to



parcel no. 661, (approx. 6.75 Ha) and 662 (0.6 Ha). That he transferred 662 to the 1<sup>st</sup> Defendant on the same date and later on, he sub divided 661 to give rise to 825 and 826. 826 was sub divided and given to the 1<sup>st</sup> Defendant on 13/07/1993 and the Surveyor attached a diagram to the report. The diagram showed that; parcel 662 was 0.59 Ha, 825 was 4.98 Ha and 826 was 1.57 Ha.

12. She testified that the surveyor found that there was no distinct boundary between 662 and 826, the two having been merged. He further found that the Plaintiff complained that the combined acreage of the parcels 662 and 826 exceed the 5 acres his father sold to the 1<sup>st</sup> Defendant. Further, that the grand total was to be 2.16 Ha which is equivalent to 5.34 acres which exceeds the registered acreage by 0.16 Ha (0.34 acres). He therefore found that it is more by 0.34 Acres. However, the original seller did not register any complaint.
13. It was her further evidence that the Surveyor stated that they received information that the Plaintiff and his brothers were the ones that enlisted the Surveyor in setting the boundaries and were witnesses to the agreements, however refuted by the Plaintiff. That there was a well-defined boundary between 826 and 825 composed of mature blue gum trees and has been in existence since 1993. That the Plaintiff claimed the Defendant sometimes planted the trees at night. According to the report, plot No. 825 had an acreage of 4.98 ha as complained by the Plaintiff which is less acreage than the title acreage of 5.35 Ha. The findings were that having taken care of the waterway corridor between parcel no. 231 and 232 on one hand between 232 and 233 and on the other hand he noted that the total acreage of 232 totaled to 7.14 Ha, which is less than the title acreage of 7.4 ha, the difference could have been due to the waterway which may not have been accounted for during the initial survey.
14. The conclusion of the survey was that parcels 662 and 826 totaled 2.16 ha against the title which is 2.0 ha and there is an excess by 0.16 Ha. That parcel no. 825 totals to 4.98 Ha against the title acreage of 5.35 Ha and is therefore less by 0.37 Ha. She produced the report as P-Exh.7.
15. On cross examination, she stated that the report shows that the Defendant owns parcels 826 and 662 and further, that it does not mention that the parcel was for the 2<sup>nd</sup> Defendant and the 3<sup>rd</sup> Defendant. That the ground report shows that parcel 662 is 0.59 Ha, 826 is 1.57 Ha and the excess acreage of the parcels registered is 0.34 acres and is therefore not in excess by 5 acres as the Plaintiff claimed. She further stated that as per the report, the 1<sup>st</sup> Defendant's land has not encroached on plot 825. That the report found that the acreage of the parcel no. 825 does not match with the registered acreage due to the waterway which may not have been captured.
16. She testified that page 2 of the Report shows the boundary between the parcels 825 and 826 is composed of mature trees and apart from the claim that the trees were planted at night, there is nothing to show that the boundary was an issue. That there was nowhere in the report that mentions that the Defendant had encroached.

### **Defendant's evidence**

17. DW1 was Patricia Wamboi Koigi, the 1<sup>st</sup> Defendant, the wife to George Koigi Ichukia (Deceased) and administrator ad litem of his estate. She testified that the surveyor came and surveyed the ground. That the size of 662 is approximately 1.5 acres, while 826 is 3.5 acres. She produced her original titles and the copies which were marked as D-Exh 1 and 2. She stated that the surveyor found the boundaries intact and that her husband bought the property from Mukaisi Isunza in 1993. She denied encroaching the Plaintiff's land.
18. On cross examination she testified that she did not know when the children of Mukaisi subdivided the land and further, that when the Plaintiff first brought the surveyor, her husband was alive but they did



not survey the property. She did not know of the waterway issue and she did not agree with the report. She did not carry out any other survey and would not give the Plaintiff 0.4 Acres.

19. At the close of the pleadings, parties filed submissions supporting their position.

### **Analysis and Disposition**

20. The Plaintiff raised the issue of the suit being time-barred which is a pertinent issue for determination. As per the plaint, the Plaintiff alleges that he first established the encroachment during the administration of the estate in 1993. Further, that the encroachment occurred in 1998 when the Defendant transferred 3.5 acres to the 1<sup>st</sup> and 2<sup>nd</sup> Defendant. The Plaintiff was not even a party to the transaction that resulted in the transfer of the property as per the sale agreement of 13/07/1993. From the evidence on record, all transfers were conducted on 13/07/1993 and it is from these transfers that the alleged encroachment arose.
21. Section 7 of the *Limitation of Actions Act*, provides as follows;

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”
22. The upshot of the foregoing is that the suit is time-barred as it was filed in 2009, 16 years after the date the alleged encroachment occurred. If indeed there was encroachment, the persons who encroached the land for all those years occupied and used it to the exclusion of the claimant for a period longer than he could recover possession thereof. He could therefore not do so.
23. That notwithstanding, this Court proceeds to determine whether, indeed, the Defendant has encroached on the suit land. The ownership of the property is not in dispute. It is clear that the Plaintiff's father sold parts of his property, all on 13/07/1993. The deceased was the owner of 232 which was subdivided into 661 and 662. 662 was then transferred to the Defendant and 661 was divided into 825 and 826. 826 was then transferred to the Defendant. The Plaintiffs' bone of contention is that the 1<sup>st</sup> Defendant annexed a further 1.5 Acres from plot no. 232 after being sold 5 acres from the same plot.
24. In order to determine the issue of encroachment, the court ordered the County Surveyor to conduct a survey of the land and file a report. The Surveyor filed a report dated 19/10/2023 after the visit conducted on 16/10/2023. He made the following finding;

“Having taken care of the 5M waterway between the parcels 231 and 232 on one hand and 232 and 233 on the other, we note that the total ground acreage for 232 totaled 7.14 Ha/17.64 Acres which is less the title acreage of 7.40 Ha/18.28 acres’
25. The surveyor attributed the difference in acreage to the water way which may not have been accounted for at the initial survey. He concluded that the total acreage that belongs to the deceased. It follows that due to an error during the initial survey, the 1<sup>st</sup> Defendant is in possession of a parcel of land whose acreage on the title differs from what is on the ground. The same does not amount to encroachment. What is required is a rectification on the title to reflect the position on the ground as the 1<sup>st</sup> Defendant is in possession of an extra 0.16 Ha.
26. In the premises, this Court finds that the suit lacks merit. It dismisses the same with costs to the Defendants.



**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY VIA THE TEAMS PLATFORM  
THIS 22<sup>ND</sup> DAY OF JULY 2025**

**HON. DR. IUR. FRED NYAGAKA**

**JUDGE**

At 11:43 AM, in the presence of:

Karanigrey for the Plaintiff

Ms. Kibonei holding brief for Nasike for 1<sup>st</sup> Defendant

