



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAMIRA

ELC NO. 56 OF 2021 (O.S)

{Formerly at Environment and Land Court at Kisii Case No. 22 of 2018 (O.S)}

IN THE MATTER OF LAND PARCEL NO. ISOGE SETTLEMENT SCHEME.312

AND

IN THE MATTER OF AN APPLICATION FOR THE DETERMINATION OF THE

RIGHTS OR INTEREST OF HEIRS OR CESTUI QUE TRUST

ELIZABETH MONYENCHE OMBARA

(Suing as the legal Administrator to the estate of YABESH KEREKI AKUMA.....APPLICANT

=VRS=

DICKSON OMARI RAYORI (Sued as legal administrator of the estate of

MILKA BOCHERE RAYORI (Deceased).....DEFENDANT

RULING:

This matter was commenced by way of an originating summons dated 3/9/2018 for the following Orders:

- (a) THAT this Honourable court be pleased to declare that the Applicant is entitled to a portion of land comprised in LR. No. ISOGE SETTLEMENT SCHEME/312 be registered in the name of the Respondent being the parcel of land that was rightly entitled to her husband (deceased).**
- (b) THAT an order do issue directing that upon the finding and declaration that Applicant is entitled to a portion of the aforesaid parcels of land that the tiles be cancelled and a new title be issued to the Applicant to the extent of her entitlement.**
- (c) THAT a permanent injunction to issue restraining the Respondent either by herself, agents, servants, assignees, representatives or nominees from sub-dividing, transferring, selling, and or doing any act which is prejudicial to the Applicant interest in the aforesaid parcels of land any resultant parcels thereof upon the successive sub-division and transfers till the Applicant's right or interest is ascertained.**
- (d) THAT this Honourable Court be pleased to declare that the parcel of land LR. NO. ISOGE SETTLEMENT SCHEME/312 is so registered in trust for the Applicant.**
- (e) That costs of this Application be provided for.**

She did so on behalf of her late husband, Yabesh Kireki Akuma on the following grounds: -

- 1. The Respondent is the mother of her late husband (the mother in-law) who is the registered owner of ISOGE SETTLEMENT SCHEME/312 and who holds the suit land in trust for both the Applicant and her later husband.**
- 2. Her husband died on 10/8/2017 and she obtained the letters of administration *ad litem* in respect to his Estate on 27/6/2018**

from the Principal Magistrate at Keroka.

The Applicant depones that upon the demise of her late husband, she was chased away from the matrimonial home and her mother-in-law has been very hostile to her and she can therefore not be able to access her matrimonial home which is situated on the suit land including all the investments she has made thereon including a permanent house, tea bushes which had been generating income of Kshs. 50,000/= per month before she was chased away, 5 rental houses with a rental income of Kshs. 1,000/= each per month and a quarter acre of blue gum trees, which would fetch Kshs. 25,000/=, a hotel thereon that realizes an income of Kshs. 2,500/= per month, livestock, 3 cows, a calf and 3 goats whose current price would be Kshs. 80,000/=. She further deposes that she is childless. The Applicant further claims that the Respondent demolished her (the Applicant's) house thereon and was consequently chased away and in **Keroka Criminal Case No. 47 of 2018 – Republic Vrs Olpha Nyabeta Akuma** which is still pending in court to protect her interest in the suit premises.

In the Affidavit in reply to the Originating Summons sworn on 28/9/2018, the Respondent says that she solely bought the suit land which was fraudulently transferred in the name of the latter's husband, one Robinson Akuma Sawe which was later re-transferred to her. On the suit land there is the Respondent's residence and her sons who have erected their respective houses and the remaining part is used for farming. She further avers that the late Yabesh Kireki Akuma died without having been married and that the Applicant herein is a stranger.

The Respondent therefore urges this Honourable Court to dismiss with costs the Applicant's suit.

On 1/7/2017, the Applicant was granted leave to amend her Originating Summons, the Respondent also being accorded leave to file a further Affidavit if need be. The same was complied with and on 26/9/2019 the matter was fixed for hearing on 3/2/2020. On 3/2/20, both parties were ready to proceed but the court could not accommodate them due to the work load. The matter was consequently fixed for hearing on 27/4/2020. It never proceeded. On 22/5/2020, the matter was fixed for mention for Directions on 26/6/2020 when M/s Gogi for the Applicant requested for a hearing date which was given to be on 10/12/2020. On 10/12/2020 both parties were equally ready to proceed but the court had 2 part heard hearings and the case could not proceed.

On 8/7/2021, the trial Judge was away on official duties. A new hearing date was set on 7/2/2022 when M/s Gogi for the Applicant had her brief held by Mr. Ondari who said that she was unable to get in touch with her client, the Applicant. Mr. Ndege for the Respondent had 3 witnesses in court. The court reluctantly adjourned the matter and ordered the Applicant to pay the day's court adjournment fees of Kshs. 10,000/= to the Respondent both to be paid before the next hearing date which is today. When the matter was called out this morning only Mr. Ndege for the Respondent was in court. Neither the Applicant nor her Advocate was in court. Mr. Ndege urged this court to dismiss the suit for non-attendance.

The court takes cognizance of the fact that although the matter is a bit old having been filed in 2015, both parties, including the Applicant, have all along been very anxious to prosecute the suit. They have always turned up in court with their witness only that the court's hands were so full to accommodate them. M/s Gogi was not in court on 7/2/2022 and she sent Mr. Ondari to inform the court that she was unable to reach her client who was not picking her Advocate's calls. She requested that she be given time to look for her client. What is not clear is whether M/s Gogi was able to reach her client and whether Mr. Ondari did communicate today's hearing or the directions made in court to M/s Gogi. Having sent someone to hold her brief, M/s Gogi is expected to be aware of today's date. It is also unclear whether the Applicant was aware that the case was coming up on 7/2/2022 and/or today. But the argument above also applies herein. Information communicated to the party's Advocate is expected to reach the client immediately. But having always attended court in the past without fail and the Applicant's Advocate M/s Gogi having not attended court today to explain whether she has not been able to reach the client the court is reluctant to dismiss this suit for non-attendance. I would exercise my discretion and give the Applicant the benefit of doubt. It would be unfair to conclude that the Applicant's failure to attend court is deliberate. However, this court cannot wait indefinitely until such time as the Applicant will re-surface to prosecute her case. I will therefore order that M/s Gogi for the Applicant do appear in court on 15/3/2020 to explain what efforts she has made to contact her client. The Applicant is also ordered to appear in court on that date to indicate whether she is still desirous of proceeding with the hearing of this suit. Mr. Ndege to serve both the Applicant (by way of registered post through her last known address indicated in the Affidavits she has sworn in court) and to the Applicant's Advocates in the ordinary way.

That is the order of the order of the court.

Ruling dated, signed and delivered at Nyamira this 28th Day of February, 2022.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Sibota

Plaintiff: N/A

Defendant: Mr. Ndege