



**Tengeya (Suing as Legal Representative of the Estate of the Late Robert Tengeya Sika) v Obare & 4 others (Environment & Land Case E008 of 2023) [2024] KEELC 7341 (KLR) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 7341 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA  
ENVIRONMENT & LAND CASE E008 OF 2023**

**JM KAMAU, J  
OCTOBER 31, 2024**

**BETWEEN**

**TRUDLE KWAMBOKA TENGEYA ..... PLAINTIFF  
SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE  
ROBERT TENGEYA SIKA**

**AND**

**ROBERT NDATI OBARE ..... 1<sup>ST</sup> DEFENDANT  
THE HON ATTORNEY GENERAL ..... 2<sup>ND</sup> DEFENDANT  
COUNTY LAND REGISTRAR, NYAMIRA ..... 3<sup>RD</sup> DEFENDANT  
COUNTY LAND SURVEYOR, NYAMIRA ..... 4<sup>TH</sup> DEFENDANT  
BORABU COUNTY ..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. Having obtained a Limited Grant of Letters of Administration Ad Litem on 10/5/2023 in Nyamira Chief Magistrate’s Court in Succession Cause No. E044 of 2023 the Plaintiff, suing for and as Legal Representative of the Estate of the late Robert Tengeya Sika who died on 6/3/2023 filed this suit vide a Plaint dated 23/5/2023. She averred that at all material times, L. R NO.Kitaru Settlement Scheme/94 measuring 0.17 Hectares a sub-division of L.R. NO.Kitaru Settlement Scheme/61 was registered in the name of Sika Ochenge Sika, father to Robert Tengeya Sika (also deceased). The other sub-division is Kitaru Settlement Scheme/93 measuring 0.817 Hectares. She claimed that L.R. NO.Kitaru Settlement Scheme/93 was sold and that the late Robert Tengeya Sika had sub-divided Kitaru Settlement Scheme/61 on 21/11/2013. She was surprised that L.R NO.Kitaru Settlement Scheme/94 was transferred to the Defendant on 2/12/2013 without any record of the Application to the Land Control Board and also without the requisite Transfer Forms. The Plaintiff claims that the 1<sup>st</sup>



Defendant started building on and developing the suit property i.e. Kitaru Settlement Scheme/94 including doing so on top of the graves of the Plaintiff's late mother Mary Nyaboke Tengeya and her brother, one Duncan Tengeya both of who had passed on in 2006 and 2004 respectively of cause long before the death of the late Robert Tengeya Sika. The Plaintiff contends that any transfer in favour of the 1<sup>st</sup> Defendant must have been fraudulent and as a result of the presentation of false documents to the Land Registry. As a consequence thereof, the Plaintiff prays for Judgment for:

- a. A Declaration that the Defendant's rightful share in the parcel known as Kitaru Settlement Scheme/94 is a portion measuring 50ft by 100ft only.
  - b. An order of permanent injunction restraining the Defendant, his agents, servants or any other person working under his instructions from preventing, barring and or blocking the Plaintiff from burying he deceased herein on L.R. Kitaru Settlement Scheme/94.
  - c. An order compelling the Defendant to produce the preservation agreement conditions containing the burial site of the Plaintiff's mother and brother burial site and indicates how the Plaintiff and her siblings can access it to bury their deceased father as per the Kisii Traditional Customary rights.
  - d. This Honourable court to order for the forensic examination of the documents through the relevant agencies and the court to determine the validity of the transactions.
  - e. This Honourable court to issue an order directing the Nyamira Lands Registrar to formally cancel the title deed to parcel Kitaru Settlement Scheme/94 and appropriate rightful acreage to the Defendant's share of 50ft by 100ft and the remaining acreage to be registered in the name of the deceased.
  - f. An order for the Plaintiff and her siblings to proceed and bury their father, the late Robert Tengeya Sika near the grave side of their mother Mary Nyaboke Motanya and brother Duncan Seme Tengeya.
  - g. An order compelling the Defendant to pull down all the structures standing on plot L.R. Kitaru Settlement Scheme/94 and in default, the Plaintiff to be at liberty to demolish the same at the Defendant's expense and under the supervision of police officers for purposes of maintaining peace and order.
  - h. An order of permanent injunction restraining the Defendant from trespassing on and in any manner interfering with the Plaintiff's proprietary interest in the suit parcel.
  - i. Costs of the suit and morgue charges accrued.
  - j. Any relief that this Honourable court may deem fit and just to grant.
12. Contemporaneously with the Plaint was filed an Application by the Plaintiff for injunction against the 1<sup>st</sup> Defendant from barring and/or preventing the burial of the late Robert Tengeya Sika on L.R. NO. Kitaru Settlement Scheme/94. In addition, an order against the Defendant restraining the alienation, trespass upon, encroachment upon or in any manner whatsoever with L.R. NO. Kitaru Settlement Scheme/94 which harbors the graveyards of the family of the late Robert Tengeya Sika was sought. On 24/5/2013, this Court ordered that the Defendants herein were restrained from interfering with the graveyards of the family of the late Robert Tengeya Sika i.e. the late Duncan Tengeya and the late Mary Nyaboke Tengeya thereon.



13. On 27/6/2013 the 1<sup>st</sup> Defendant filed a statement of Defence denying the Plaintiff's case and claiming that the Plaintiff's mother and brother were respectively buried on the original L.R. NO.Kitaru Settlement Scheme/61 long before the sub-division of the same.
14. When the matter came up for hearing on 28/9/2013, the Plaintiff testified that the 1<sup>st</sup> Defendant never bought the suit land from her late father Robert Tengeya Sika. Adopting her statements filed on 24/5/2023 and 20/7/2023 respectively, the Plaintiff testified that her father only sold to the 1<sup>st</sup> Defendant Kitaru Settlement Scheme/93 measuring 0.817 Hectares leaving intact the portion his wife and son had been buried earlier on before he relocated to Kitale. There were no records to show the transaction claimed by the 1<sup>st</sup> Defendant in relation to the sale to himself of LR. NO.Kitaru Settlement Scheme/94. She also advanced evidence that summons by the Land Registrar to the 1<sup>st</sup> Defendant to appear and explain the validity of the transfer were not honoured at all. The Plaintiff also testified that in 2016, the 1<sup>st</sup> Defendant demolished their home. To buttress her case, the Plaintiff produced a copy of the Limited Grant of Letters of Administrator Ad Litem issued by the Chief Magistrate's Court, Nyamira on 10/5/2023 and a Death Certificate in respect to the late Sika issued on 31/3/2023 serial number 1589167, a copy of the burial permit thereof, serial number 1876531, a copy of the abstract of Title (Green Card) dated 13/4/2023 showing that title to the Land Parcel No.Kitaru Settlement Scheme/61 was issued on 15/4/2010 in favour of the late Robert Tengeya Sika of P.O BOX 362, Kisii and closed on 21/11/2013 on sub-division of the same into Kitaru Settlement Scheme/93 and Kitaru Settlement Scheme/94 respectively. There is also a copy of the Green Card in respect to Kitaru Settlement Scheme/94 opened on 2/12/2013 with the Title Deed issued to one Robert Ndati Obare. The Plaintiff equally produced a copy of a letter dated 6/4/2023 from Mr. Martin M. Osano, Land Registrar, Nyamira addressed to the Defendant herein asking him to appear before him on 13/4/2023 at 9.00a.m. without fail to avail documents that facilitated the transfer of L.R.NO.Kitaru Settlement Scheme/94 to himself. He was also told to avail the respective Title Deed. There is also a letter of even date from the same Land Registrar to the Assistant County Commissioner, Borabu Sub-County enquiring whether there was a Land Control Board meeting held in November, 2013 for the transfer of the suit property to the 1<sup>st</sup> Defendant. There is no response to either of the letters. On cross-examination by Mr. Masese for the 1<sup>st</sup> Defendant, the Plaintiff said that her late father owned 3 Acres in Kitaru and that he sold a portion of 2 Acres to one Eric Onchana i.e.Kitaru Settlement Scheme/93. The 1<sup>st</sup> Defendant is occupying 1 Acre and that she has no problem with Eric's purchased land. In answer to questions from Mr. Ranah for the other 4 Defendant, the Plaintiff said that she has a problem with the Land Register because the same does not indicate the circumstances under which the land was transferred. On re-examination by Mr. Ochoki, Trudle said that she was told by her late father that the only portion the 1<sup>st</sup> Defendant had bought from him was a 50 x 100 feet parcel of land.
15. The second and last witness for the Plaintiff, Mr. Nathan Nyakerita Ochenge, an uncle to the late Robert said he would have known if Robert would have sold land to the 1<sup>st</sup> Defendant. Adopting his statement dated 21/7/2023, Mr. Ochenge said that according to Kisii customs, a person cannot purchase a graveyard yet the 1<sup>st</sup> Defendant all along knew of the 2 graves on the suit land. He insisted on cross-examination that there was no sale of the suit land.
16. The 1<sup>st</sup> Defendant, a Police Officer, in Embakasi, adopted his statement dated 24/7/2023 as his evidence in chief where he testified that he bought the suit land i.e.Kitaru Settlement Scheme/94 measuring 0.17 Hectares in two jiffs, 40ft by 182 feet at the price of Kshs. 180,000/= in 2011 when the land was still in the name of Sika Ochenge Sika and as L.R. No.Kitaru Settlement Scheme/24. The second agreement was for 78feet by 182 feet at the price of kshs. 360,000/= being Kitaru Settlement Scheme/61. In December 2013, Kitaru Settlement Scheme/94 was transferred to the 1<sup>st</sup> Defendant. He said that when buying the suit land, he was aware there were 2 graves on the land, that of the Deceased's



wife and the other one of his son. He also said that Kitaru Settlement Scheme/93 was transferred to one Erick Achana. The 1<sup>st</sup> Defendant also relied on the documents attached to his Affidavit sworn on 16/6/2023 viz; the first one was a sale agreement dated 6/6/2011 in respect of sale of 40 x 182 feet from land parcel number Kitaru Settlement Scheme/24 from Robert Tengeya Sika. The same was witnessed by J.K. Rono & Co. Advocates. There is also a 2<sup>nd</sup> sale agreement between Robert Tengeya Sika and himself dated 23/9/2013. It was witnessed by C.O. Nyamwange Advocates. He equally produced a copy of Title Deed in respect of Kitaru Settlement Scheme/94 issued on 2/12/2013 and a handwritten statement I believe to be the police done by the late Robert Tengeya Sika. On cross-examination by Ms. Opiyo for the State, the 1<sup>st</sup> Defendant said that he did appear before the Land Control Board, Borabu but could not produce a copy of the Application for consent nor receipt for Stamp Duty. On cross-examination by Mr. Ochoki for the Plaintiff, Mr. Obare said that by the time he bought Kitaru Settlement Scheme/24 the registered owner of the same had long died. He and the late Sika agreed that the Title would be transferred directly to Obare's name. Succession for his estate was to be done after the sale. On re-examination by Mr. Masese the witness said that he bought the said land from the late Robert when there were already graves on the ground.

17. DW2, the 1<sup>st</sup> Defendant's father said that he witnessed the agreement between the late Robert and the 1<sup>st</sup> Defendant. On cross-examination by Mr. Ranah for the State, Mr. James Obare Nyakeriga said that and his people do cultivate the land. On cross-examination by Mr. Ochoki for the Plaintiff, Mr. Nyakeriga said that he did not sign the agreement since he was unwell. He said he could not remember when the consent of the Land Control Board was obtained and that although the land, Kitaru Settlement Scheme/24 belonged to the Vendor's (Robert's) late father, no Succession Cause was ever commenced. He also admitted that there were graves on the land. DW3, Francis Nyamagwa Otara, a neighbour to the 1<sup>st</sup> Defendant said that he witnessed the agreement of 40 x 182 feet and saw Kshs.180,000/= change hands from the 1<sup>st</sup> Defendant to the late Robert. On cross-examination by Counsel for the Plaintiff, the witness said that he only witnessed the 1<sup>st</sup> agreement but knew nothing about the latter. He admitted that among the Kisiis graves are never sold. He knows that there are graves on the suit land, but that at that time he was not aware of the graves.
18. The Land Registrar, Nyamira, Mr. Martin Osano appeared in Court as a witness as the 3<sup>rd</sup> Defendant. He said that he could not trace the transfer documents at all. He could also not trace the parcel file. He could only see documents in respect of the sub-division of parcel No. Kitaru Settlement Scheme/61. When cross-examined by Mr. Ochoki for the Plaintiff Mr. Osano said that he should be having all transfer documents in the parcel file i.e. the consent, mutation forms and that he could not tell how the suit land was transferred to the 1<sup>st</sup> Defendant. The Presentation Book does not also show the transaction in favour of the 1<sup>st</sup> Defendant.
19. The last witness in the case was Mr. Stanley Ndungu Kamande, Deputy County Commissioner, Borabu Sub-County in Nyamira County. He came with a copy of the letter of consent which he produced in court but could not tell whether the Board meeting that allegedly consented to the transfer was a "special" or "normal" Board. The letter shows that the consent was applied for on 1/10/2013 and the Board held its meeting on 5/10/2013. However, the letter does not show the date. It has been obfuscated. On cross-examination by Mr. Ochoki for the Plaintiff, the witness said that he got the copy of letter of consent from the 1<sup>st</sup> Defendant himself. He said they didn't have any such a copy in their office and that he didn't know where the 1<sup>st</sup> Defendant got the copy from. He also said he did not come across the minutes of the Board that gave the alleged Consent.
20. Having heard all the parties and having gone through the written submissions from all the parties herein I am satisfied that the Plaintiff has shown to the Court that the property known as Kitaru Settlement Scheme/24 was registered in the name of one Sika Ochenge Sika on 12/3/2010. The same



was sub-divided into Kitaru Settlement Scheme/61 measuring 0.997 Hectares among others and Kitaru Settlement Scheme/61 registered in the name of Robert Tengeya Sika on 15/4/2010 and a Title Deed issued to him the same day. The Title Register was closed on 21/11/2013 when Kitaru Settlement Scheme/61 was sub-divided into Kitaru Settlement Scheme/93 and Kitaru Settlement.

21. There are 2 sale agreements between the 1<sup>st</sup> Defendant and one Robert Tengeya Sika dated 6/6/2011 and 23/9/2013 respectively.
22. As for the 1<sup>st</sup> agreement, the same is dated 6/6/2011 and relates to Kitaru Settlement Scheme/24 for KShs. 180,000/= and clearly indicates that it relates to a parcel of land in the name of the seller's late father, Sika Ochenga (Deceased). The Vendor (seller) is Robert Tengeya Sika. The law is very clear on this. If ever there was any sale, the same amounted to the intermeddling of a Deceased's property under section 45 of the *Law of Succession Act*, cap 160 Laws of Kenya.
  - “(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
  - (2) Any person who contravenes the provisions of this section shall-
    - (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
    - (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”
23. The same is an offence under section 45 (2) of the Act. The alleged Vendor did not therefore possess a Title and did not have capacity to convey a clean Title in respect to the suit land. There was therefore no valid transaction. There has also not been shown any Application for, nor letter of Consent to transfer. Of course, none could have been issued by the Land Control Board since there was nobody capable of applying for the same. Only living persons can apply and obtain Consent to transfer. The sale therefore fails for these 2 reasons.
24. The 2<sup>nd</sup> agreement was made on 23/9/2013 and it relates to North Mugirango/Kitaru Settlement Scheme/61. The same is for 78 x 182 feet and the consideration is indicated as KShs.300,000/= and was witnessed by C.O. Nyamwange & Co. Advocates, inter alia. By this time L.R.Kitaru Settlement Scheme/94 was not in existence. The Agreement cannot therefore be relating to the latter.
25. Nowhere in the sale Agreements is L.R.Kitaru Settlement Scheme/94 measuring 0.17 Hectares mentioned. But the same is shown to have changed ownership in favour of Robert Ndati Obare, the 1<sup>st</sup> Defendant on 2/12/2013 and a Title Deed issued the same date. It is indeed shown to be a transfer but there is no proof of payment of Stamp Duty. The Land Registrar, Mr. Osano testified that there were no transfer documents in the respective parcel file nor does the Presentation Book indicate this transaction. The Deputy County Commissioner, Borabu produced an unclear copy of consent but no Application for the same. Curiously, he said that he was given the same by the 1<sup>st</sup> Defendant who did not explain to him its source. He said there were no records in his office nor minutes to show that the consent had been obtained by the 1<sup>st</sup> Defendant. It is notable that the date of the letter of Consent has been craftily deleted. Furthermore, even assuming that the alleged date of Application is the date



the same was delivered to the Board, it is hard to believe that consent was obtained within a week from the date of the Application. Was there reasonable time for Notification? Was there a Search before the consent was given? The said letter of Consent is not available at the Lands Office which should have been the final destination of the letter of consent without which no valid transfer of an agricultural land such as the suit land would have taken place. If the Application of the said Consent were availed to the Court, it would certainly contain the Vendor's signature. This would have then left no doubt that the late Robert Tengeya Sika was behind the transfer of the suit land.

26. The upshot of the above is that the Plaintiff has proved her case on a balance of probability by showing that the transfer of Kitaru Settlement Scheme/94 in the name of the 1<sup>st</sup> Defendant was done fraudulently and the same cannot stand.
27. However, since the Plaintiff has made admission in respect to 50ft by 100ft out of Kitaru Settlement Scheme/94 the same shall be excised therefrom and transferred to the Defendant after all the requisite conditions such as Land Control Board consent, registration fees and Stamp Duty have been met. The expenses of the sub-division and transfer of the above shall be met by the Defendant.
28. I therefore enter Judgment for the Plaintiff against the Defendant as prayed for in the Plaint dated 23/5/2023 as follows: -
  - a. A Declaration be and is hereby issued to the effect that that the parcel of land known as L.R. No. Kitaru Settlement Scheme/94 belongs to the Estate of the late Robert Tengeya Sika save a portion measuring 50ft by 100ft only which is the Defendant's rightful share.
  - b. This Honourable court do issue an order directing the Land Registrar Nyamira to forthwith cancel the Title Deed in respect to parcel No. Kitaru Settlement Scheme/94.
  - c. The Land Registrar Nyamira is hereby ordered to excise and register 50ft by 100ft only out of Kitaru Settlement Scheme/94 in the name of the Defendant.
  - d. The remaining parcel of land shall wholly be registered in the name of the Plaintiff to hold the same in trust for the Estate of the late Robert Tengeya Sika.
  - e. The expenses of the sub-division and transfer of (c) and (d) above shall be borne by the Defendant.
  - f. Should the body of the late Robert Tengeya Sika not have been buried by now, the Plaintiff and her siblings are at liberty to proceed and bury their father, the late Robert Tengeya Sika near the grave side of their mother Mary Nyaboke Motanya and brother Duncan Seme Tengeya within plot No. L.R. Kitaru Settlement Scheme/94 save the 50ft by 100ft portion belonging to the Defendant.
  - g. An order be and is hereby issued compelling the Defendant to pull down all the structures standing on plot L.R. Kitaru Settlement Scheme/94 and in default, the Plaintiff shall be at liberty to demolish the same at the Defendant's expense and under the supervision of police officers for purposes of maintaining peace and order.
  - h. An order of permanent injunction be and is hereby issued restraining the Defendant from trespassing on and in any manner interfering with the Plaintiff's proprietary interests in the suit parcel save the 50ft by 100ft portion belonging to him as will be appropriately registered as shown above.
29. The Plaintiff shall also have the Costs of the suit and morgue charges accrued since the death of the late Robert Tengeya Sika to the date of this Judgment.



**JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 31ST DAY OF OCTOBER, 2024.**

**MUGO KAMAU**

**JUDGE**

In the Presence of: -

Court Assistant: Ms. Brenda.

Plaintiff's Counsel: Mr. Ochoki & Ms. Chepkorir.

Defendants' Counsel: Mr. Masese.

