



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISUMU**  
**CIVIL CASE NO.236 OF 2002**

**ISDORA OPIYO YOGO.....PLAINTIFF**

**VERSUS**

**ESTHER A. NGICHO.....DEFENDANT**

**R U L I N G**

1. **Esther A. Ngicho**, the Defendant, filed the Notice of Motion dated 17th February 2014 seeking six prayers, the main one being:

" 2. That the purported execution of the judgment of this court by the plaintiff and the Land Registrar, Homabay, the report dated 25th August 2011 and the cancellation of the Defendant's names as proprietor of land parcel No. **Kagan/Komenya/457** as well as the registration of the plaintiff as the proprietor of the said parcel of land be set aside".

The application is based on the six grounds on its face and the supporting affidavit sworn by the Defendant on the 17th February 2014.

2. The Application is opposed by **Isdora Opiyo Yogo**, the plaintiff, through her replying affidavit sworn on 1st April 2014.

3. The counsel for the plaintiff filed their written submissions dated 16/7/2014. Thereafter the counsel for the parties appeared in court on 26th February 2015 and the matter was placed for a mention to enable counsel for the Defendant file their written submissions, but none was filed. On the 2nd November 2015 Mr Otieno and Omondi Advocates for the Defendant and plaintiff respectively made oral submissions on the application.

4. **SUMMARY OF THE DEFENDANT'S COUNSEL SUBMISSION**

a) That the plaintiff commenced this suit through the originating summons claiming the suit land as an adverse possessor but lost.

b) That this court's judgment upheld the lower court's decision in Magistrate Court case number 71 of 1964 to which was annexed a sketch on the boundary position which should have been followed in positioning the boundary.

c) That contrary to the court's order, the plaintiff and the Land Registrar visited the suit land on 25/08/2011 and placed the boundary, based on a registry index map, instead of the sketch attached to the lower court's judgment alluded to earlier. That the plaintiff and the Land Registrar did not involve the Defendant's counsel and the surveyor in the exercise.

- d) That the report made by the Land Registrar was not in conformity with the court's order and the registration of the suit land in the names of the plaintiff by the Land Registrar was erroneous.
- e) That no decree was drawn before execution contrary to the provision of Order 21 of Civil Procedure Rules.
- f) That the Land Registrar acted on his report before presenting it to the court for adoption and there was therefore mischief in the way the plaintiff was registered with the suit land.
- g) That execution was done before taxation of costs in contravention with Section 94 of the Civil Procedure Act.
- h) That the plaintiff had filed this suit on behalf of the estate of Simon Yogo on the strength of a limited grant and it was illegal to have had the suit land registered in his names instead of the deceased's names. That the plaintiff actions contravened the provision of the Law of Succession Act, Chapter 160 of Laws of Kenya.
- I) That contrary to the Defendant's counsel's submission, their application was not for stay pending appeal and do not therefore need to provide security for costs.
- j) That the Defendant has filed a notice of appeal with the Court of Appeal but that appeal is not a bar to the hearing of their application.

#### **5. SUMMARY OF THE PLAINTIFF'S COUNSEL'S SUBMISSIONS**

- a) That the Defendant has not established that she would suffer substantial loss if stay orders are not granted as required under Order 42(6) 2 of Civil Procedure Rules. The counsel referred the court to the decision in the case of **Ngute -V- Mugundu** [2004] eKLR.
- b) That there was delay in filing this application. The counsel referred the court to a decision on the issue in the case of **Gursharan Singh Bar trading as Kinal Saw Mill - V- Mathew Oseko** (2005) eKLR.
- c) That the Defendant has not offered security for costs as required under Order 42 Rule 6 of Civil Procedure Rules.
- d) That the registration of the suit land in the names of the plaintiff was in accordance with the court's order and to allow the Defendant's application to rectify the register would be going against the court's order.
- e) That this court cannot sit on appeal on its own orders as that should be pursued in the Court of Appeal.
- f) That both parties were invited under a letter to be present when the Land Registrar went to the suit land.
- g) That the Defendant has not availed documentary evidence to confirm her contention that the suit land was transferred to the names of the plaintiff.

6. The court has carefully considered the affidavit evidence, written and oral submissions. The court has also perused the record and come to the following finding:

- (a) That copies of the Originating Summons, both original and the amended versions, clearly show that the plaintiff claim over land parcel **Kagan/Komenya/457** was based on adverse possession. The plaintiff averred in the first paragraph as follows:

**"Let Esther A. Ngicho of P.O. Box ..... within 15 days after service of this application upon her, enter appearance to this summons which is issued on the application of Isdora Opiyo Yogo, who claims to have acquired title to a portion measuring 4.9 hectares of parcel No.Kagan/Komenya/457 by adverse possession having occupied and used the same since 1938....."**

b) That the court heard the case and rendered its judgment on the 14th July 2011 issuing the following orders:

**" 1. The doctrine of adverse possession is not applicable.**

**2. I herein declare that the land allocated to Esther Ngicho's husband, Ngicho Okwany and Isdora Yogo's husband, Simon Yogo, are as outlined and demarcated by District Magistrate's court case No.71 of 1964.**

**3. I direct the relevant Land's office to rectify the registers of L.R No.457 and 458 in line with the decision of the District Magistrate Case No.71 of 1964.**

**4. Costs to the Applicant."**

c) That the Land Registrar Homabay wrote to both parties to be present when he visited the two suit properties on the 25th August, 2011 and thereafter prepared a report which he forwarded to the court under letter dated 9th September 2011. The report under the heading **"INTRODUCTION"** states as follows:

**" This is a report upon implementation of a court order over land parcel No. Kagan/Komenya/457 vide decision of District Magistrate case No.71 of 1964.**

**The land parcel Kagan/Komenya/457 was registered in the name of Esther A. Ngicho alongside Parcel No.458. The two parcels are found on Sheet 1 of Komenya Adjudication Section".**

The report under the heading of **"WAY FORWARD"** further stated as follows:

**" The verdict of case No.71 of 1964 clearly defined each party's land. The outlined by the District Magistrates Court depicted by the ground position, that the Ngicho family occupy parcel No.458 whereas the Yogo family lives on parcel No.457. Therefore the registers are rectified under Section 143 of Cap 300 of Laws of Kenya in line with the decision of the District Magistrates case No.71 of 1964. All the copy of Green card attached."**

The Land Registrar report clearly shows that he had effected the rectifications as directed by the court. The plaintiff subsequently filed the Notice of Motion dated 15th November 2011 Seeking to have the Land Registrar's report adopted among other prayers. The Defendant filed a replying affidavit sworn on 22nd March 2013 in which she appears to take issue with the position the Land Registrar had placed the boundary. The court heard the counsel for the parties on 22nd March 2012 and delivered the ruling on 27th July 2012. The following portion of the ruling is important in this matter;

**" The orders sort are incapable of being granted. There is no report to be adopted. In my view the Land Registrar acted on the judgment of this court. The parties are consequently directed to comply with the judgment and to advise their family members to do likewise failure to which any of the 2 parties may move the court for contempt proceedings."**

d)That flowing from the finding in (c) above the position taken by the Defendant's counsel that the Plaintiff and the Land Registrar erred in acting on the report without having it adopted by the court is unsustainable. The court pronounced itself on the issue of whether or not the Land Registrar's

report needed to be adopted before implementation in its ruling of 27th July 2012. The court's judgment had not required the adoption of the report to be made by the Land Registrar before the implementation, but had directed the execution of the District Magistrate Court Order in case No.71 of 1964. This court cannot therefore sit on appeal of its order of 27th July 2012. The forum for challenging that order is the Court of Appeal. It is important to note that there is no application before this court to review the said orders.

e) That the court did not find any deviation from its orders on the Land Registrar's report, and had the report failed to conform to the court Order, the counsel for the parties would have raised the matter with the court during the hearing of the application dated 15th November 2011; and the court would have pronounced itself on such an issue in its ruling of 27th July 2012.

f) That the originating summons filed by the plaintiff do not indicate that he was filing the suit on behalf of the estate of Simon Yogo. He was claiming the land for himself under adverse possession doctrine but lost. The court then directed the implementation of the

Orders issued in District Magistrate Court case No.71 of 1964, and was satisfied with the execution or compliance as seen in the ruling of 27th July 2012.

7. That having found as above, the court finds that the Defendant's application dated 17th February 2014 is without merit and is hereby dismissed with costs.

It is so ordered.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**Dated and delivered at KISUMU this 17TH Day of February 2016.**

IN PRESENCE OF;

PLAINTIFF      Absent

DEFENDANT    Absent

COUNSEL      **Mr Omondi T. for plaintiff/Respondent**

**Mr Otieno for Defendant/Applicant**

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**17/2/2016**

17/2/2016

S.M. Kibunja J

Oyugi Court Assistant

Parties absent

Mr Otieno D for Defendant/Applicant

Mr Omondi T. for plaintiff/Respondent

Court: Ruling delivered in open court in presence of Mr Omondi T. for Plaintiff/Respondent and Mr Otieno D. for Defendant/Respondent.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**17/2/2016**

Mr Otieno: I have instructions to appeal for the ruling and pray for leave.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**17/2/2016**

Mr Omomdi T. : No objection

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**17/2/2016**

Court: Leave to appeal granted.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**17/2/2016**