



**Magara (Suing as the done of Samson Basil Magara who Donated to her Power of Attorney) v County Government of Nyamira & another (Environment & Land Case 44 of 2021) [2024] KEELC 14096 (KLR) (11 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 14096 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA  
ENVIRONMENT & LAND CASE 44 OF 2021  
JM KAMAU, J  
DECEMBER 11, 2024**

**BETWEEN**

**NYABOKE MAGARA ..... PLAINTIFF**

**SUING AS THE DONE OF SAMSON BASIL MAGARA WHO DONATED TO HER POWER OF ATTORNEY**

**AND**

**COUNTY GOVERNMENT OF NYAMIRA ..... 1<sup>ST</sup> DEFENDANT**

**COUNTY ENGINEER OF NYAMIRA COUNTY GOVERNMENT .... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The suit before me was filed by the Plaintiff Bathseba Nyaboke Magara against the County Government of Nyamira and the County Engineer, Nyamira County, the 1<sup>st</sup> Defendant’s employee. The same was initially dated 12/12/2016 but later amended on 12/6/2023. The Plaintiff obtained a special Power of Attorney from her husband Samson Basil Magara dated 16/6/2016 and registered in the lands office Nyamira on 17/11/2016 since the Donee stays in the United Kingdom. The same is attached to the Plaintiff. Samson Basil Magara is the registered proprietor of GESIMA SETTLEMENT SCHEME/509. The Respondents, according to the Plaintiff, and without Notice or consent wrongfully and unlawfully used their very heavy machines to uproot and destroy the Plaintiff’s Tea bushes on the suit land numbering 667 bushes and 47 Greveviambusta trees of various sizes in the month of October, 2016 while curving out the road of access through the Plaintiff’s land. This exercise was conducted to expand the road of access beyond what is provided for in the Registry Index Map, Sheet no. GESIMA SETTLEMENT SCHEME and in the process invaded onto the Plaintiff’s land a portion of land measuring approximately 82 metres long by 4.5 metres wide. The damage was assessed at Kshs.707,345.60 which the Plaintiff claims as against the Defendants jointly and severally together



with General Damages and a permanent injunction against further encroachment and trespass. The Plaintiff is dated 14/12/2016 and was amended on 14/6/2023.

- a. Return of a portion of Land Measuring approximately 4.5 metres wide and 82 metres long (0.04HA) unlawfully taken from LR NO.GESIMA SETTLEMENT SCHEME/509 and included as part of the Road of Access during the purported expansion of the Road.
  - aa) Return of the portion of land measuring approximately 4.5metres wide by 82 meres long (0.04HA) unlawfully curved out of LR No.GESIMA SETTLEMENT SCHEME/509 and included as part of the Road of Access during the purported expansion of the road OR Alternatively the value of the suit portion of land of Kshs.575,000/= as outline and/or described in paragraphs 7A and 14 hereinabove.
  - b. Payment of Kshs.707.345.60.
  - bb) Total payment of Kshs.1,282,3645.60 being the value of the uprooted and/or destroyed tea bushes and trees together with the value of the suit portion of land.
  - c. General Damages for the wasted portion of Land.
  - d. A permanent injunction to permanently restrain the Defendants jointly and severally and/ or their agents, servants or assignees from in future encroaching or trespassing onto the Suit Land beyond the provided for measurements of the Road reserve in the Registry Index Map and/or in anyway or manner whatsoever whatever reasons(s) whatsoever trespassing or interfering with the Plaintiff's quiet possession, occupation and user of LR.NO. GESIMA SETTLEMENT SCHEME/509.
  - e. Costs of this suit.
  - f. Interest at Court rates in (b) (c)(d) and (f) above.
2. On 8/2/2017 this Court ordered that the Land Registrar and County Surveyor, Nyamira do visit the land GESIMA SETTLEMENT SCHEME/509 and delineate the road of access and fix its dimensions within 90 Days from the date of the order. On 15/12/2021 a further order was made that the Government Valuers, Kisii, Homabay and Migori counties do visit the suit land for purposes of evaluating the Damage caused by the Defendant in October 2016 and file a Report in Court within 10 Days thereafter. On 3/1/2022 the Principal Valuer Kisii/Nyamira Mr. Obadiah Onkundi wrote to Court saying he was unable to carry out the assessment of the Damage and that he was not provided with the requisite road design for the subject road indicating the boundaries and measurements for valuation purposes. On 1/3/2022, a further order was given that parties agree on the measurements of the encroached area and the number of tea bushes destroyed and the Report filed in Court on or before 14/3/2022.
3. On 29/6/2023 the Defendants filed an amended Defence denying the entire claim by the Plaintiff.
4. The Plaintiff through Bathseba Nyaboke Magara testified on 5/7/2023 by adopting her statement dated 14/12/2016 in which she repeated the averments in Plaintiff. She said that on 26/10/2016 when she came back home from work, she found that her tea bushes, trees and fences had been destroyed by a tractor that was constructing the road through their land. She also produced the following documents to buff up her case:
1. Title Deed in respect of Gesima Settlement Scheme/509
  2. Power of Attorney donated from the Donor to the Donee dated 16<sup>th</sup> June, 2016.



3. Letter from the Area Chief addressed to Forester Borabu Sub-County dated 28/10/2016.
  4. A letter from Police addressed to Forest Officer dated 2<sup>nd</sup> November, 2016.
  5. A letter from Area Chief addressed to the Ministry of Agriculture dated 3/11/2016.
  6. Advocates letter dated 16<sup>th</sup> November, 2016 to the County Land Registrar Nyamira.
  7. Certified Copy of the Register in respect of Nyamira/Gesima Settlement Scheme/509.
  8. Demand Notices addressed to the Defendants.
  9. Pictures of the site showing damaged Tea Bushes dated 27/10/2016.
5. She said that the suit land belongs to her husband who was at the material time in the United Kingdom and that the road was expanded from 5 metres to 12 metres into their land albeit illegally by the Defendants. The flora of the destruction totals Kshs. 707,345.60 and the value of the land taken away 0.04 Hectares was valued at Kshs. 575,000/= which she claimed together with General Damages. On cross-examination by Mr. Nyangera for the Defendants the witness said she was not at home when the destruction started being carried out but found it in the process and was able to establish that the tractor belonged to the 1<sup>st</sup> Defendant because of a sign on the ground showing that the 1<sup>st</sup> Defendant was the one carrying out the road construction. She said the total number of trees uprooted was 47 and 667 tea bushes.
6. PW2 Benard Nyabuga Motanya, a registered surveyor from Geomatics Services testified that he visited the suit land on 1/11/2016 for purposes of confirming the extent of encroachment. He had Map Sheet No. 1 of GESIMA SETTLEMENT SCHEME which had Plot No.509 which showed that the road was 8 metres wide but on the ground it had been encroached to the extent of 82 metres by 4.5 metres wide, approximately 0.0369 Hectares. He then produced the following documents: -
1. Title Deed in respect of Gesima Settlement Scheme/509.
  2. Power of Attorney donated from the Donor to the Donee dated 16<sup>th</sup> June, 2016.
  3. Letter from the Area Chief addressed to Forester Borabu Sub-County dated 28/10/2016.
  4. A letter from Police addressed to Forest Officer dated 2<sup>nd</sup> November, 2016.
  5. A letter from Area Chief addressed to the Ministry of Agriculture dated 3/11/2016.
  6. Advocates letter dated 16<sup>th</sup> November, 2016 to the County Land Registrar Nyamira.
  7. Certified Copy of the Register in respect of Nyamira/Gesima Settlement Scheme/509.
  8. Demand Notices addressed to the Defendants.
  9. Pictures of the site showing damaged Tea Bushes dated 27/10/2016.
7. On cross-examination by Mr. Nyambane for the Defendants he mentioned that the scale of the map was 1:10,000.
8. PW3 Rael Otundo, a valuer said she visited the suit land on 13/9/2021 for purposes of ascertaining the encroached land which she put at approximately 0.04 Hectares which she valued at kshs.575,000/=. She produced the valuation Report dated .....which on cross-examination she said she based it on where the land is, the topography, soils and the use of the land and also disturbance allowance.



9. There being no re-examination, PW4 Anthony Onyango, an Agricultural Officer within the Ministry of Agriculture, County Government of Nyamira produced the Report of one retired Edward Ngare Mabeya dated 7/11/2016.
10. Ms. Rael Nyamita Nyataire, Assistant County Forest Conservator, Nyamira produced the Report of Tom Mungai, a retired Sub-County officer Borabu. The same is dated on 6/12/2016 before his retirement. It concerns the felled trees on GESIMA SETTLEMENT SCHEME/509. And on cross-examination by Mr. Maranga for the Defendant, Ms. Nyataige said the rate of the destroyed trees is determined by Legal Notice No. 21 of 2016 and that she obtained the Report from Nyamira County Forest Offices. At that point, the Plaintiff closed her case. This was followed by the evidence of Dennis Nyamberega, the 1<sup>st</sup> Defendants Roads, Engineer relying on his statement recorded on 25/8/2024, the witness maintained that the area the road was extended to is a road reserve and a public road for that matter. He then produced the following documents:-Road Design Manual.Land Registrar's Report dated 21/2/2018.County Surveyor's Report dated 22/2/2018.Copies of Site Sketch Map.
11. On cross-examination by Mr. Momanyi for the Plaintiff, the witness admitted that the manual he was using, prepared by his employer's Roads Department of the Ministry of Works is not signed and that it is a guideline of Roads National Government from the Ministry. He said that the 2.4 metres wide encroachment was a road reserve and that the Defendant never went beyond the road reserve. He said that the manual does not need to be signed once prepared. This closed the Defendant's case.
12. From the evidence produced in Court, the Plaintiff has proved her case on a balance of probabilities and is granted Judgment as follows:
  - a) Return of the portion of land measuring approximately 4.5metres wide by 82 meres long (0.04HA) unlawfully curved out of LR No.GESIMA SETTLEMENT SCHEME/509 and included as part of the Road of Access during the purported expansion of the road  
OR  
Alternatively the value of the suit portion of land of Kshs.575,000/= as outline and/or described in paragraphs 7A and 14 hereinabove.
  - b) Payment of Kshs.1,000,000/= being the value of the uprooted and/or destroyed tea bushes and trees together with the value of the suit portion of land.
  - c) A permanent injunction to permanently restrain the Defendants jointly and severally and/or their agents, servants or assignees from in future encroaching or trespassing onto the Suit Land beyond the provided for measurements of the Road reserve in the Registry Index Map and/or in anyway or manner whatsoever whatever reasons(s) whatsoever trespassing or interfering with the Plaintiff's quiet possession, occupation and user of LR.NO. GESIMA SETTLEMENT SCHEME/509.
  - d. Costs of this suit.
  - e. Interest at Court rates in (a) if the Defendants opt for the alternative prayer, (b) (c) and (d)) above.

**JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 11TH DAY OF DECEMBER, 2024.**

**MUGO KAMAU**

**JUDGE**



In the Presence of: -

Court Assistant: Brenda

Plaintiff: Mr. Momanyi

Defendant: Ms. Kerubo h/b for Mr. Maronga.

