



REPUBLIC OF KENYA

High Court at Kisumu

Civil Case 123 of 2002

HENRY ONDITI OKOTH .....1<sup>ST</sup> PLAINTIFF

STAKUS OBOR OKOTH.....2<sup>ND</sup> PLAINTIFF

VERSUS

ZEDEKIAH ONGAO OKOTH .....DEFENDANT

JUDGMENT

The plaintiff amended plaintiff asks for the following reliefs:-

- a) **Temporary and permanent injunction restraining the defendant from entering parcel number Kisumu / Wathorego / 717 or carrying out any act which may be inconsistent with interest of the plaintiff.**
- b) **Rectification of registers of family land of the deceased and in particular Kisumu / Wathorego / 717 (2850 and 2851).**
- c) **General damages for trespass, provocation among other prayers .**

The plaintiff and the defendant are the sons of the later Samuel Okoth Odinga who died sometimes in 1974. He had six (6) sons namely:- **Stakus, Zedekiah (defendant), John Aloo, Okoth, Daniel Sigu Okoth and Henry Ombiti Okoth.** He also left behind a widow called Merceleline Oyugi Okoth.

According to the plaintiff the deceased left several parcels of land to the defendant who was to hold them in trust for and on behalf of the plaintiffs and other siblings stated above.

The parcels of land includes land parcels numbers **Kisumu / Wathorego/730, 725, 614, 593, 566, 718, 706, 717, 729, 711, 649 and 736.** The born of contention however is land parcel number 717.

According to the plaintiffs the said parcel of land was sub divided by the defendant into two portions namely 2850 and 2851. Parcel number 2850 is registered in the names of Daniel Sigu Okoth and 2851 is in the name of the defendant. The deceased homestead is comprised in the aforementioned parcels of land.

The plaintiff further accused the defendant of selling other parcels of land which belonged to the deceased which include parcel numbers Kisumu / Wathorego / 736, 730, 614, 566, 706 and 620. Apparently the plaintiff did not produce any evidence of sale or call any purchasers to corroborate their assertion.

The plaintiffs claim therefore is that by breaching the trust granted to the defendant by their late father, they have suffered immensely as they have been deprived of their land.

The defendant on the other hand has denied the plaintiff's allegation. He said that parcels number 730, 614, 513, 566, 726 and 718 have never been in his names. He further said that originally land parcel No. 717 was in his name and one Daniel Sigu Okoth. They then partitioned into two where Daniel Sigu Okoth got No. 2850 and he got No. 2851.

According to the defendant the plaintiff's suit is a gang up by the step brothers to deny him his parcel of land.

Having carefully listened to the parties herein as well as their submissions the twin issues to be determined is whether the plaintiffs have established that the defendant was entrusted with the properties and in particular the suit land by their late father for onward transmission to the other brothers and whether or not the plaintiffs have established fraud against the defendant.

It is not contested that the plaintiffs and the defendants are the sons of the late Samuel Okoth Odinga. It is not further in dispute that the deceased owned several parcels of land. I am however unable to find that the deceased left behind the suit property in the hands of the defendant. The search certificate which were produced by the parties does not in any way show that originally the suit property No. 717 was registered in the names of the deceased and thereafter transferred to the defendant.

It would appear that the suit property was indeed registered in the joint names of the defendant and one Daniel Sigu Okoth. The same was divided into two, thus creating number 2850 and 2851. Where thus trust emerge in this scenario?

Trust must always be proved or established. Going by the defence evidence therefore it is clear that all the other siblings have their parcels and they are registered in their names as follows:-

- a) KISUMU WATHOREGO / 649 in the names of JOHN OLOO OKOTH**
- b) KISUMU / WATHOREGO / 711 – Silvanus Odera Okoth.**
- c) KISUMU / WATHOREGO / 719 – in the name of Marceline Oyugi Okoth – Widow**
- d) KISUMU / WATHOREGO / 729 in the name of Stakus Obour Okoth**
- e) KISUMU / WATHOREGO / 2850 in the name of Daniel Sigu Okoth.**
- f) KISUMU / WATHOREGO / 2851 in the name of Zedekiah Ongao**

If the above registration was effected by the defendant why aren't the plaintiffs complaining? They seem to be happy except for the way parcel No. 717 was done. Equally, they did not produce any evidence of sale of the other parcels allegedly left behind by the deceased. I do not therefore find any merit in the assertion that the defendant breached the trust left to him by their late father. Trust ought to be established. None has been done by the plaintiffs in this case.

The other issue raised by the plaintiff is that the defendant acted fraudulently by sub-dividing the parcel of land into two. Again I do not see any fraud. If he acted fraudulently did he also act fraudulently when he transferred the other parcels to the plaintiffs and other siblings stated above? Why didn't they complain? Equally and of great significant if Daniel Sigu Okoth did not participate in the subdivision of land parcel No. 717 why is he still holding the resultant title No. 2850 to date?

In answer to the above questions I do not find any fraud established by the plaintiffs against the defendant.

I do not find anywhere where he manipulated the adjudication process of the Wathorego area as claimed by the plaintiffs. None of the parties and in particular the plaintiff called any officer from the Ministry of Lands to establish this. Further they did not call any evidence to establish that Daniel Sigu Okoth did not participate in the partitioning of land parcel No. 717.

The upshot of my findings are that the plaintiffs have failed to prove their claim against the defendant. This suit must fail. I do therefore dismiss it with costs to the defendant.

**Dated, signed and delivered at Kisumu this 14<sup>th</sup> day of November 2012.**

**H.K. CHEMITEI  
JUDGE**

**In the presence of:**

P. J. Otieno for the defendant

Ouko for Kowino for the plaintiffs

*HKC/aao*