



**Ouko (Suing as the administrator of the Estate of Tobias Ouko Osir - Deceased) v Olwal & 2 others  
(Environment & Land Case 2 of 2023) [2023] KEELC 21661 (KLR) (20 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21661 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND CASE 2 OF 2023  
SO OKONG'O, J  
NOVEMBER 20, 2023**

**BETWEEN**

**JANET OUKO (SUING AS THE ADMINISTRATOR OF THE ESTATE OF  
TOBIAS OUKO OSIR - DECEASED) ..... PLAINTIFF**

**AND**

**SHEM ROMBO OLWAL ..... 1<sup>ST</sup> DEFENDANT**

**GEORGE OTIENO OLWAL ..... 2<sup>ND</sup> DEFENDANT**

**PHILIP BODO OLWAL ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. Tobias Ouko Osir, deceased (hereinafter referred to only as “the deceased plaintiff”) instituted this suit in the High Court by way of an Originating Summons dated 30<sup>th</sup> December 1998 in High Court Civil Suit No. 1 of 1999(O.S). The deceased plaintiff averred that he was rightfully and lawfully entitled to the entire parcel of land known as Title No. Kisumu/ Nyahera/548(hereinafter referred to only as “the suit property”). The deceased plaintiff averred that although the suit property was registered in the names of the defendants and their late father, the deceased plaintiff had been living and occupying the same for many years. The deceased plaintiff averred that the court should find that he had acquired the title to the suit property by prescription and/or adverse possession and that the defendants who were registered as the proprietors of the suit property held the same in trust for the deceased plaintiff. The deceased plaintiff sought the determination of the following questions;
  1. That suit property be found and declared to have become the property of the deceased plaintiff by adverse possession.
  2. That the defendants be ordered to effect the transfer of the suit property to the deceased plaintiff and the Deputy Registrar of this court to execute the transfer should the defendants fail to do so.



3. That the defendants be ordered to pay to the deceased plaintiff mesne profits and/or general damages at the discretion of the court.
4. That the costs of this suit be provided for.
2. In his affidavit in support of the Originating Summons, the deceased plaintiff stated that he was the son of the late Osir Rombo and his wife Nyang'ute Osir. His father was the proprietor of among others the suit property where his home was situated. That he was born in the said home in or about 1940 and had lived there all his life and still lived on the said piece of land as at the time of coming to court. He was born together with the late Nelson Olwal Osir who was his elder brother and they lived together in the said home of their parents. From time to time he had to leave home and stay away in Mombasa where he was engaged in employment and in his absence his late elder brother Nelson Olwal Osir was in charge of and acted as the caretaker of all their properties and affairs at home. Although he was away from time to time as aforesaid, he used to come back home. While at home, he would till and work on the suit property. He also erected several houses on the suit property from time to time and continued to work and occupy the suit property. His occupation of the suit property had not been interrupted as at the time of filing the suit.
3. The plaintiff stated that he discovered that the suit property was registered in the names of the defendants who were his late brother's sons to his exclusion. The suit property ought to have been registered in his name since according to their customs, he was the last son of the late Osir Rombo who should have inherited the homestead. The process of land demarcation and adjudication took place in his absence and his elder brother should have ensured that the land was demarcated and recorded in his name as he had promised to do. His elder brother had been given his own separate piece of land by their late father. He had brought the suit so that the suit property could be subdivided and a distinct portion thereof which he occupied and where his house stood would be registered in his name and the rest of the land be shared amongst the sons of his brother. That the said sons of his brother were under his care following the death of their father and as such he could not take the whole land from them. He stated that he only wanted the portion of the suit property which rightfully belonged to him. That the clan elders had considered the matter and had determined the manner in which the land could be apportioned.
4. On 2<sup>nd</sup> February 2000, the court directed that the dispute be referred to the District Officer, Winam Division, Kisumu District for arbitration with the assistance of four clan elders. The parties were to choose two elders each. The said District Officer was to file the award in court within 60 days from the date of service of the order. The District Officer and the chosen panel of elders arbitrated on the matter and filed the award in court on 10<sup>th</sup> July 2000. According to the award, the deceased plaintiff was entitled to inherit the disputed land. On 28<sup>th</sup> September 2000, the court entered judgment in terms of the said award.
5. Following the said judgment, the deceased plaintiff caused the suit property to be subdivided into two portions, Title No. East Kisumu/Nyahera/ 2244 measuring 1.49 hectares and Title No. East Kisumu/Nyahera/ 2245 measuring 0.81 hectares. The deceased plaintiff had Title No. East Kisumu/Nyahera/ 2245 transferred to his name while Title No. East Kisumu/Nyahera/ 2244 remained in the names of the defendants and their deceased father.
6. What is before the court for determination is the defendants' Notice of Motion application dated 21<sup>st</sup> June 2022 brought under order 24 rule 1, order 50 rule 6 and order 51 of the *Civil Procedure Rules* 2010 and sections 1A and 3A of the *Civil Procedure Act*. In the application, the defendants sought the following orders:



1. That the court be pleased to grant the defendants an extension of time to substitute the deceased plaintiff, Tobias Ouko Osir with his administrator, Janet Ouko in this matter.
  2. That the court in furtherance to the substitution order in 1 above, be pleased to issue an order compelling the Land Registrar, Kisumu to revoke and cancel the titles of the parcels of land Title No. East Kisumu/Nyahera/2244 and Title No. East Kisumu/Nyahera/2245 issued after the illegal subdivision of parcel of land Title No. Kisumu/Nyahera/548 measuring approximately 1.4ha.
  3. That the court be pleased to issue an order for the cancellation of Title No. East Kisumu/Nyahera/2244 and Title No. East Kisumu/Nyahera/2245 in order for the land to revert to the original Title No. Kisumu/Nyahera/548 for a proper and legal subdivision by all the parties involved.
  4. That the court be pleased to issue an order that a new subdivision be done legally, openly and strictly within the confines of the report filed by District Officer with the deceased plaintiff taking only 0.21ha. out of the 1.4ha. in land parcel Title No. Kisumu/Nyahera/548 which is the homestead of Mzee Osir Rombo and in accordance with the judgment that was delivered on 29<sup>th</sup> September 2000.
  5. That costs of the application be provided for.
7. Prayer 1 of the application was granted on 15<sup>th</sup> May 2023. What remains for consideration are prayers 2 to 4 of the application. The application was brought on the grounds set out on the face thereof and on the supporting affidavit of the 1<sup>st</sup> defendant, Shem Rombo Olwal. The defendants averred that the deceased plaintiff conducted an illegal, fraudulent and malicious subdivision contrary to the court orders made on 28<sup>th</sup> September 2000 and took more than he should have taken by subdividing the suit property into Title No. East Kisumu/ Nyahera/2244 (Plot No. 2244) measuring approximately 1.49ha. and Title No. East Kisumu/Nyahera/2245 (Plot No. 2245) measuring approximately 0.81ha. The defendants averred that the said subdivision was illegal and fraudulent since the deceased plaintiff concealed the whole process of subdivision and did the same silently without any consultations with the defendants.
8. In his affidavit in support of the application the 1<sup>st</sup> defendant stated that the defendants were nephews of the deceased plaintiff while Nelson Olwal (deceased) was their (defendants) late father and Mzee Osir Rombo (deceased) was their grandfather. He stated that the deceased plaintiff had instituted this suit and judgment was made on 28<sup>th</sup> September 2000. He stated that the suit involved the suit property which was registered in the names of his late father Nelson Olwal, his brothers Phillip Bodo Olwal (deceased) and George Otieno Olwal together with him as the legal owners. He stated that the suit property measured approximately 1.4 ha. while the homestead of the late Mzee Osir Rombo measured approximately 0.21ha. He stated that the remaining 1.19ha. belonged to the late Nelson Olwal, who purchased it separately out of his own money. He stated that during land adjudication, the homestead of Mzee Osir Rombo and the late Nelson Olwal's piece of land were registered under the same title as one whole parcel of land known as Title No. Kisumu/Nyahera/548 (the suit property) in his name and his three sons. He stated that this suit was brought on the allegations that the defendants had chased the deceased plaintiff out of the homestead which he believed he had a legal right to inherit as the youngest son of Mzee Osir Rombo.
9. He stated that they felt aggrieved with the court's decision but decided to let things lie as they were for the sake of peace since they all lived on the suit property in which he together with his siblings and children had lived, developed, cultivated and buried loved ones for more than sixty years. He stated



that sometime in 2009, a tussle arose and when they went to the Land Registrar's office to confirm the records for the suit property, they were astonished to find that the title for the suit property had been closed upon the subdivision of the property into 2 portions, Plot No. 2244 and Plot No. 2245 in the year 2001. He stated that the subdivision was carried out without their knowledge and consent although they were the legally registered owners of the suit property and the first title holders of the same. He stated that the deceased plaintiff secretly and fraudulently subdivided the suit property in 2001 and later passed on in the same year. He stated that this illegal subdivision could not have been easily discovered by them. He stated that according to the judgment of the court, the deceased plaintiff had a right to inherit only the homestead measuring approximately 0.21ha. and not the entire suit property.

10. He stated that the deceased plaintiff, through an illegal, fraudulent and malicious subdivision took more than he should have taken. He stated that the subdivision was illegal and fraudulent. He stated that the deceased plaintiff's illegal acts had deprived the defendants of the use of their portion of the suit property that their father had bought adjacent to their grandfather's home and this had caused them extensive inconvenience and mental anguish and they had suffered enormous loss and damages.
11. The application was opposed by Janet Akelo Ouko through a replying affidavit sworn on July 3, 2023. She stated that she was the widow and legal representative of the deceased plaintiff, Tobias Ouko Osir and that she had been substituted as the plaintiff in the matter. She stated that she was issued with a Grant of letters of administration in respect of the estate of the deceased plaintiff and upon confirmation of the said Grant, the estate of the deceased plaintiff was distributed among the beneficiaries. She stated that issuing the orders sought by the defendants would interfere with the deceased's estate. She stated that the orders sought if granted would amount to rectification of the Grant confirmed by the court which remedy was not available to the defendants in this suit. She stated that the only remedy that was available to the defendants was to have appealed the decision of this court which appeal was not lodged by the defendants. She stated that the orders sought were not available to the defendants. She stated further that this court was functus officio and therefore did not have jurisdiction to entertain, hear and determine the application before it by the defendants. She contended that the application before the court had no merit and ought to be dismissed with costs.
12. The application came up for hearing on 10<sup>th</sup> July 2023. The defendants relied on the grounds on the face of the application and the supporting affidavit of the 1<sup>st</sup> defendant. The defendants submitted that the deceased plaintiff was supposed to get a portion of the suit property measuring 0.21 ha. and the rest which according to them measured 1.2 ha. was supposed to remain in the name of the defendants and their deceased father. The defendants reiterated that the subdivision of the suit property was done by the deceased plaintiff secretly without the involvement of the defendants. The defendants urged the court to look at paragraphs 1, 2, and 3 of the judgment of the court. The defendant submitted that the disputed land was the homestead of Mzee Osir Rombo and that the judgment did not refer to the suit property. The defendant submitted that the sketch map that was attached to the judgment shows the disputed land measuring 64 feet by 51 feet. The defendants submitted that they had measured the land and found out that it measured 0.21 ha. The defendants submitted that the plaintiff had claimed only his father's homestead but ended up being given the entire land. The defendants submitted that the deceased beneficiaries' interest could not override the defendants' interest.
13. In reply, the plaintiff relied on her replying affidavit. The plaintiff submitted that the deceased plaintiff's claim was for the disputed land and that the judgment of the court did not limit the plaintiff's entitlement to the homestead of Mzee Osir Rombo. The plaintiff submitted that the defendants' application was an appeal against the judgment of the court and prayed that the application be dismissed with costs.



## **Determination**

13. I have considered the defendants' application together with the affidavit filed in support thereof. I have also considered the replying affidavit by the plaintiff and the submissions by counsels. In addition, I have perused the previous proceedings of the court and the award that was made by the panel of elders under the chairmanship of the District Officer, Winam Division Kisumu which was adopted as the judgment of the court. Having carefully considered the record before me, I find no merit in the defendants' application. There is nothing in the award by the elders to the effect that the deceased plaintiff was to get a portion of the suit property measuring 0.21ha. while the rest of the property measuring 1.2 ha. was to be retained by the defendants. I have also found no sketch map attached to the award of the elders that was adopted by the court as a judgment. The sketch map that the defendants have relied on was attached to the award by Nyahera Chief (Chief North Kisumu Location) which was rejected by the defendants and was set aside by the court on 2<sup>nd</sup> February 2000. It is therefore not correct as claimed by the defendants that the deceased plaintiff was entitled to land measuring 51 feet by 64 feet. That in my view was not even what the said map was all about. In any event, even 51 feet by 64 feet does not come to 0.21 ha. According to the judgment of this court, the deceased plaintiff was entitled to the whole land that was in dispute. The parties knew very well what was in dispute on the ground. That may explain why no measurements were given in the judgment and the advocates for both parties did not find an issue with it. They were both present when the award of the elders was adopted as a judgment of the court.
14. The judgment was executed in 2001 more than 21 years ago by the subdivision of the suit property and registration of portions thereof in the names of the parties. This court cannot be called upon after 20 years to interpret a judgment and vary the manner in which it was executed. I have found no basis for the variation sought. I am of the view that litigation must come to an end.

## **Conclusion**

15. This court finds no merit in the notice of motion dated 21<sup>st</sup> June 2022. Save for the limb of the application that sought the substitution of the deceased plaintiff by his legal representative that was granted on 15<sup>th</sup> May 2023, the application is dismissed. Each party shall bear its own costs.

**DELIVERED AND DATED AT KISUMU ON THIS 20TH DAY OF NOVEMBER 2023**

**S. OKONG'O**

**JUDGE**

**Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:**

**N/A for the plaintiff**

**Ms. Ochieng h/b for Mr. Nyanga for the defendants**

**Ms. J.Omondi-Court Assistant**

