



**Orori v Nyakambi (Environment & Land Case 63 of 2021)
[2022] KEELC 45 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEELC 45 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT & LAND CASE 63 OF 2021
JM KAMAU, J
APRIL 28, 2022
FORMERLY KISII ELC CASE NO. 100 OF 2014**

BETWEEN

ALFRED NYABUTI ORORI PLAINTIFF

AND

ALEX NYAMWARO NYAKAMBI DEFENDANT

(Formerly Kisii ELC Case No. 100 of 2014)

JUDGMENT

1. The Plaintiff brings this suit on behalf of and as the Administrator of the Estate of his late father, Jeremiah Orori Nyamwaro who died on 24/1/2013. The Defendant is the nephew of the late Jeremiah Orori and son of Nyakambi Nyamwaro. The parties' fathers were brothers. The Plaintiff's claim is that in 1967 the 2 late brothers bought one share in Kerumbe Farm measuring 414 Acres which was registered as L.R. No. 940/2. In 2013, the 1 share was allotted 32.61 Hectares. According to the Plaintiff, the Defendant then gave to the late Jeremiah Orori Nyamwaro's family 10 Acres. By this time the Plaintiff's family had already taken possession of ½ of 32.61 since, as he claimed, they owned the 1 share in equal shares. He therefore seeks a Declaration that the 32.61 Hectares in Land Parcel Number L.R. 940/2 should be registered in the names of the Defendant's father, Nyakambi Nyamwaro and Jeremiah Orori Nyamwaro's family in equal shares and that the Estate of the late Jeremiah Orori Nyamwaro is entitled to 16.3 Hectares thereof as demarcated on the ground which the court should order transferred to the latter's Estate. On his part, the Defendant in his amended Defence and Counter claim admits that his late father Nyakambi Nyamwaro was brother to the Plaintiff's late father, Jeremiah Orori Nyamwaro. He averred that his late father bought the 1 share in Kerumbe Farm without the participation of the Plaintiff's late father and only allowed Jeremiah Orori Nyamwaro to stay on the suit land in order to take care of it and that he was only a licensee.



2. He further avers that he has not yet been registered as owner of L.R. No. 940/2 or portion thereof and that this suit is therefore anticipatory. It is part of Title No. Kerumbe Farm Number 940/19 that was sold to the Defendant's father and others. In the Counter-claim, the Defendant avers that it was the intention of his late father to bequeath to the Plaintiff's father 7 Acres as a gift but after the latter's demise the Defendant's mother gave to the Plaintiff's father 10 Acres as a gift and also in order to satisfy the wishes of her late husband and due to the Plaintiff's insatiable greed, the Defendant urges the court to evict the Plaintiff from the suit land and also permanently restrain him and his family from trespassing on the parcel of land L.R. Kerumbe Farm Number 940/2.
3. The Plaintiff took to the witness box and adopted his statement dated 19/1/2014 as his evidence in chief by repeating the averments in the Plaintiff. He stated that his late father and his family has been living on the suit land since 1995 i.e. half of the 82 Acres which was all registered in the name of his paternal uncle, Nyakambi Nyamwaro. His father made various developments thereon i.e. 2 Acres of Blue gum trees, planted tea on 12 Acres, coffee on 2 Acres, used 3 Acres thereof as grazing land, 10 Acres of food crop and 2 Acres of homestead and that there is a clear demarcation between the parcels belonging to the 2 late brothers on the ground. The Plaintiff exhibited photographs as proof of all the above. He concluded his evidence in chief by testifying that although his late father has occupied half of the land known as Kerumbe Farm since 1967, his late brother and father to the Defendant never complained during his lifetime which came to an end in 2008 and that the Defendant started demanding that the Plaintiff and his family quit in 2013 through a Demand letter dated 23/9/2013. On cross-examination, the Plaintiff said that his father's name is not shown on the owners' list in the Title Deed and that the 2 brothers had several joint ventures from which business they bought this 1 share and that his father was not a caretaker of the 5.7 Acres and eventually 10 Acres he had been given by his late brother. His late father occupied the one side of the land and the 2 portions were demarcated by a footpath which was later fenced but has now been interfered with by the Defendant. The Plaintiff also said that he moved to the suit land at the age of 74 and that all his siblings were born on the suit land. All the developments thereon were made before this suit was filed. On re-examination the Plaintiff said that in the Defendant's father's certificate of confirmation, their (Plaintiff's) family was not provided for.
4. To prove his case the Plaintiff produced the following documents: -
 1. Limited grant of letters of administration issued to Alfred Nyabuti Orori.
 2. Certificate of death of Jeremiah Orori Nyamwaro.
 3. Demand letter from C.O. Nyamwange & Co. Advocates to the Plaintiff.
 4. Photocopy of certificate of confirmation of grant of the estate of Nyakambi Nyamwaro.
 5. Deed plan for land Reference Number L.R. Kerumbe Farm 940/2.
 6. Photocopy showing part of the common boundary between the parties and the developments on the said land.
 7. Photographs showing Plaintiff's family's homestead.
 8. Photograph showing further developments made by the Plaintiff's family comprising of tea and trees.
 9. Photograph showing some further developments made by the Plaintiff's family comprising of tea, maize crop and trees.



5. The Defendant testified that he lives on the suit land. He moved on the suit land on instructions from his late father where he found his cousin, the Plaintiff herein. He claims that the Plaintiff was a care taker.
6. His late father allowed the Plaintiff's father to put up a house and also cultivate on 5 Acres. After his father's death in 2007, the Defendant's mother told the Plaintiff's father that the family had decided to give him 10 Acres instead of the 7 Acres her husband had given him but that the latter protested and demanded 25 to 30 Acres. He said that before this case was filed, the Plaintiff had planted a small portion of tea leaves, less than an Acre but after filing the case, he increased the acreage of the tea bushes to 6 and also put up a permanent house.

To back up his case the Defendant produced the following documents: -

1. Letter for purchase of Land Parcel No. 940/2.
 2. Registration of Land Parcel Number 940/2.
 3. Letter dated 29/05/1989.
 4. Certificate of title dated 3rd August, 1972.
 5. Certificate of registration of business christened as Motwabe Trading Company.
 6. Letter dated 11th March, 1970.
 7. Letter of consent dated 20/02/1980 from L.C.B.
 8. Savings Bank Book of father of Defendant.
 9. Letter from Kerumbe Farm.
 10. Verdict dated 27/12/2013 from D.O. Kiangeni Division.
 11. Minutes of Meeting held on 27/07/1997 over sharing of family shops.
 12. The shops pleadings herein.
 13. Google map.
 14. Proceedings between Jeremiah Orori vs Teresiah Nyakundi before area Chief and Assistant Chief held in 2009.
7. On cross-examination the Defendant said he was born in 1957 and that the property was acquired in 1967. He said that he went to the suit land in 1995 but he was not accommodated by the Plaintiff's father. His father's Estate owns 32.61 Hectares, about 84 Acres. He admitted that the Plaintiff's father, Jeremiah Orori Nyamwaro and his daughter were both buried on the suit land although this is not their ancestral land the latter being elsewhere. On re-examination the Defendant said that since he settled on the suit land, his late father has never been there, the land is not demarcated and that the family had long decided to give the Plaintiff and his father's family 10 Acres. This was agreed before the death of the Defendant's mother which took place in 2013.
 8. The Defendant's witness, Gekara Ogeto adopted his recorded statement dated 21/1/2022 as his evidence. He claimed that he was given L.R. No. Kerumbe Farm 940/17 by a white man because he emerged the best agriculturalist in the Agriculture show when he was young. He could not remember the name of the white man. Because he did not have enough money to buy the land, he invited the Defendant's father who was his cousin to fund him and buy the land. He gave the Defendant's father



Kshs. 5,000/= to pay and he also paid Kshs. 5,000/=. He also invited other people to each pay Kshs. 5,000/=. These were Tinega, Joseph Nyanyuki and Stephen Mogeni but the Plaintiffs' father was not one of them.

9. On cross-examination, Mr. Ogeto said he was the only surviving partner and that the land was bought in 1967. He said he did not understand how the Plaintiff's father came to the land and what arrangement he had with his brother, the Defendant's father. But he admitted that the Plaintiff's father had planted trees but he never planted coffee in the suit land. However, he could not tell where the Plaintiff's father was buried. He concluded by saying that the entire land has never been demarcated and sub-divided among the 5 owners but he knows that the Plaintiff has peacefully lived on part of the land with his wife.
10. The Defendant has produced a letter of purchase to show that his late father Nyakambi Nyamwaro bought land parcel No. 940/2 at Ngoina being grant No. L.R. 950, Registration No. 940/2 and Deed Plan No. 84156 at Kshs. 50/= per Acre, Kshs. 3,500/= for house, Kshs. 3,550 survey fees, Kshs. 555 stamp duty, registration fee of Kshs. 50/= and Kshs. 560/= as Advocate's fees.
11. The land was bought from Brook Bond Equatorial Ltd. The letter goes on to show the persons who jointly bought the land as Stephen Onyango Mogeni, Gekara Ogeto, Joseph Nyanyuki Tirisa, Nyakundi Nyamwaro and Samuel Gekara. The certificate of Title dated 03/08/1972 shows the joint lessees as Stephen Ogenyo Mogeni, Gekara Ogeto, Joseph Nyanyuki, Nyakambi Nyamwaro and Harrison Tinega. The letter of Grant to transfer dated 20/02/1980 still shows the same 5 people as transferees. The same letter clearly states that the land in question is Kerumbe Farm L.R. 940/2. All the above documents are unanimous as to who the purchasers of the suit land were. Further, the purchase documents contain the names of the parties, the description of the property, the purchase price and the conditions thereto. A look at the said sale agreement confirms that the same is a valid agreement which is enforceable by the parties.
12. On the other hand, the documents showing joint businesses between the Plaintiff's father and the Defendant's father do not indicate that any of the profits from these businesses ever became part of the monies paid in respect of the suit land and none of the documents of ownership and/or purchase of the suit land mentioned Mr. Jeremiah Orori Nymwaro as a joint owner. I disregarded the document dated 27/12/2013 christened as Verdict on Land Dispute between Nyakambi and Orori families for lack of clarity as to its source.
13. Section 3(3) of the [Law of Contract Act](#) states as follows: -
 - 3(3) No suit shall be brought upon a contract for the disposition of an interest in land unless—
 - (a) the contract upon which the suit is founded—
 - (i) is in writing;
 - (ii) is signed by all the parties thereto; and
 - (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:
14. Provided that this subsection shall not apply to a contract made in the course of a public auction nor shall anything in it affect the creation of a resulting, implied or constructive trust.
15. There is no Agreement of sale or any other Document that shows that the Plaintiff was a party to the purchase of Kerumbe Farm L.R. 940/2. Equally, we are unable to draw any conclusion that any trust whether resulting, implied or constructive was ever created herein. A resulting trust would have been



created if it was shown that Jeremiah Orori gave Nyakambi Nyamwaro money to go and pay on his behalf to Kerumbe Farm vendors and that he ended up registering the same as his property.

16. The Plaintiff has not told us how much was paid by his father to the latter's brother, when and how it was paid. The alleged intentions are not visible anywhere in the evidence adduced in court. The onus of proof on this point fell on the Plaintiff. This is not a case of absolute necessity and therefore the court cannot imply a resulting trust. I also don't see any footprints of constructive trust in the evidence. I fail to understand how the father of the Plaintiff trusted his brother so much and never bothered to attend any of the meetings or insist that his name should appear in any of the documents showing ownership of the suit land. None of the documents produced by the Plaintiff has any semblance of ownership or co-ownership of the suit land. He has not even exhibited any document to show the business the 2 late brothers allegedly used to carry out together and the Accounts, source of funds and the use of the same to see whether there were any monies from the business that went towards the purchase of Kerumbe Farm.

Section 24(a) of the *Land Registration Act* states as follows: -

the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”.

Sub -Section (b) further states:

the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.”

17. The rights of a proprietor are enshrined under Section 25 as follows:
- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
- a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - b. to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.
18. In the absence of trusteeship as observed above, no one can deny the Defendant such rights and privileges.
19. The upshot of the above is that I am not persuaded the Plaintiff's claim is well founded. The Plaintiff ought to be contented with the 10 Acres given to him *ex gratia* by his late uncle's family and stop demanding from the Defendant and the Estate represented by his cousin for more. The Plaintiff's claim therefore fails and is hereby dismissed with costs. And since the Defendant's mother had already given the Plaintiff's family 10 Acres out of the suit land, I will not grant the whole prayer in the counterclaim. This is because in the entire evidence no witness has said that there was any time that the Plaintiff was ever asked to vacate the 10 Acres he occupies. But the Plaintiff should confine himself to the 10



Acres. I therefore grant a permanent injunction partially, i.e. in respect to any other portion beyond the 10 Acres around the Plaintiff's homestead which had been initially given to him by the Defendant's family. Anything else that falls outside the 10 Acres is part of the land and the doctrine of *quic quid plantatur solo solo cedit* applies.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 28TH DAY OF APRIL, 2022.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Sibota

Plaintiff: Mr. Soire

Defendant: Mr. Bosire Gichana

