



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**CASE NO. 42 OF 2012**

NYANGAU ONKWARE ..... 1<sup>ST</sup> PLAINTIFF

NYANGECHI ONKWARE ..... 2<sup>ND</sup> PLAINTIFF

**VERSUS**

BOUNDI ONGERI ..... 1<sup>ST</sup> DEFENDANT

OMBUI ONGERI ..... 2<sup>ND</sup> DEFENDANT

OMBUI OMWEGA ONGERI ..... 3<sup>RD</sup> DEFENDANT

**JUDGMENT**

1. The plaintiffs father and defendants father were brothers. Both are now deceased. The plaintiffs by a plaint dated 21<sup>st</sup> December 2012 and filed in court on 31<sup>st</sup> December 2012 state that their deceased father, **Onkware Omosa** was the registered proprietor of land parcel **Majoge/Kanyimbo/ 1021**. The 1<sup>st</sup> and 2<sup>nd</sup> defendants' father was the registered owner of parcel **Majoge/ Kanyimbo/1022**. The plaintiffs claim that parcels **1021** and **1022** were supposed to be of equal size but aver that during re-survey, the defendants allegedly colluded with the surveyor such that a portion of 3 acres out of parcel **1021** was included in parcel **1022** which the defendants have since illegally subdivided without following due process and created land parcels **Majoge/Kanyimbo/1849, 1850** and **1851** which have been registered in the defendants names respectively.
2. The plaintiffs by a plaint dated 21<sup>st</sup> December 2012 and filed in court on 31<sup>st</sup> December 2012 seek judgment against the defendants for:-
  - a. **Declaration that the registration of land parcels Majoge/Kanyimbo/1849, 1850 and 1851 in the defendants names was fraudulently obtained;**
  - b. **An order of rectification of the register by deleting entries of land parcels Majoge/Kanyimbo/1849, 1850 and 1851 and return the titles to its original state and carve out 3 acres from it and rejoin to land parcel No. Majoge/Kanyimbo/1021.**
  - c. **That an order of permanent prohibitory injunction to restrain the defendants from entering into cultivating or in any other way dealing with the land measuring about 3 acres of the plaintiffs.**
  - d. **Costs of the suit.**

The defendants filed a statement of defence dated 11<sup>th</sup> January 2013 on the same date basically denying the allegations contained in the plaint. By the defence, the defendants stated there was a

pending case before Senior Principal Magistrate Ogembo being Civil Case No. 1 of 2012 and on that account pleaded that this court lacked the jurisdiction to deal with the matter. The defendants did not attach any pleadings in the case.

3. Pretrial directions were given in the suit on 19<sup>th</sup> September 2013 when the court directed that the defendants file their bundle of documents and witness statements within 30 days and granted liberty to the plaintiff to fix the suit for hearing after the expiry of the said period. The record shows that the plaintiffs' advocates fixed the suit for hearing on 26<sup>th</sup> March 2014 in the absence of defendants' advocates. The suit was on the said date listed for hearing before Hon. Justice Okong'o who after satisfying himself a hearing notice of the suit had been duly served on the defendants counsel allowed the suit to proceed for hearing ex parte.
4. The 1<sup>st</sup> plaintiff testified as PW1 and he stated that he and the 2<sup>nd</sup> plaintiff are brothers and that their father Onkware Omosa died on 15<sup>th</sup> March 1980. The 1<sup>st</sup> plaintiff had obtained a limited grant of administration Ad Litem for his late father's estate dated 19<sup>th</sup> April 2012 (PEx. 2). He stated that the 1<sup>st</sup> and 2<sup>nd</sup> defendants are brothers while the 3<sup>rd</sup> defendant is a nephew of the 1<sup>st</sup> and 2<sup>nd</sup> defendants by reason of being a son of their brother Ongeru Omosa. PW1 stated that their father and the 1<sup>st</sup> and 2<sup>nd</sup> defendants father, one Ongeru Omosa were brothers. He further stated that their father (plaintiffs) and the 1<sup>st</sup> and 2<sup>nd</sup> defendants' father owned land parcels **Majoge/Kanyimbo/1021** and **Majoge/Kanyimbo/1022** respectively. Both the plaintiffs' father and the 1<sup>st</sup> and 2<sup>nd</sup> defendants' father are deceased. PW1 further stated that before their deaths, their fathers had settled in their respective parcels of land and there was a distinct boundary fence delineating land parcel **1021** and **1022**. The plaintiffs state they had planted blue gum trees and tea bushes on the portion of 3 acres that the defendants have now encroached upon which form part of parcel 1021. The plaintiffs stated that the defendants are now picking the plaintiffs tea bushes on the portion of 3 acres without the plaintiffs consent. The plaintiffs state that neither they nor the defendants have filed succession in respect of their deceased father's estates to enable any distribution to be effected to the beneficiaries.
5. The 1<sup>st</sup> plaintiff testified that as the defendants wanted to evict them from the portion of 3 acres forming part of their father's land parcel **Majoge/ Kanyimbo/1021** they filed a land dispute at the Land Disputes Tribunal at Ogembo being Tribunal Case No. 13 and the dispute was heard and the tribunal found and held that the defendants had trespassed onto the plaintiffs father's land to the extent of 3 acres. The tribunal proceedings were produced in evidence as PEx. 3. The award of the tribunal was adopted as a judgment and a decree issued by the Ogembo Principal Magistrates court in Misc. Application No. 30 of 2010. Court decree was produced as PEx. 4.
6. The 1<sup>st</sup> plaintiff testified that although the defendants have not taken out any letters of administration to their late father's land they somehow managed to have parcel **No. 1022** subdivided into parcel numbers **1849, 1850** and **1851** and title issued to the three (3) defendants respectively. Search certificates for the parcels of land issued on 25<sup>th</sup> November 2011 were produced and marked PEx. 5 (a), (b) and (c) as well as a copy of the mutation in respect of parcel number **Majoge/Kanyimbo/1022** which gave rise to the 3 parcels dated 24<sup>th</sup> May 2010 was produced as PExh. 6. The mutation shows land parcel number **1022** to have been 2.8Hectares. The plaintiffs state their father's parcel **1021** and the defendants' father's parcel **1022** were supposed to be equal as they were brothers but the plaintiffs state parcel **1021** is as per the copy of certificate of search dated 20<sup>th</sup> September 2010 marked as PEx. 8 shown to be only 1.6Hectares. The plaintiffs state their father's parcel 1021 ought to have been 2.2hectares and the defendants' parcel **1022** also 2.2hectares.
7. The 1<sup>st</sup> plaintiff therefore contends the defendants titles were irregularly obtained and seeks their nullification. The 2<sup>nd</sup> plaintiff in his evidence adopted the evidence given by the 1<sup>st</sup> plaintiff. The plaintiffs' counsel after the close of the plaintiffs case filed written submissions dated 30<sup>th</sup> October 2014.
8. I have reviewed the evidence adduced by the plaintiffs and I have also considered and reviewed the submissions filed by the counsel for the plaintiff. I have further considered the statement of agreed issues by the plaintiff dated 21<sup>st</sup> May 2013 and filed in court on 30<sup>th</sup> May 2013. The issues

in my view that arise for determination can be summarized as follows:-

- i. **Whether the plaintiffs' deceased father was the registered owner of land parcel Majoge/Kanyimbo/2021 and the 1<sup>st</sup> and 2<sup>nd</sup> defendants' deceased father the owner of land parcel Majoge/Kanyimbo/1022.**
- ii. **Whether the defendants unlawfully and fraudulently colluded with the surveyor to cause a portion of 3 acres to be hived out of land parcels 1021 and included to form part of parcel 1022.**
- iii. **Whether the defendants fraudulently caused the subdivision of land parcel 1022 to create land parcels Majoge/Kanyimbo/1849, 1850 and 1851.**
- iv. **Whether land parcels Majoge/Kanyimbo/1021 and 1022 were equal and/or supposed to have been equal.**
- v. **Whether the plaintiffs are entitled to the reliefs sought.**

#### 9. Issue No. (i)

On the basis of the evidence adduced by the plaintiff which has not been controverted there is credible evidence that the plaintiffs deceased father, Onkware Omosa and the 1<sup>st</sup> and 2<sup>nd</sup> defendants, deceased father, Onger Omosa were brothers. I have perused the copy of the land tribunal proceedings tendered in evidence as PEx. 3 and note that the 3 defendants did actually participate and gave evidence before the tribunal on 28<sup>th</sup> September 2010 but were absent on 9<sup>th</sup> November 2010 when the tribunal panel visited the *locus in quo* the subject of the dispute. From the record of the proceedings it is clear that the two brothers owned land that was adjacent to each other the two parcels of land having been subdivided from one parcel. The plaintiffs' father's parcels of land as per the certificate of search PEx. 8 was land parcel **Majoge/Kanyimbo/1021** which was registered in the name of Okware Omosa on 16<sup>th</sup> March 1970. The adjacent parcel **Majoge/Kanyimbo/1022** no doubt must have been the parcel registered in the 1<sup>st</sup> and 2<sup>nd</sup> defendants' father's name. The survey map of the area sheet No. 17 produced as PEx. 7 shows parcel numbers **1021** and **1022** to be adjacent to each other. I therefore will answer issue No. (i) in the affirmative.

#### 10. Issue No. (ii);

As relates to issue No. (ii) the plaintiffs have tendered a copy of the mutation dated 24<sup>th</sup> May 2010 produced as PEx. '6' which shows land parcel **Majoge/Kanyimbo/1022** was being subdivided into 3 portions to yield parcel Nos. 1849, 1850 and 1851. The 3 defendants signed the mutation form as the proprietors. There is no indication that any grant of letters of administration had been taken out in favour of the defendants or that the said land had been transferred to them jointly. The defendants in their evidence before the land disputes tribunal affirm that their parents had subdivided their land into 2 parcels and that the defendants and the plaintiffs had respected the boundaries placed by their parents up to February 2010 when after obtaining the number of their father's (defendants) plot number and map they caused a survey to be done which connotes the land parcel 1022 was up to 2010 in the defendants' father's name. After the survey the defendants blocked the plaintiffs' access to the portion where they had tea bushes and had planted blue gum trees after realizing they were on their (defendants) portion of land. The defendants after the survey damaged the original boundary put by their parents and put a new boundary. The evidence by the plaintiffs establishes that after their parents partitioned their land into 2 parcels, the plaintiffs occupied the portion of their father and the plaintiffs tea and blue gum trees planted between (1982-84) as per the evidence before the Land Disputes Tribunal was within the portion of 3 acres which the defendants have now appropriated.

11. The defendants were aware that their parents had subdivided and/or partitioned their ancestral land and had placed boundary features which were evident on the ground and the parties had respected those boundaries for over 30 years considering the plaintiffs father died in 1980. It was fraudulent on the part of the defendants to seek to alter those boundaries without the involvement

of the plaintiffs. In my view even if the existing registry index map (RIM) produced by the plaintiffs as PEx. 7 showed that the plaintiffs father's land did not extend to the Egetuki market road, the evidence was clear that when the plaintiffs deceased father and the 1<sup>st</sup> and 2<sup>nd</sup> deceased father subdivided their land each of their parcels indeed reached the Egetuki market road and the boundaries they put was clear in regard to this fact. The plaintiffs' tea bushes and the blue gum trees were planted in conformity with the subdivision effected by their parents. The evidence adduced by the parties and the witnesses during the hearing before the land disputes tribunal was clear that the two brothers (the plaintiffs father and the 1<sup>st</sup> and 2<sup>nd</sup> defendants father) had subdivided their land so that each fronted the Egetuki Market road. In the premises I am satisfied that to the extent that the defendants procured survey which resulted in change of long established boundaries, the act was fraudulent. In my view what ought to have been done was a resurvey with a view of amendment of the RIM to conform with the situation on the ground which would have led to the registrar making appropriate amendments in the register in case the areas of the parcels of land were affected. The survey by the defendants had the effect of appropriating a portion of the plaintiffs' parcel of land and I therefore answer issue No. (ii) in the affirmative.

**12. Issue No. (iii);**

Having answered issues (i) and (ii) in the affirmative it follows that I have to answer issue No. (iii) in the positive. Although it is unclear whether or not the defendants had taken out letters of administration to enable them to distribute the estate of Ongeru Omosa (deceased) it is evident that in undertaking the subdivision they appropriated land belonging to the plaintiffs. The plaintiffs testified the defendants never filed any succession cause and therefore never had any capacity to cause the subdivision and distribution of the late Ongeru Omosa's estate. Though pleaded in the plaint, the defendants did not in their defence dispute the fact. The defendants defence filed on 11<sup>th</sup> January 2013 did not comply with Order 7 Rule 5 which requires that written statements signed by witnesses and copies of documents to be relied on at the trial do accompany the defence. The plaintiffs' averments therefore remain unrebutted and the court is inclined to accept the plaintiffs' evidence that the defendants had not filed any succession case to entitle them to distribute their late father's estate. The court in the premises holds and finds that the defendants' subdivision of land parcel 1022 to create land parcels 1849, 1850 and 1851 was fraudulent.

**13. Issue No. (iv);**

The plaintiffs' father and the 1<sup>st</sup> and 2<sup>nd</sup> defendants' father subdivided their parcel of land to create the two parcels 1021 and 1022. Each of them occupied their respective parcels and established their physical boundaries. From the evidence tendered it would appear it may have been their intention to create equal parcels. Indeed going by the boundaries they established and which were respected until 2010 when the defendants caused the resurvey to be done it does appear the parcels were of equal size since a portion of about 3 acres which hitherto was on the plaintiffs side was appropriated and is now included in the resultant parcels 1849, 1850 and 1851 from parcel **1022** following the subdivision. While the certificate of search produced as PEx. 8 shows parcel number **Majoge/Kanyimbo/1021** was approximately 1.6 hectares, this appears not to have been the case on the ground as the plaintiffs were occupying a much bigger portion as per the subdivision effected by their father and the 1<sup>st</sup> and 2<sup>nd</sup> defendants father. In my view the boundaries that were established by the original owners ought to have been respected and given effect to. There would be no basis to interfere with the boundary that the parties had honoured for over 40 years having regard to the fact that the plaintiffs' father was registered owner of **1021** in 1970.

14. After reviewing all the evidence tendered by the plaintiffs, I am satisfied the plaintiffs have proved their case on a balance of probabilities and I accordingly enter judgment in their favour against the defendants jointly and severally and make the following orders:-

- i. **The subdivision of land parcel Majoge/Kanyimbo/1022 to create land parcels Majoge/Kanyimbo/1849, 1850 and 1851 is hereby declared null and void.**
- ii. **The land registrar Kisii County is hereby directed and ordered to cancel the registration of**

- land parcels Majoge/Kanyimbo/1849, 1850 and 1851 and to restore the original title Majoge/Kanyimbo/1022.
- iii. That a resurvey of land parcels Majoge/Kanyimbo/1021 and 1022 be carried out on the basis of the old established boundaries of the two parcels with a view of amending the RIM and register to correspond with what is physically on the ground.
  - iv. The land registrar to comply with (ii) and (iii) above within 120 days of being served with a certified copy of this judgment.
  - v. The costs of the suit to be borne by the defendants.

**Judgment dated, signed and delivered at Kisii this 20<sup>th</sup> day of May, 2016.**

**J. M MUTUNGI**

**JUDGE**

**In the presence of:**

..... for the 1<sup>st</sup> and 2<sup>nd</sup> plaintiff

..... for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants

**J. M. MUTUNGI**

**JUDGE**