



**Ombaba v Osiemo & 2 others (Environment & Land Case  
28 of 2018) [2024] KEELC 4253 (KLR) (16 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4253 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND CASE 28 OF 2018**

**M SILA, J**

**MAY 16, 2024**

**BETWEEN**

**GEORGE NYAKUNDI OMBABA ..... PLAINTIFF**

**AND**

**TURUSIRA OSIEMO ..... 1<sup>ST</sup> DEFENDANT**

**THE KISII DISTRICT/COUNTY LAND REGISTRAR ..... 2<sup>ND</sup> DEFENDANT**

**THE ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff commenced this suit through a long winded plaint going into eleven pages, which was filed on 3 December 2018. The long and short of it however, is that he has pleaded that his father, Osiemo Onyinkwa, had four wives, respectively being Kemunto, Moraa, Kerubo and Turusira. He averred that his father owned the land parcel Nyaribari Chache/Birongo/291 measuring 8.5ha which was adjudicated to him. He averred that his mother, Kerubo, in similar fashion came to own the land parcel Nyaribari Chache/Birongo/572. He pleaded that in the year 2013, his step-mother, Turusira (sued as 1<sup>st</sup> defendant) trespassed into his mother's land parcel No. 572 and proceeded to harvest mature gum trees planted by his mother. Upon investigation, he discovered that she has a title reading Nyaribari Chache/Birongo/717. He avers that investigations showed that his father subdivided his land parcel No. 291 in 1988 but in the course of that subdivision, a portion of the parcel No. 572 was included. He claims that the result was that the title of the 1<sup>st</sup> defendant was illegally carved out of his mother's land parcel No. 572. In the suit he wants the following orders (paraphrased for brevity)
  - a. A declaration that the transfer process concerning the title No. 717 is null and void and was tainted with fraud and forgery.
  - b. cancellation of the title No. 717 as it was fraudulently acquired and illegally encroaches into land parcel No. 572, property of Kerubo Osiemo.



- c. A declaration that the subdivision and transfer process concerning the parcel No. 291 is null and void as they were tainted with fraud and forgery.
  - d. Cancellation of titles issued on the fraudulent subdivision of parcel No. 291 on 27 November 1988.
  - e. Restoration of the original title No. 291.
  - f. Cancellation of all titles issued on subdivision of parcel No. 572.
  - g. Restoration of the original land parcel No. 572.
  - h. Permanent injunction to restrain the defendants from interfering with the plaintiff's occupation of the subject matter of the suit.
  - i. Exemplary and special damages.
2. The 1<sup>st</sup> defendant entered appearance and filed defence. She more or less pleaded to be a stranger to the plaintiff's allegations and put him to strict proof.
  3. The plaintiff testified on 7 April 2021. He of course mentioned that his father had four wives and owned the parcel No. 291 whereas his mother owned the parcel No. 572. He claimed that there has not been issued letters of administration for the estate of his late father. He stated that a grant was issued in respect of his mother's estate, which was confirmed, and the land parcel No. 572 was subdivided by his brother Patrick who was administrator. Patrick died in 2019 and the plaintiff succeeded him as administrator. He stated that he was not happy with the subdivision as it excluded the sisters. He stated that he filed suit in order to recover the portion of his mother's land registered in the name of the 1<sup>st</sup> defendant. He wanted the 2.4 acres of that title returned to his mother's name so that he can distribute it to the beneficiaries of his mother's estate. He also wanted cancellation of the subdivisions of parcel No. 291 so that succession can be done. Cross-examined he testified that the 1<sup>st</sup> defendant got title to the parcel No. 717 in 1989. He stated that it was in 2013 that he discovered that a portion of his mother's land had been excised. He stated that succession in respect of the parcel No. 572 was done in 2017 but he produced no grant. He denied that it was his father who subdivided the parcel No. 291 and transferred parcel No. 717 to the 1<sup>st</sup> defendant. He acknowledged that the 1<sup>st</sup> defendant has been occupying the land from when it was part of the parcel No. 291. He nevertheless claimed that parcel No. 717 extends into the parcel No. 572.
  4. With the above evidence, he closed his case.
  5. DW – 1 was the 1<sup>st</sup> defendant. Her evidence was that she was given her land by her late husband. She denied obtaining title by fraud. She was cross-examined by the plaintiff but her evidence was that she did not know about the parcels No. 291 and No. 572.
  6. With that evidence the 1<sup>st</sup> defendant closed her case.
  7. At this juncture, Mr. Nyauma, learned counsel for the State applied to have the land visited by the Land Registrar and Surveyor and this was agreed by all parties.
  8. The land was duly visited on 15 November 2022 and a report dated 22 November 2022 was filed.
  9. The report details that both parcel No. 291 and 572 are original numbers issued upon adjudication. The parcel No. 291 was adjudicated to Onyinkwa Osiemo (deceased) and the parcel No. 572 adjudicated to Kerubo Osiemo (deceased). The parcel No. 291 measured 23.5 acres whereas the parcel No. 572 measured 8.5 acres. It mentions that Onyinkwa Osiemo had four wives, that is Victoria



Kemunto, Yuventius Moraa, Pauline Kerubo, and Turusila Bochaberi. That Onyinkwa shared his parcel No. 291 among his three wives excluding the 3rd wife since she already had the parcel No. 572. The report avers that both parcels No. 291 and 572 are now subdivided as follows :

No. 572 subdivided into the parcels No. 5942 – 5947 to :

5942 – Lucy Kerubo Nyakundi – 0.51 Ha

5943 – Hellen Moraa Abea – 0.52 Ha

5944 – Alex Nyamweya Osiemo – 0.52 Ha

5945 – Charles Osiemo Onyinkwa – 0.66 Ha

5946 – Alfred John O. Osiemo – 0.60 Ha

5947 – George Nyakundi Ombaba – 0.61 Ha

Road of access – 0.06 Ha

The parcel No. 291 was subdivided on 25 July 1977 into the parcels No. 717 – 724 to :

717 – Turusira Osiemo – 9.0 acres

718 – Geoffrey Ogeto Osiemo – 1.3 acres

719 – Osiemo Onyinkwa – 1.1 acres

720 Osiemo Onyinkwa – 1.3 acres

721 – Yuventious Omwoyo Osiemo – 1.2 acres

722 – Joyce Kemunto Okioma – 1.3 acres

723 – William Omboya Osiemo – 1.1 acres

724 – Osiemo Onyinkwa – 4.0 acres.

10. The report states that there are existing boundaries that generally define the ground occupation defined by live fences, wooden rails and posts. It identifies the disputed portion as being within the land parcel No. 717. It acknowledges that there is some discrepancies on the ground occupation and the title acreage but no issue is raised on the basis that these are general boundaries. The report makes the following conclusion
  1. The combined ground acreage being occupied by the beneficiaries of parcel No. 291 and 572 are within the bounds of the boundaries defining their respective titles
  2. Each beneficiary utilizes a portion of land with defined and or traceable boundaries.
  3. The disputed portion 1.18Ha is being utilized by the 1st defendant and is within parcel No. 717 (291 original).
11. The plaintiff contested the report and I allowed the case to be re-opened so that he can undertake his own survey. He engaged Geomatic Services Limited, a survey firm based in Nairobi. The proprietor, John Dominic Obel, licenced surveyor, testified and presented his report. It turned out that he never visited the land in question. His report was based on an analysis of various documents. One was a survey report by a Mr. Wafula who served in the survey office Kisii where he recommended that the 1<sup>st</sup> defendant should not extend her boundary to the plaintiff's land. The other was a letter of the Land Registrar, Kisii, which accepted Mr. Wafula's report and recommended the amendment of the cadastral map to conform to the report. In cross-examination, he acknowledged that in order to confirm encroachment one needs to carry out measurement on the ground.



12. The 1<sup>st</sup> defendant called Mr. David Lemaiyan, the surveyor who prepared the report on the order of court. He testified that the variations in acreage on the ground as compared to the map was not abnormal as this was general boundary land. He was categorical that the 1st defendant has not encroached on land belonging to the plaintiff and that the boundaries should be maintained as they are. He stated that what the 1st defendant occupies on the ground is actually less by 0.2 acres as compared to what is shown in her title.
13. With the above evidence the parties closed their respective cases. I invited counsel to file submissions and I have taken note of the submissions filed.
14. At the outset I must say that the plaintiff's case is a non-starter for two reasons. The first is that as drawn and presented this would be a case for the benefit of the estate of Kerubo Osiemo (deceased) who was the registered proprietor of the land parcel No. 572. However, the plaintiff never filed this case in the capacity of legal representative of the estate of the said deceased. In fact the estate of Kerubo Osiemo (deceased) as owner of the original parcel No. 572 has no complaint. The estate is not complaining that its land was encroached into and a portion of it carved out to add to the parcel No. 717. Kerubo Osiemo never raised any issue when she was alive until her death in 2008 yet the parcel No. 717 was created in 1989 about 20 years prior to her death. Even when the plaintiff and his siblings were distributing the estate of Kerubo Osiemo, and subdivided the land parcel No. 572 amongst themselves, nobody complained. If indeed there was a genuine complaint, why is it that before distribution, they never filed suit to claim part of the land parcel No. 717 as their own? Secondly, at the time that he filed suit, the land parcel No. 291 and No. 572 were not in existence as they had been subdivided and titles issued to other people. In his pleadings, the plaintiff urged that the whole of the subdivision of the parcel No. 291 was wrongful and in his prayers he *inter alia* sought orders that all the titles emanating from the subdivision of the parcel No. 291 need to be cancelled. The plaintiff cannot get this order without suing all the owners of the other subdivided titles. Similarly, he also cannot get the prayers to revert back the parcel No. 572 without suing all the owners of the subdivisions thereof. Without crossing these two thresholds, and the plaintiff has not, his case is for dismissal.
15. Assuming I am wrong on the above, and that the plaintiff can still pursue his case, there is a third threshold, that of limitation of time. The evidence shows that the parcel No. 717 was carved out of the land parcel No. 291 which was subdivided in the year 1988. The title of the 1<sup>st</sup> defendant has been in existence since 1989 and there is no evidence that the ground position ever changed from the time it was created. If the plaintiff thought that there was any issue he ought to have raised it within 12 years of the creation of this title which is the limitation period given in Section 7 of the [Limitation of Actions Act](#), on actions for land. The evidence does not show that there was any concealment of this title so that it could not be discovered from the year 1989. The case of the plaintiff is therefore out of time and is again for dismissal on that ground.
16. Even on the merits of the case, the plaintiff has not proved any wrongdoing in the creation of the land parcel No. 717. He claims that it was illegally created so as to encroach into the former land parcel No. 572. There is no such evidence. The plaintiff never came with concrete evidence to say that this is what was parcel No. 572, and this is what was carved out of it, to add to the former parcel No. 291. His survey report is nothing but an armchair report that was devoid of any measurements on the ground and cannot be relied upon to demonstrate any encroachment or the extent thereof. With due respect to Mr. Obel, how do you claim there is encroachment when you have not even measured the land? In his evidence, Mr. Obel said that he relied on three documents; one a report of Mr. Wafula, Kisii County Surveyor, dated 7 June 2017, a letter dated 12 July 2017 from the Land Registrar, Kisii and another letter dated 13 October 2017 from the County Surveyor, Kisii. There is nothing in those three documents that would suggest any encroachment by the parcel No. 717 into the former parcel No.



572. In his report, Mr. Wafula found that the parcel No. 717 emanated from the parcel No. 291 and that there was the parcel No. 572. He recommended to the County Surveyor that the parcel No. 717 should not be extended into the parcel No. 572. That report only states the obvious, that each person should stay in their own land, and there is nothing in that report that even remotely suggests that the creation of the parcel No. 717 encroached into the parcel No. 572. The letter of the Land Registrar, dated 12 July 2017 only says that the map be amended according to Mr. Wafula's report. But as I have shown, Mr. Wafula's report did not say anything about encroachment by one parcel into the other and therefore the letter of the Land Registrar means nothing. What is it that was to be amended is not even said. The letter of 13 October 2017 is from the County Surveyor replying to the Land Registrar's letter of 12 July 2017. That letter concludes by saying that the issues be addressed in a court of law. There is therefore nothing in those three documents that help the plaintiff.

17. Whatever the case, their reports cannot override that of Mr. Lemaiyan, the present District Surveyor. The report of Mr. Lemaiyan is very clear that there is nothing wrong with the boundaries and that every person is occupying their land on the ground. He acknowledged the discrepancies between the title acreage and the ground occupation but he saw no issue as these are general boundaries. What is important is that there are clearly delineated boundaries on the ground and everybody is residing in his/her parcel of land. The 1<sup>st</sup> defendant, as I have said, has been on her parcel No. 717 since it was created. The plaintiff has not provided this court with any reason that would entitle this court cancel this title No. 717 or even affect its acreage both on the ground and in the title.
18. I can only think that the plaintiff is motivated by greed to grab some land from his step-mother. He wants to create a problem where there is none so that he can get more land than he deserves. Indeed nobody else apart from him appears to be complaining from all the four houses of his father. Everybody else is happy with the subdivision of the land by their late father and is happy with whatever land and title they got. That should tell you something. I am sorry to inform the plaintiff that he has no case. His suit is hereby dismissed with costs to the defendants.
19. Judgment accordingly.

**DATED AND DELIVERED THIS 16 DAY OF MAY 2024**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT AT KISII**

