



Nyamwange & another v Ondoro & 5 others (Environment & Land Case 60 of 2021) [2024] KEELC 4562 (KLR) (9 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4562 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT & LAND CASE 60 OF 2021**

JM KAMAU, J

MAY 9, 2024

BETWEEN

YUNES BOERA NYAMWANGE 1ST PLAINTIFF

GEORGE NYAMWANGE 2ND PLAINTIFF

AND

RHODA MONGINA ONDORO 1ST DEFENDANT

JOHNSTON OMBANGI 2ND DEFENDANT

SAMUEL RAINI NYARUSA 3RD DEFENDANT

JAMES ONGERA KEMONI 4TH DEFENDANT

HELLEN ACHINGA MAKORI 5TH DEFENDANT

THE LAND REGISTRAR, NYAMIRA 6TH DEFENDANT

JUDGMENT

1. By a Complaint amended on 27/2/2017 originally dated 31/10/2016, the Plaintiffs who are mother and sons respectively describe themselves as the registered proprietors of the Parcel of land known as Gesima Settlement Scheme/5 which they inherited from the late David Nyamwange, the father to the 2nd and 3rd Plaintiffs while the 1st Defendant was the registered owner of Gesima Settlement Scheme/2 which neighbours the former having been registered in the name of Stanley Ondoro Bonaya. According to the Plaintiffs, Gesima Settlement Scheme/5 is still undivided to date but the 1st Defendant has caused Gesima Settlement Scheme/2 to be subdivided into Gesima Settlement Scheme/337, 338,339, 340,341,342, 343,344,345, 346, 585,586 and 587 and the new subdivisions registered with new proprietors as follows:

337 – Rhoda Mongina Ondoro



338- Johnstone N.O Ombagi
339 – Johnstone Ombagi Omenge
340 – Samuel Raini Nyarusa
341 – James Ongera Kemoni
Hellen Anchinga Makori
342 – Yunes Boera Nyamwange
343 – Rhoda Mongina ONdoro
344 – Rhodah Mongina ondoro
345 – Rhoda Mongina Ondoro
346 – Title Closed upon further subdivision to give rise to Nos. 585,586,587.
585 – Gladys Moraa Ondoro
586 – Josphine Kemunto Ondoro
587 – Fred Bundi Ondoro

2. The Plaintiffs further claim that in the course of effecting the registration of the new sub-divisions, some parcels encroached onto and as a result interfered with Gesima Settlement Scheme/5 hence compromising the boundary between Gesima Settlement Scheme/5 on one hand and Gesima Settlement Scheme/2 on the other which boundary dispute had been determined in Kisumu HCCC No. 74 of 1968 between David Nyambange and Stanley Ondoro Boraya. The matter had also been resolved by the Department of lands. The offending parcels are Gesima Settlement Scheme/337,338,340,341,342, and 344 and that part of parcel No. Gesima Settlement Scheme/5 was curved off and annexed to Gesima Settlement Scheme/2 during the subdivision of parcel No. Gesima Settlement Scheme/2 and Title Deeds have already been issued and the Plaintiffs pray that the aforesaid Titles Gesima Settlement Scheme/337,338,340,341,342 and 344 be returned for cancellation and rectification.
3. The 1st Defendant on the other hand denied the entire claim by the Plaintiffs and by way of a counter claim averred that Gesima Settlement Scheme/343 ought not to be cancelled or revert to the Plaintiffs. The 2nd Defendant averred that vide Statement of Defence filed on 14/11/2016 Gesima Settlement Scheme/2 was lawfully sub-divided by its original proprietor, Stanley Ondoro Bonaya (now deceased) in 1995 and the resultant subdivisions transferred to various persons with him taking Gesima Settlement Scheme/338 and that Gesima Settlement Scheme/2 did not eat into Gesima Settlement Scheme/5. He has since 1995 been in occupation of Gesima Settlement Scheme/338 and the Plaintiffs' claim is therefore time barred and the same ought to be dismissed with costs. The 3rd Defendant equally denies the Plaintiffs' claim and avers that he is lawfully the registered proprietor of Gesima Settlement Scheme /340 and that there is a road of access that runs between Gesima Settlement Scheme/2 and Gesima Settlement Scheme/5. The 4th and 5th Defendants also deny the Plaintiffs' averments in the Amended Plaint and plead that they are the legitimate owners of Gesima Settlement Scheme/341 and that Gesima Settlement Scheme/2 comprised of Sub-plots 2,5,6,10 and 11 owned jointly by David Nyamwange (husband to the 1st Plaintiff and father to the 2nd and 3rd Plaintiffs) and Stanley Ondoro (husband to the 1st Defendant) both of who are now deceased. That sub-plots 2,5,6,10 and 11 had 3 permanent improvements;

801 – House, Garden and Brick Water Tank



802 – Seasonal river and brick water tank

803 – A dairy

4. They aver that there arose a dispute as to the ownership of the permanent improvements and Justice K.G. Bennet in Kisumu HCC 74 of 1968 ordered that Gesima Settlement Scheme be divided between the initial owners of David Nyamweya taking sub-plots 5, 6, and 10 while Stanley Ondoro took sub-plots 2 and 11 which Decree was implemented by the Director of Land Adjudication and settlement. Sub-plots 2 and 11 remained Gesima Settlement Scheme/2 measuring 55 Hectares in the name of Stanley Ondoro and sub-plots 5, 6, and 10 were named Gesima Settlement Scheme/5 measuring 19 Hectares in the name of David Nyamwange but that erroneously 801,802 and 803 were assumed to be situate in Gesima Settlement Scheme/5 (sub-plots 5,6 and 10) and not on Gesima Settlement Scheme/2 (sub-plot 11) belonging to Stanley Ondoro while P1 803 fell within Gesima Settlement Scheme/5 (sub-plot No. 6) apportioned to David Nyamwange. Consequently, an R.IM was published by the Director of Surveys in 1985 depicting Gesima Settlement Scheme/2 with P1 801 and 802 while Gesima Settlement Scheme/5 has one P1 NO. 803. Gesima Settlement Scheme/2 was discharged on 7/3/1986 and a Title Deed issued. In 1992 Gesima Settlement Scheme/2 was sub-divided into Gesima Settlement Scheme/537,338,339,340,341,342 ,343,344, 345,346,585,586 and 587 and Title Deeds issued and PI 801 falls within Gesima Settlement Scheme/ 342 which the 2 purchased. They finally call for the dismissal of the suit with costs.
5. PW1, Charles Nyamwange testified in court and said that the only person he did not know was the 4th Defendant. He said that his late father, David Nyamwange was allocated plot No. 2 by the Settlement Funds Trustees in 1965 which had been initially allocated to the late Musa Nyandusi and later to his father which transfer was effected on 27/6/1966. In a dispute of ownership in 1968 the High Court in Kisumu HCCC No. 74 of 1968 held that Stanley Ondoro was to get the ownership of Plot Nos. 2 and 11 and his late father David Nyamwange Plot Nos. 5,6, and 10. Plot Nos. 2 and 11 were to be held by David Nyamwange in trust for Stanley Ondoro. David Nyamwange got sub-plots 5,6,10 and the permanent improvements thereon. Each of them took possession of their individual shares but a problem arose as to the ownership of the permanent improvements on Plot Nos. 801 and 802. The 1st Defendant then encroached onto 801 from both sides, a portion of 1.5 Acres, Johnstone Ombagi, the 2nd Defendant encroached 801 to the extent of 3.5 Acres. The 3rd Defendant encroached plot No. 802 to the extent of 0.75 of an Acre and the 4th Defendant has encroached 801 to the extent of 2 Acres. Plots 2 and 11 were subsequently consolidated to plot No. Gesima Settlement Scheme/2. Plots Nos. 5,6,10, 801 and 802 became Plot No. 5. The court ordered that the family owns plot Nos. 5,6 and 10. The Ondoro's family then encroached onto part of plot No. 5 which was confirmed by the County Surveyor and the plots that had interfered were 337,338,340,341,342 and 344. This interference is evidenced by the map marked page 50 in the Plaintiffs' bundle of documents. On cross-examination by Mr. Oguttu the witness said that the ownership of land parcels 2 and 5 was determined in 1969 in case No. 74 of 1968 which case did not determine the acreage of the 2 parcels. Plot No. 2 measures 42 Acres while Plot No. 5 measures 16.5 Acres. After some time, the R.I.M was amended as shown in the map on page 53. There is a letter to that effect. On re-examination by Mr. Bosire, PW1 said that land parcel No. 2 is 5.5. Hectares, parcel No. 5 is 19 Hectares and the entire parcel No. 2 is approximately 136 Acres, which is erroneous. The amended map shows that the Plaintiffs' Land No. 5 goes beyond the road.
6. PW2 William Momanyi Nyamwange, an Advocate of the High Court of Kenya and a former Pilot with the Kenya Airways until November 2011 testified. He is also a son to the late David Nyamwange. He adopted his statement dated 27/2/2017 as his evidence in chief. He said that Gesima Settlement Scheme/5 is registered in the name of the Plaintiffs and that Gesima Settlement Scheme/2 is in the



name of the 1st Defendant. Gesima Settlement Scheme/2 was sub-divided into Gesima Settlement Scheme/337,338,339,340, 341,342, 343,344, 345, 346, 585,586 and 587 some of which encroached onto Gesima Settlement Scheme/5 and 338,340,341,342 and 344 ought to be recalled, cancelled and rectified. The witness, a son of the 1st Plaintiff testified that the PIs were given to his late father by the Settlement Funds Trustees and the liabilities for the same paid for.

7. The R.I.M produced in August 1985 has an error for it did not comply with the letter dated 24/8/1977 by omitting the PIS 801 and 802 which error was corrected in 1996 and a new map drawn but which corrected map was later interfered with again and new parcels created interfering with plot No. 5. He prays for the cancellation of the created parcels.
8. On cross-examination by Mr. Kipnetich, Mr. Nyamwange said that the Surveyor's Report indicated that 801 and 802 were not part of parcel No. 2 and that the Director of S.F.T executed the order of the court. Plot No. 2 was registered in the name of Ondoro on 17/3/1986. When cross-examined by Mr. Muindi he said that they did not complain about the changes because they came to learn of the interference in the maps in 2015. On re-examination by Mr. Bosire, the witness said that Plot No. 342 does not exist on the ground.
9. PW3, Prescott Mokaya Nyakanyo, produced the Survey Report on the status of land parcel No. Gesima Settlement Scheme/244 dated 13/4/2019 and gave the exact measurements of each of the new sub-parcels from parcel No. 2 and their encroachment onto parcel No. 5. He produced his Report dated 10/6/2019. According to his Report, Parcel No. 5 came into being after combining parcels 5,6,10,801, 802, 803 and 804 and Parcel No. 2 came into being by combining parcels 2 and 11. He concluded the Report by explaining that sub-parcels 337,338,341,342, and 344 do encroach onto parcels 801 of parcel 5 and that sub-divisions 340 and 341 encroach onto 802 of Parcel No. 5. Subdivisions of parcel 2 gave rise to sub-parcels 337-346 (inclusive) which was irregularly executed and which led into encroachment into part of parcel 5. He recommended these latter irregular Titles be revoked to allow fresh and legitimate survey of parcel No. 2 to be conducted. On cross-examination by Mr. Kipnetich, Mr. Nyakango said that he was aware that the R.I.M had been discussed by the County Surveyor and Land Registrar. On Cross-examination by Mr. Muindi Mr. Nyakango said that although he was not licensed he was qualified as a Surveyor.
10. To support their claim, the Plaintiffs produced the following documents:
 1. Grant of letters of Administration and Certificate of Confirmation of Grant in Kisii Succession cause No. 37 of 1996.
 2. Copy of the Register for Land Parcel No. KISII/ Gesima Settlement Scheme/5.
 3. Decree issued on 8th October, 2003 in KISII HCC No. 534(B) of 1994.
 4. Letter from the Senior Land Registrar Nyamira to the Plaintiffs dated 6th October, 2016.
 5. Letter dated 6th October, 2016 by Surveyor Nyamira to the Land Registrar, Nyamira forwarding copies of the Mutation of sub-division of Gesima Settlement Scheme/2 dated 7th April, 1995 and the map for Gesima Settlement Scheme RIM sheet 3.
 6. Photographs numbered a, b and c.
 7. Letter to the settlement Officer – Gesima from Senior Settlement Officer dated 27th June, 1966.
 8. Extract of Development Map for Gesima Settlement Scheme showing “z” plot No. 2.



9. Copy of Judgment delivered on 8th January, 1969 in KISUMU HCC NO. 74 of 1968 (David Nyamwange =vs= Stanley Ondoro)
10. Letter from the Director of Settlement, Ministry of Lands and Settlement to the Settlement Officer Sotik dated 24th August, 1977.
11. Settlement Fund Trustee Letter to the district Settlement Officer – Sotik dated 7th February, 1980.
12. Map of Gesima Settlement Scheme sheet No. 3 of August, 1985.
13. Letter from Director of Land Adjudication and Settlement to the Land Registrar Nyamira dated 24th February, 1994.
14. Letter from District Land Adjudication and Settlement Officer Nyamira to District Land Registrar Nyamira dated 14th March, 1994.
15. Letter from the Land Registrar Nyamira to the Director of Survey through the District Surveyor Nyamira dated 10th January, 1995.
16. Letter from the Director of Survey to the Land registrar Nyamira dated 17th January 1995.
17. Letter from the District Land Registrar Nyamira to the Director of survey through the District Surveyor Nyamira dated 25th January, 1995.
18. Mutation form dated 24th January, 1995 for NYAMIRA/Gesima Settlement Scheme/5.
19. Map of Gesima Settlement Scheme sheet No. 3 of 1996.
20. The consent order dated 3rd December, 1996 in KISII HCC No. 534B of 1994(Stanley Ondoro boraya=vs=George Nyamwange and Another)
21. Order issued on 7th February, 1997 in KISII HCC NO. 534B of 1994 (Stanley Ondoro Boraya =vs=George Nyamwange and Another).
22. The Report by the District Surveyor Kisii dated 21st August, 1997.
23. Proceedings of the KISII HCC No. 534B of 1994(Stanley Ondoro Boraya =VS= George Nyamwange and Another.
24. Map of Gesima Settlement Scheme sheet No. 3 certified on 5th May 2015.
25. Note from the County Surveyor Nyamira to the County Surveyor Kisii dated 15th July, 2015.
26. Overlay of maps of Gesima Settlement Scheme sheet 3 showing the encroachment.
27. Map of Gesima Settlement Scheme sheet 3 of 1996 showing the record of amendments.
28. Corrected map of Gesima Settlement Scheme sheet 3 certified on 23rd September, 2016.
29. Letter from Bosire Gichana and Company Advocates to the Land Registrar- Nyamira dated 16th December, 2016.
30. Letter from the Land Registrar – Nyamira County to Bosire Gichana & Company Advocates dated 23rd January, 2017 forwarding mutation form dated 7th April, 1995.



31. Letter dated 13th January 2017 from Sub County Settlement Officer Borabu County Land Registrar Nyamira, with attachments.
 32. Aerial Photograph.
11. After the close of the Plaintiffs' case, the 1st Defendant, Rhoda Mongina Ondoro took to the witness Box. She adopted her statement dated 4/10/2017. She said that she is the widow of the late Stanley Ondoro, the registered proprietor of Gesima Settlement Scheme/2. She testified that the original mutation forms show that the 2 parcels Gesima Settlement Scheme/2 and Gesima Settlement Scheme/5 are separated by a murrum road and that she has not interfered with the boundary features and that she can't understand how the boundary shifted from the murrum road into the Defendants' land. She said that the original Registry Index Maps from the Director of Survey and Director of Land Adjudication bear the correct position of the initial maps. She testified that the sub-divisions of Gesima Settlement Scheme/5 were properly done and all the Title Deeds issued as a result, are valid and should not be nullified or rectified and that the Land Registrar's Report has endorsed the impulse which this court should follow. She also describes the 2nd Plaintiff as her late husband's nephew. On cross-examination by Mr. Gichana the 1st Defendant said that it is not true that Nos. 5 and 11 were amalgamated. She stays in No. 2 which was 42 Acres but doesn't know whether No. 11 was 34.5 Acres. She also did not know who paid for the PIs or how much.
 12. DW2, Johnstone Nyanyuki Ombangi recorded a statement dated 10/11/2016 where he stated that alongside other buyers, he bought the disputed houses, a portion of Gesima Settlement Scheme/2 from Stanley Ondero Boraya in 1993 measuring 11 Acres but he cannot trace the written sale agreement and a licensed Surveyor carried out the survey work. The land was sub-divided and he got Gesima Settlement Scheme/338 on 7/4/1995 which has permanent structures since 2000 and another portion, a tea plantation and another one eucalyptus trees. He has therefore not encroached onto the Plaintiffs' land. He also testified that he bought Gesima Settlement Scheme/341 measuring 5 Acres and Gesima Settlement Scheme/339 measuring 3 Acres and took possession of the same which he started developing. This he did with the full knowledge of the Plaintiffs. He produced 9 documents in favour of his case as follows:
 1. Letter dated 16th December, 2016
 2. Letter dated 23rd January, 2017
 3. Letter dated 27th June 1966
 4. Letter dated 17th January 1995
 5. Letter dated 14th March 1994
 6. Letter dated 24th February 1994
 7. Court Order given on 7th February 1997 in Kisii HCCC No. 534B of 1994
 8. Report by Nyamira District Land Surveyor and Registrar dated 21st August 1997.
 9. Court proceedings in Kisii HCCC No. 534 B of 1994.
 13. On cross-examination by Ms. Mwititi, Mr. Ombongi said that the 1st Plaintiff bought land from the late Stanley Ondoro and was issued with a Title Deed in 1995. While responding to cross-examination by Mr. Gichana he said that he obtained consent from the Land Control Board otherwise the land could not have been transferred to him and that he never encroached on anyone's land.



14. DW3, Samuel Raini Nyausa adopted his statement filed in court on 13/5/2022. He testified that on 11/9/1991 he bought Gesima Settlement Scheme/2 from Stanley Ondoro Bonaya and after following all the legal processes he was issued with a Title Deed. The original mutation shows that this land was divided by a murrum road with Gesima Settlement Scheme/5 and that he has not interfered with the boundary features and the road of access acts as the current boundary between Gesima Settlement Scheme/2 and Gesima Settlement Scheme/ 5. He is the beneficiary of Gesima Settlement Scheme/342 which should not be nullified. He produced in court a copy of the Title Deed and sale agreement, 2 searches in respect of the same and 2 letters from the Land Registrar and County Surveyor, Nyamira but the 2 letters were objected to till their makers came to court to produce them which objection was sustained by the court. Upon cross-examination by Mr. Ochwal, the witness said that he bought Gesima Settlement Scheme/340 from Stanley Ondoro without knowing that there existed a dispute between the late Stanley Ondoro and David Nyamwange.
15. On cross-examination by Ms. Mwiti, the witness said that he had planted gum trees, tea bushes and built a house on the suit land where he has been for the last 21 years now without any complaint from the Plaintiffs. When answering Mr. Gichana, Nyausa said that the size of what he bought is 4 Acres and later added another 2 Acres and that he has not encroached onto the 1 Acre belonging to the Plaintiffs and that he could not remember whether he went to the Land Control Board for consent to transfer. On re-examination he said that he bought 2 Acres.
16. DW4, James Kemoni Ongera, a land Administrator and a Physical Planner from the Ministry of Lands and Physical Planning, Nairobi adopted his statement of 14/3/2019 and produced documents 1 to 13 (inclusive) as follows:
 1. Registry Index Map for the entire Gesima Settlement Scheme No. 3 (130/4/10).
 2. Judgement dated 8th January, 1969.
 3. Letter dated 6th October 2016 from the Senior Land Registrar, Nyamira to Yuness Nyamwange, George Nyamwange and Charles Nyamwange.
 4. Letter dated 6th October 2016 from the District Survey Office, Nyamira to the District Land Registrar, Nyamira.
 5. Letter dated 17th February 1993 from the Land Adjudication/Settlement office to Chief Accountant Settlement Fund Trustee.
 6. Letter dated 21st November 2016 from the County Survey Office, Nyamira to the Director of Surveys, Nairobi to the County Surveyor, Nyamira.
 7. Letter dated 17th November 2016 from Ministry of Lands, Director of Surveys, Nairobi to the County Surveyor, Nyamira
 8. Letter dated 21st November 2016 from the County Survey Office, Nyamira to the County Land Registrar, Nyamira.
 9. Letter dated 22nd November, 2016 from the District Land Registrar, Nyamira to the Deputy Registrar Kisii High Court.
 10. Title Deed for Gesima Settlement Scheme/341.
 11. Transfer of Land from Johnstone Ombagi Menge to James Ongera Kemoni and Hellen Nyaboke Makori.



12. Certificate of Official search for Gesima Settlement Scheme/341.
 13. Copy of survey Report prepared by Joel Odhiambo Akumu (licensed surveyor) of February 2018.
17. save documents 6,8,9 and 13. He testified that without knowing that there was a dispute between the families of Ondoro and Nyamwange he bought a piece of land from the 2nd Defendant in 2016 being Gesima Settlement Scheme/341 measuring 5 Acres which he has occupied since 2010 to date. He was issued with a Title Deed in 2014. He has developed the land with some cattle shed, eucalyptus trees, varieties of fruit trees, a pit latrine and a home, a permanent mansionate valued at close to Kshs.15 million and tea bushes. The Plaintiffs have never complained. On cross-examination by Ms. Ochwal, Ongera said that he had mature trees on the suit land which had been planted by the 2nd Defendant. On cross-examination by Mr. Gichana, the witness said that there was a water tank and a small dam on the land. Plots 801 and 802 are also contained therein and parcel numbers 2 and 5 are separated by a 12-meter public access road. On re-examination he clarified that Plot No. 5 measures 19 Hectares.
18. PW5 Joel Odhiambo Akumu, a Private Licensed Land surveyor number 156 with the firm of Prime line Surveyors adopted his statement of 14/3/2019 and also produced a Report dated 15/6/2018. He had been assigned the work by the 4th Defendant to peruse the available documents presented to him and cross check them with the Lands office where he was able to confirm that there was a 40 feet wide road separating plot numbers 5,6,10,803 on the one hand and 2,11,801 and 802 on the other. Plot Nos. 2 and 11 were part of plot No. 2. He then gave his conclusions as follows:
1. The R.I.M created the plots available for registration by surveying and mapping the extents (boundaries) of individual ownership rights or claims. This was done after the plots had been allocated. The boundaries demarcated on the ground by the settlement officers and demarcated boundaries shown to the allottees and surveyed and mapped as shown.
 2. The plots shown on the Development Plan as 801, 802 and 803 were not surveyed and mapped as individual entities on the RIM. Plots 801 and 802 on the Development plan were surveyed as part of plot number 2 on the RIM, while plot 803 on the Development plan was surveyed as part of plot number 5 on RIM. So after preparation of the RIM there should be no reference to plots number 801,802 or 803.
 3. The Settlement Officers demarcated the plot boundaries on the ground, they pointed out the correct boundaries to be surveyed for preparations of the RIM. They also counter checked the Area list and the RIM before it was published to ensure that all plots are surveyed and included, no plot is omitted and the plots on the RIM correspond to what they had allocated.
 4. The combination form that was prepared by the Land Registrar Nyamira in 1995 is erroneous and cannot be implemented since it refers to plots that are nonexistent.
 5. The old colonial house is on plot number 342. Mr. Kemoni is occupying plot number 341, and the old dam and the old disused water tank both are inside plot number 341 as was subdivided from plot number 2.
19. On cross-examination by Mr. Moracha, he said that the 2 plots are divided by a public access road. When answering questions from Mr. Gichana he said that plot numbers 801 and 802 are on the same side of the road, on plot numbers 2 and 11. Plot No. 803 is part of Plot No. 5. On re-examination by Ms. Mwiti Mr. Akumu said that when there is an error the person affected ought to go to the Land and Settlement office for confirmation.



20. Mr. Martin Manwari Osano, the Land Registrar Nyamira testified that the 1st plaintiff is the registered proprietor of LR. NO. Gesima Settlement Scheme/342 which was created after sub-dividing Gesima Settlement Scheme/2. The same is 1.22 Hectares and that the transfer from Stanley Ondoro Boraya is described as a sale. On cross-examination by Mr. Gichana, he said that a Title Deed was issued after the transfer was registered. A mutation was also available. Mr. Kennedy Edward Bosire, the current Land Registrar, Bomet County and the Land Registrar Nyamira between 2015 and 2019 said that he authored 2 letters dated 6/10/2016 and 22/11/2016 respectively. The earlier one being advisory and not an order. Before writing the second letter, Mr. Bosire got a map from the Director of Surveys showing that there was no brace and that the acreage for parcel number 2 was 55 Hectares and parcel number 5 measures 19 Hectares with an access road between them. He therefore formed an opinion that the 1st letter was erroneous and did a correction vide the second letter which states that there was encroachment between Gesima Settlement Scheme 2 and 5 respectively. He therefore asked that the 1st letter dated 6/10/2016 be expunged from the court records.
21. The last witness, Robert Atika Torori, a county surveyor based in Nyamira produced a letter dated 6/10/2016 on Gesima Settlement Scheme/2 and 5 addressing the Plaintiffs' conflicts on parcel No. 2 encroaching on land No. 5. After getting R.I.M from the Director of Surveys this letter was corrected with the one dated 21/11/2016. He confirmed that he was the author of the 2 letters and that there was no encroachment between Gesima Settlement Scheme/2 and Gesima Settlement Scheme/5 but that he did not go to the ground to take measurements.
22. This Judgment was ready for delivery as early as prior to the date it was to be read i.e. 28th Day of September 2022 but the delivery of the same was arrested to allow a visit to the Locus in Quo for more evidence which took place on 12/10/2023. The visit was followed by respective Reports from the Land Registrar and County Surveyor, Nyamira which were interrogated by all the parties by way of written comments. Unfortunately, the said Reports were not of much help and did not help to change the mind of the Court and the Court now delivers its Judgment.
23. This is a case of confusion caused by the Lands office and generally the Ministry of Lands. In this case it is quite clear that all the parties bought a piece of land from Mzee Musa Nyandusi, now deceased. From the evidence tendered in court, it is not in doubt that David Nyamwange bought Plot number 2 at Gesima Settlement Scheme in 1965 which comprised plot numbers 2,5,6,10 and 11 which had permanent improvements on plot numbers 801,802,803 and 804. The transfer of plot number 2 was effected on 27/6/1966. Among what is housed in Plot number 801 are water storage tanks. Plot Number P1 802 has a natural spring source and a Dam, P1 803 a cow shed and P1 804 a cattle dip. This kind of set up depicts a well-managed farm. Mr. Daniel Nyamwange did pay for PIS 801 and 802 as shown in the copies of receipts in his bundle of documents. In Kisumu High Court Civil Case No. 74 of 1968 pitting Stanley Ondero and David Nyamwange, the parties entered a consent to the effect that Mr. Ondero would get plot numbers 2 and 11 while Mr. Nyamwange was to own plots numbers 5,6, and 10. A copy of Judgement to that effect was produced as exhibit number 9. But the Judgment never said anything about the permanent improvements.
24. For Plot No. Gesima Settlement Scheme/2 the settlement funds Trustees letter dated 24/8/1977 exhibit P 10 comprised of plots 2 and 11 while plots 5,6 and P I 10 became Gesima Settlement Scheme No. 5. The letter was addressed to the settlement officer, Sotik for action. The Director of land Adjudication and settlement who vide a letter dated 24/2/1994 to the District Land Registrar Nyamira indicated that plot no. 2 Gesima Settlement Scheme did not contain a PI. He said that the R.I.M that showed PIs 801 and 802 being in plot number 2 belonging to Stanley Ondero was erroneous. He clarified that all the plots were allocated to David Nyamwange in plot number 5. On 14/3/1994, the District Land Adjudication and settlement officer, Nyamira wrote to the District Land Registrar,



- Nyamira indicating that plot number 2 measures 137.5 Acres while plot number 5 measures 57.5 Acres.
25. From the Land Registrar's letter dated 10/1/1995 the Lands office indicated that the location of plots 801,802 and 803 and an amendment of the Registry Index Map was done and the same fell under Gesima Settlement Scheme/5. The letter was addressed to the Director of Surveys. The District Land Registrar, Nyamira also requested the Director of Surveys to avail the map and send to him a copy of the Registry Index Map for the same for further action. DW5, Joel Odhiambo Akumu, a Land Surveyor tendered evidence in Court and said that there is a 40 feet wide road separating Plot Nos. 5, 6,10,803 on one side and Plot numbers 2,11,801 and 802 on the other. He further explained the process of registration, that the Registry Index Map in the Department of settlement marks the boundaries. The Survey Department is then called upon to survey the existing boundaries as marked on the ground by the Settlement Department and as shown to the owners of the parcels of land. The survey is compiled as a Registry Index Map showing the boundaries as surveyed on the ground. That map together with the area list is then submitted to the Settlement Department to check whether there are any issues. Once accepted, the settlement Department gives the list of beneficiaries before it is officially published. The plots are then registered at the Lands office. However, he said that he doesn't agree with the contents of the letter dated 10/1/1995 and says that it was erroneous and could not be implemented and that 801 and 802 were already part of plot No. 2. He testified that plot numbers 801 and 802 are on the same side of the road as numbers 2 and 11. Also he said that 801,802 and 803 were not registered as separate entities. 801 and 802 are part of plot number 2 and 803 is part of plot number 5. Plot numbers 2 and 11 were not registered separately whereas 5,6,10 and 803 were registered as plot No. 5.
 26. DW6 Martin Manwari Osano, the Land Registrar, Nyamira could not shed light as to how the plots were registered.
 27. DW7 Kennedy Edward Bosire, the Land Registrar Bomett and who was based in Nyamira from 2015 to 2019 said that plot No. 5 did not contain a brace and that this information came from the map that was given to him through the County Surveyor from the Director of Surveys, Nairobi. The road of access between plot numbers 2 and 5 marked the boundary between the 2 parcels and that parcel number 2 measures 55 hectares or thereabout while plot number 5 measures 19 Hectares. Copies of the area list, mutation forms for sub-division in respect to parcel number 2 and the current map from the Director of Surveys were produced to support this. He explained that the letter written on 6/10/2016 was erroneous because it was informed by a map that was not genuine and that this impression was corrected by the letter dated 22/11/2016. The County Surveyor Mr. Robert Atika Torori and author of the 2 letters corroborated the evidence of the Land Registrar.
 28. It is clear from the Registry Index Map and the evidence given by the land officials from the Ministry of Lands that there is no brace cutting across the land Parcel number Gesima Settlement Scheme/5. There is therefore a clear boundary in form of an access road that separates plot number 2 on one side and plot number 5 on the other. In any case accordingly the owner of plot number 5 had already acquired rights over the PIs Nos. 801 and 802 which this Court has no powers to take away from him at this stage. The PIs were never registered and would therefore only be part of the parcels of land they are located in.
 29. It is trite law that once a person is registered as a proprietor of land, he is to enjoy all rights and privileges appurtenant thereto. Having established that the Defendants are the registered owners of the suit properties, I find that they are entitled to all the rights and privileges belonging or appurtenant thereto and hence to occupy, possess and all that is legally appurtenant to their rightful ownership. The



Defendants are therefore entitled to the protection of the law. Section 24(a) of the [Land Registration Act](#) states as follows: -

“the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”.

30. The rights of a proprietor are enshrined under Section 25 as follows:(1)

“The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto.....”

31. Appurtenant to is derived from the Norman French word which means to belong to, anything corporeal or incorporeal which is an incident of, and belongs to some other thing as principal, an addition to, adjoining to, enjoyed with, an adjunct of, usually occupied with or attached to a more important thing and passing with it upon sale, transfer, or conveyance.

32. It is also trite law that whatever is permanently attached to the soil becomes part of the soil and runs with the land; it matters not who affixed or embedded the object. This is captured in the Latin maxim quicquid plantatur solo, solo cedit. See my Judgment in [Orori v Nyakambi \(Environment & Land Case 63 of 2021\)](#) [2022] KEELC 45 (KLR) (28 April 2022). The owner of the land becomes the owner of the soil and all objects permanently affixed or embedded thereto. In a conveyance or sale transaction, all objects affixed and embedded to the land at the time of the contract of sale must be left for the purchaser unless otherwise agreed. In law, a sale agreement is effective to pass objects permanently affixed to the soil without express mention.

33. From the above Definition and Doctrine that has been entrenched in Section 24(a) of the [Land Registration Act](#), I agree with the Defendant’s Witness Mr. Joel Odhiambo Akumu, a land Surveyor, that the owner of plot number 5 had already acquired rights over the PIs Nos. 801 and 802. The PIs were never registered and would therefore only be part of the parcels of land they are located in.

34. Consequently, the Plaintiffs’ claim fails in its entirety, the 1st Defendant’s counter-claim succeeds to the extent that Gesima Settlement Scheme/342 does not belong to the Plaintiffs. In case the Plaintiffs had paid any money in respect of the plot numbers PIs 801 and 802 then they are entitled to compensation from the Settlement Funds Trustees Department which the court advises them to pursue.

35. As to costs, the mess here has been substantially contributed to by the Ministry of Lands and in particular, the holders of the offices of Nyamira Land Registrar and County Surveyor respectively who were in office in the year 2016. I will therefore order that each party bears his own costs.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 9TH MAY 2024.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant -Brenda

Mr. Gichana for the Plaintiff

Ms. Mwiti for the 4th and 5th Defendants



Mr. Okenye holding brief for Mr. Moracha for the 1st and 3rd Defendants

Mr. Wabwire for the 6th Defendant

Mr. Ochwal for the 2nd Defendant

