



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISUMU

Civil Case 17 of 2008

ELISHA JUMA AWUOR PLAINTIFF

-VERSUS-

1. WALTER MBOYA ONYANGO

2. ATTORNEY GENERAL DEFENDANTS

Coram:

J. W. Mwera, Judge

Oguttu Mboya for Plaintiff

Odunga for 1st Defendant

George CC.

J U D G M E N T

The case about to be determined began as KISII HCCC 598/1994 – PETER AWUOR MIYAWA –VS- SALMON ONYANGO SHEM, DISTRICT LAND REGISTRAR, HOMA BAY. It was filed by Mr. Moses Orenge Advocate on 21.10.94. There is no defence traced on the file but on 9.1.2006 the plaint was amended now with one ELISHA OUMA AWUOR as the plaintiff, being the legal representative of the late Peter Awuor Miyawa. On 01.8.2002 the 1st defendant Salmon Onyango Shem filed a defence through the firm of M/s Nyariki & Co. Advocates, Kisii. And the record has it that an amended plaint had earlier been filed on 4.2.2000 by M/s Ocharo & Co. Advocates whereby the 2nd defendant, the district land registrar was replaced by the Attorney – General. It is not clear how it all transpired, but the file has it that by 4.6.2007 correspondence addressed to the deputy registrar at the Central Registry made reference to NRI HCCC MISC. APPL. NO. 324/2007 featuring the same parties and quoting KISII

Further, through the times on 7.8.2007 M/s Oguttu – Mboya & Co. Advocates, Kisii filed a re-amended plaint dated the same day with one Walter Mboya Onyango as the 1st defendant, being the legal representative of Salmon Onyango Shem who had died. That must have provoked an amended defence and counter-claim by the 1st defendant dated 16.8.2007 filed by M/s Nyamweya Osoro & Nyamweya & Co. Advocates, Kisii. This was followed on 30.8.2007 by a reply to the amended defence and defence to the counter-claim by Mr. Oguttu – Mboya on behalf of the plaintiff. Agreed issues were filed on 26.11.2007. It is not clear how and why by Mr. Oguttu – Mboya filed another reply to the counter-claim by the 1st defendant on 31/8/2007. Be that as it may, on/about 12/3/2008 this Kisii case was transferred to this station and given KSU HCCC NO. 17/2008 on account of a judge at Kisii having disqualified himself from hearing it. Then another amended defence and counter-claim was filed on 29.10.2007 by M/s Wambua Njuguna Kiriba & Co. Advocates, Kisii. So seen at a glance, this case which started at Kisii High Court ended at this court where its trial took place. The other aspect to note is that lawyers have changed as well as the parties. Then pleadings have been amended and in some cases more than two scripts with different dates but similar in substance, filed. Perhaps from the submissions the court will be enlightened about the final script of pleadings each side will be relying on. If that is not done then the court will endeavour to take whatever pleadings it deems basic in bringing out the dispute between the parties. Then lastly it may be noted that the last set of lawyers to represent the parties in this case are Mr. Oguttu – Mboya for the plaintiff and Mr. Odunga for the 1st defendant. The court was told that the 2nd defendant, the Attorney - General, never entered appearance and he did not participate at any point.

From the submissions, the plaintiff relied on the re-amended plaint dated 7/8/2007. His claim was that at all the material times Elisha Juma Awuor (to be precise his late father, Peter Awuor Miyawa) was the registered proprietor of the land parcel no. KABONDO/KODUMO EAST/293 measuring 18.1 acres or 7.24 ha., lying on one side of the Kisii – Kisumu Rd. The plaintiff's family has resided on this land from times immemorial and this land borders land parcel NO. KABONDO/KODUMO EAST/328 owned by one JAMES OBANDE. It was further averred that on the other hand the 1st defendant (or his late father Salmon Onyango Shem) is the registered proprietor of land parcel NO. KABONDO/KODUMO EAST/294. It lies across the main Kisumu – Kisii Rd and has no boundary with Plot no. 293 and it too measures 18.1 acres or 7.24 ha. But then in September 1994 by way of fraud the 1st defendant's father with the land registry staff (Homa Bay) purported to fix a boundary of Plot no. 293, dividing it into two portions, and giving one part to 1st defendant, thereby reducing the plaintiff's Plot No. 293 to only 4.8 ha. This occasioned the plaintiff to suffer loss and damage – a thing the 1st defendant ought to be permanently restrained from doing. And that the defendant's father had instead claimed that his plot no. 294 extended in such a manner as to border both the plaintiff's plot 293 and 328 of James Obande. That a search revealed that by devious acts the plaintiff's land had been reduced to a mere 4.8 ha and not the original 7.24 ha. The defendant's father then in October 2005 encroached on the plaintiff's disputed portion of Plot No. 293 and erected structures there and that family now occupies the portion. By that occupation the plaintiff cannot access his homestead. So court was asked to declare and order that:-

- a) the plaintiff's plot no. 293 measured 18.1 acres or 7.24 ha.
- b) the boundary fixed by the defendant in 1994 over plot 293 was a trespass.
- c) plot 293 and 294 did not share a boundary having always been separated by the Kisumu – Kisii Rd.
- d) boundaries of the plaintiff's plot no. 293 be permanently fixed (18.1 acres, 7.24 ha.)
- e) the land register be rectified to reflect that.
- f) payment of general damages for trespass plus mesne profits.
- g) a permanent injunction to issue against the 1st defendant from interfering with the plaintiff's use of

plot 293.

- h) to evict the defendant from the disputed portion of plot 293 he occupies
- i) costs and interest.

On his part the 1st defendant submitted that he filed a counter-claim along with a defence denying the claim. This was meant to refer to the plaintiff's claim as based on the re-amended plaint of 7.8.2007. In this regard the court took the 1st defendant's amended defence and counter-claim dated 16.8.2007 as the basis of his side of the case. Together with the reply to the amended defence and counter – claim dated 30.8.2007, they form the principal pleadings, the focus in these proceedings, this court doing its best in the circumstances.

In the amended defence dated 16.8.2007 the 1st defendant averred that there was always a common boundary between the plots nos. 293 and 294 and that the plaintiff's father's acreage (Plot no. 293) was always 4.8 ha. only. The plaintiff destroyed the common boundary in 1994 and began to lay claim on suit land. This defendant claimed that his plot no. 294 always lay on both sides of the Kisumu – Kisii. The alleged acts of fraud were denied in toto together with the prayers for remedies.

In the counter-claim the defendant reiterated that his late father, Salmon Onyango Shem, was registered, entitled to and all the time in occupation of Plot No. 294 which bordered the plaintiff's Plot No. 293 with a marked boundary. The plaintiff destroyed it in 1994. It was the plaintiff who trespassed on Plot No. 294 in 1998 by erecting structures there. Then in 2005 the late Shem built a home on the disputed portion of his Plot No. 294 (also referred to as lying on the upper part) and expressed his wish to be buried there when he died. When he died in 2006 burial, took place on this disputed portion of land, leading to a court case that restrained burial on PLOT NO. 293. The body which had been buried was exhumed and has since been lying at a hospital mortuary, awaiting the determination about to follow here. The 1st defendant therefore claimed special damages following the expenses of that disputed burial, plus general damages, eviction order from Plot No. 294, costs and interest. As alluded to earlier, the plaintiff filed a reply to the defence and defence to the counter-claim. Then there were 18 agreed issues filed. The trial commenced.

Peter Ongera Bwala (PW1), an officer in-charge of land adjudication records in Homa Bay and Rachuonyo Districts had knowledge about Kodumo East Adjudication Section, Rachuonyo. He also knew 2 people, Peter Awuor (deceased) as owner of Plot No. 293 and James Obande owner of Plot No. 328. The two once had a boundary dispute which was resolved sometime in 1966 before a land adjudication Committee (Exh. P1). The 2 disputants were to remain in their respective plots with a sisal boundary in between. There was no plot 294 between the subject two. If it came later, only the land registrar could explain because after adjudication the records were given to him. PW1 looked at the adjudication register shown to him and noted that PLOT NO. 294 featured. It was signed by the land adjudication committee chairman and the plot owner on 29.6.1966. Solomon Onyango was the owner. PW1 added that the said committee only dealt with plots that had numbers.

Joshua Omasire (PW2), the land registrar Rachuonyo brought to court the records he holds on plots 293 and 294. Peter Awuor (deceased plaintiff) was first registered over plot no. 293 w.e.f. 1.09.1966 – 18.1 acres. This imperial measurement system was changed to the metric one in the 1980's and 90's and the converted acreages started to appear on the titles of land. So plot 293 covered 4.8 ha. The witness found this figure suspect because converting 18.1 acres should convert to 7.24 ha. PW2 said that the land registrar, a Mr. Musyoki, could have made the conversion regarding plot 293 (Exh. P2). Looking at the land certificate of the same plot, the court was told that plot. 293 (MFI, P3) belonging to Peter Awuor, measured 18.1 acres. Comparing the signatures on the green card (Exh P2) and the land certificate before him signed on 2.9.94, PW2 observed that the signatories were different. It had not been entered on the green card, as it should, that the acreage had been converted and replaced. And no other title for plot 293 was issued other than the one of 1971. The matter having been highly contested with each side calling several witnesses and producing several documents, it may be pertinent to remark even at this early stage that the green card (Exh. P2) was opened on 17.9.69 with Peter Awuor as the proprietor of Plot 293. It

was therein printed: APPROXIMATE 4.8 ACRES. Then between 4.8 and acres was inserted in hand, 18.1. And the land certificate issued to Peter Awuor on/or about 23/12/1971 for plot 293 bears 18.1 acres. PW2 added that acreage to a given plot can be changed by the owner(s) but that follows the land registrar first coming on the ground, hearing the parties as to why they wish to alter the acreage of their plots. The land registrar then makes a decision to be followed by a mutation with ultimate details being entered in the register as to the changed layout of a given plot(s) together with the acreage(s). All this is placed in the file. To him 4.8 ha. would convert to 12 acres and the witness did not see the process of the mutation in the file he had regarding plot 293.

As for plot 294 the court heard that it belonged to one Onyango Shem Oem w.e.f. 17.09.69 – on first registration. No title was issued. That on 10.5.94 the owners name was corrected to read Salmon Onyango Oem and a title followed on 11.05.1994 – 8.6 acres or 4.8 ha. To PW2, the proper calculation should have converted to 12 acres (Exh P4). Again, if a remark is made here on this green card dated 17.9.69, the first entry was Onyango Shem. The correction of 10.5.94 read Salmon Onyango Oem. The approximate acreage of plot 294 was printed 4.8 ACRES and inserted in between those two by hand, 8.6. So far no one explained to the court the variation between the typed and hand-written aspects of the two cards for the 2 plots. Or the purpose of each and the apparent discrepancy in the conversion between acres and hactres. But as for Plot 294 it was noted REGISTRY MAP SHEET NO. 2, 3 while plot no. 293 had sheet no. 2 only. This bit is referred to here particularly in the light of evidence to come up presently that the area of plot 294 spread over two map sheets, and not only one as plot no. 293 did. This will be of essence when deciding whether plot no. 294 did extend into the area being disputed or not.

To continue with PW2, he testified that it appeared that the entries in both green cards were made by the same registrar. The witness and district surveyor (Kisii) were once summoned to court in the dispute going on here and so they visited the scene to familiarize themselves with the lay-out – without the parties, before appearing in court. They found mature trees on the disputed portion with the defendant's homestead. Perhaps PW2 could have done better to visit the site with the parties but what he observed does not appear to have prejudiced any. However, the dispute between these two plot owners was reported to PW2 in March 1995 by Salmon Onyango (Exh P5, 6) regarding a boundary. The land registrar one Mr. Musyoki had attended to an earlier dispute there (Exh P7) which he ruled upon on 1.3.95. Musyoki had directed that Elishah Awuor (the plaintiff) do file a suit in respect of their dispute in 30 days or Musyoki would go back to the site and plant a boundary. This meant the land registrar going to the scene, hearing disputants, recording all and using maps to fix a boundary.

PW2 looked at other sets of documents in the hands of the defence, regarding plots no. 293 and 294 and remarked that plot 293 was 18.1 acres marked in pencil. Plot 294 was 4.8 (with 8.6, in pencil) acres. To the witness knowledge, plot 293 lay on the upper part of the road. It measured 18.1 acres while on the lower side of the boundary is plot 294, 8.6 acres. To the witness Exh. P4, the green card signed by the land registrar showed the correct entry of 8.6 acres and not the conversion of 4.8 ha. This could not agree with PW2's twenty five years experience in converting land acreages. He could correct errors of this type regarding plot 294 but for this case. His evidence was that aerial maps did not show that plot 294 lay across both sides of the KSU – Kisii Rd. It nonetheless had an aerial map which plot 293 did not have.

Looking at the adjudication register shown to him by the defence counsel PW2 said that as Peter Awuor accepted the decision on plot 293, Onyango Shem accepted that regarding plot 294, and they signed accordingly on 30.11.66. While the adjudication file is held in their Nairobi office, an adjudication register is sent to the land registrar (as PW2) to open green cards. To do that the registrar must have:

- a) an adjudication record, which he had
- b) an area list held by the Department of Survey, which he did not have and
- c) a map (RIM).

It was PW2's further evidence that acreage indicated before the metric system, was endorsed in pencil on the green cards. When Onyango Salmon raised the dispute in 1994/95 with PW2, his officers visited the

ground and found that it was not about a boundary but ownership of 4 acres. The court heard that green cards (Exh. P2, 4) for plot nos. 293, 294 were issued by the land registrar Rachuonyo while similar cards held by the defence (MFI) came from the land registrar, Homa Bay. However to this witness Exh P2, 4 contained errors in the conversion of acreages. Both contain land covering 26.7 acres or 24 ha. There was thus a discrepancy in the conversion from acres to hactres. But if he confined himself to the portion of Plot 294 lying on the lower part of the boundary (road?) it was 8.6 acres. And on the upper side the entire plot no. 293 is 18 acres. Just to note, the issue of the lower or upper part being referred to eventually came to refer to the left or the right of the main KSU – Kisii Road as one faced Kisii. The witness then said that the disputed portion lay within plot 294 and that if an aerial map showed that plot no. 294 extended beyond the road into plot no. 293, then there must be a brace – sign indicating the extension. Such maps were with the Director of Survey and if they indicated the brace (for the extension) then plot no. 294 could be larger.

In re-examination, the court heard that after adjudication on the ground, records are given to the Director of Survey to prepare area maps and lists, which in turn assist in preparing green cards and issuance of titles by the land registrars. Those records come through the Chief Land Registrar. The court heard that aerial maps taken by an aeroplane precede Registry Index Maps (RIM). The aerial map with the original Registry Index Maps are basic in issuing title numbers. The witness said that there was no brace on the aerial map for plot no. 294 and if the Registry Index Maps showed such, there could have been an amendment to plot no. 293 which would mean a change in that number. But plot 293 had always remained the same. Then with the 2 sets of green cards (one lot from Rachuonyo (Exh. P2, 4) and another from Homa Bay) the witness ended his testimony by expressing wonder at such a mystery – two sets of green cards from two offices about same plots of land.

Thomas Nyakado (PW3), a district surveyor, Rachuonyo was conversant with Kodumo East, which fell in his area. He brought an aerial map of the whole area (Diagram 3). He had also preliminary Index Diagram for that area during adjudication. The map Diag. 3 only covered plot no. 294 but the officer could not trace and present Diagram 2 covering plot no. 293. Diagram 3 showed plot 294 with a road, trees and buildings. It ended on the Oyugis/Kisii – Kisumu Road on the lower side as one faced Sondu Miriu River. There were homesteads there. A brace is a map sign showing that a plot crosses a road or a river. There was none here for plot 294. For plot 328 it lay across the road and a brace marked that. And an aerial photograph (Exh P8) which precedes and Index Diagram should agree with the diagram. The witness had with him 3rd and 9th editions of diagrams he referred to as “PIDS”, showing braces. PW3 however did not have the 1st edition of the PID which he said had to agree with the aerial photograph (in other places referred to as Maps) Exh. P.8. Referring to the 3rd edition PID dated 12.5.2008 (DIAG 2) PW3 said that he obtained it from the Provincial Surveyor’s office (KSM) and it showed that Plot no. 294 had a brace across the road meaning that it lay on both sides thereof. While this plot was on the northern side of the road, Plots no. 293 and 328 lay to the south (the directions only to be understood in the light of compass points on the Maps, if any). And plot 293 bordered plot 294. Plot 294 crossed the road by about 6 acres on the upper part while the lower part was 8.3 acres. So the total acreage, as per the PID, 3rd edition (Exh P9) which PW3 had, plot 294 covers 14.3 acres. And from the same document plot 293 could only be 12 acres. PW3 then produced the 9th edition of the PID (Exh P10) which did not feature plot 293. While plot 294 was 8.3 acres, the witness looked at the land certificate held by Peter Awuor (MFI P3, ExhP3) and said that it showed 18.14 acres. The totals therefore varied - 12 acres (Exh P9) and 18.14 in the title.

PW3 then said that at some point his predecessor had made visits to the site and taken measurements. Looking at some tracing paper with plots 293, 294, and he noted a red line denoting a new boundary with a “red” brace (new). He told the court that one D. R. Mbuto, a surveyor made the drawings on 29.11.95. That Mr. Mbuto remarked that the new (red) boundary did not exist on the ground, but it did in the maps. From those drawings plot 293 was 11.86 acres and the disputed portion, 6.24 acres. PW3 who knew Mbuto’s hand-writing and signature then produced the tracing paper/maps with the letter forwarding them to the High Court at Kisii (Exh P11, 12). When PW3 superimposed the diagram by Mr. Mbuto over his diagram (Exh P9), the two agreed in features.

In cross – examination PW3 did not see any braces on the aerial photograph (Exh P8). He maintained that position even as he noted that title to plot no. 294 appeared in sheets nos – 2, 3 (Exh P3) meaning that it did not only end in Diagram 3 (the aerial photograph) which was obtained from the survey office, Kisii.

Rev. Elisha Juma Awuor (PW4, plaintiff) then testified. At this point there appears to be a bit of confusion because it was recorded that Peter Ongera Bwala (PW1) could be recalled to testify on the aerial survey map/photograph (Exh P8) but the record contains PW4's testimony. PW4 once testified at Kisii where he produced his late father's title deed (Peter Awuor Miyawa) Exh. P3 – dated 10/12/71 for plot no. 293, measuring 18.1 acres. PW4 also produced a grant to administer his late father's estate (Exh P13) and that a court at Kisii gave him an injunction order (Exh P14) to maintain status quo.

At that time the deceased Salmon was living on the lower side of the KSU – Kisii Road in plot 294. Their own plot was no 293 lying on the upper side of the road – and that is where the disputed portion of land also lies. To him, that portion forms part of plot no. 293. It has mature trees which his father planted; he himself built a church there. Then in 2005 Salmon Onyango moved and built a home-stead on the disputed portion on the upper side of the road. That act breached the status quo orders referred to earlier, though it appears that no contempt proceedings were instituted but another court order was issued (Exh P5) on 14.11.2005 to reinforce the earlier one. He denied that his father destroyed any common boundary between the two plots but instead maintained as in the plaint that there was never such a boundary. And that plot 293 only bordered plot 328 of James Obande. He did not trespass on the disputed plot in 1998. His family had planted there trees 50 years ago. The only boundary issue that was resolved during the adjudication period was between plots 293 and 328. But in 1994 a land registrar came to plot 293 with intention of hiving off a portion to add to plot 294, but in his proceedings (Exh P7) that land registrar found that PW4's father had occupied and grown trees on the disputed portion for over 50 years. So the defendant should not claim it and the attempt to bury Salmon there in January 2006 did not lie. PW4 denied that he should meet the burial/funeral expenses claimed in the counter-claim. He had nothing to do with them if anything they arose when the defendant disobeyed the court order in force regarding the status quo of the disputed portion. The defendant always knew of the plaintiff's father's rights over the disputed portion even as they occupied their own land on the lower side of the road (Plot 294). The order of eviction does not lie either, not even an injunction against him or the sought damages.

In cross – examination PW4 referred to his grant of letters (Exh P13) as relating to colligenda bona, and not to administer the estate of Peter Awuor. To him, it mattered not. He had been told that that grant could enable him to continue with this case. Plot no 293 measures 18.1 acres (7.24 ha.) and if any changes on the acreage occurred then that took place in the land registry. Thus the defendant should not claim 6.1 acres from the plaintiff's plot 293. The plaintiff then looked at the maps and diagrams (ExhP9, 10) and noted that plots no. 293, 194 shared a boundary, and plot 294 was adjacent to plot 328. But he denied the accuracy of those maps. He could not say how plot 294 came in between plot 293 and 328.

The plaintiff told the court that his father, not Salmon, got compensation from the power company whose lines passed over the disputed portion in 1985. He looked at an area list dated 21.2.2005 from the Director of Survey and noted therein that plot 293 measured 4.80 ha. while plot 294 was 4.8 ha.

James Onyango (PW5), a peasant farmer from Kabondo, knew Peter Awuor as well as Salmon Onyango – the initial litigants herein and fathers of the present ones. While Peter owned plot 293, Salmon had plot 294. PW5 claimed all this on account of being a local land adjudication committee member in 1963. They were determining individual plot boundaries and no dispute arose between Peter and Salmon. Their 2 plots were separated by the Kisumu – Kisii Road. Awuor was on the upper side with Onyango on the lower – the right and left sides of the road as one faced Kisii. Onyango who had his home on his lower side has since moved it onto Awuor's side on the right side of the road. Awuor planted the trees standing there. The only boundary dispute that PW5's committee entertained was between Awuor and Obande in respect of plots 293 and 328. To this elder, the disputed land belonged to Awuor. In cross – examination PW5 said that their committee secretary was Leo Ojwang and not Silvanus Ogot. Evantus Odindo was the chairman.

Lawrence Owuor Ouma (PW6), was once an assistant chief of Kodumo East sub-location. He knew the

original litigants here – Peter Awuor and Salmon Onyango. They owned plots 293 and 294 respectively. The two plots are on the right and left side of the main Kisumu – Kisii Road. Currently Onyango's home is on Awuor's land which has trees he planted. At some point Awuor donated some of those trees for PW6 to build a school with. Salmon did not object to this. Then Salmon built his houses on the disputed plot in 2005. PW6 was there when power lines passed over Awuor's land and he was not aware that it was Salmon who was paid compensation for this.

That closed the plaintiff's case. As noted earlier at some stage it was intimated that PW1, Peter Bwala, could be recalled with a view to testify further on the counter-claim. It appears that was abandoned and the defence case opened.

Andrew Mursoi (DW1), the Provincial Surveyor (Nyanza) arrived with documents relating to Kodumo East Plots no. 293, 294 – in dispute. He had Diagram 2, 3 for parcel no. 294 showing that a road passed through it i.e it lies on both sides of the road while plot 293 is only in Diagram 2. Plot no. 293 bordered plots no. 449 and 294 and the diagrams were produced (Exh D4, 5).

DW1 also produced an aerial photograph (DIAG. 5) the same as Exh. P8. That it showed plot no. 294 – a portion thereof. Just like the plaintiff's side, DW1 had not been able to have and produce the other air photograph (no 2) of the area in issue. The court heard that to effect registration the land registrar had what were called area lists, containing diagrams where given plots fell plus their acreage. In one such list plot 294 was 4.8 ha. (app. 11.9 acres) falling in DIAG 2 and 3. Plot 293 appeared in DIAG 2 only – 11.9 acres. The area list was marked for identification (MF1 D6) and later produced. The witness told the court that the documents before court were prepared before registration of the suit plots. DW1 went over the exercise of consolidating plots and concluded that neither of plots no. 293 nor 294 underwent consolidation or sub-division. They were in the original state.

Looking at Exh. P2, green card for plot 293, the witness said that it measured 4.8 ha. which converted to 11 acres – not 18. And Exh. P4 – green card for plot 294 it too was 4.8 ha., about 11.9 acres not 8.6 written there in hand. His opinion was that the court do accept that each plot was 4.8 ha. in area and forget about the acres indicated in hand. The diagrams he produced (Exh D4, 5) were dated 28.4.1972.

In cross – examination DW1 said that Exh. P8 (aerial photograph) only contained plot 294 and was not complete. The plot continued in the missing part of the photograph – although there was no brace on the exhibit regarding plot 294.

However, in his Exh. D4 (DIAG. 2) made in 1972 plot 294 had braces while plot 293 did not. Exh. D5 (Diag. 3) had plot 294 and not 293. The witness however said that when the land certificate to plot 293 was issued on 10.12.1971 it showed that the plot was 18.1 acres. That could have been in the area list. The aerial photographs were supplied from Nairobi. Requisition to obtain the missing one here came to naught. Such documents do give final acreage of any given plot in an area. And plot 294 crossed the road (Exh. D5). It also featured in the aerial photograph (Exh P.8).

Walter Mboya Onyango (DW2, defendant) showed the court a grant he took out to wage this case for the estate of his late father, Salmon, and thus appear in these proceedings (Exh. D4). His father owned plot no. 294 (Exh D8) as per certificate of 11.5.94 and it had a green card too (Exh. D9). The land was registered in the deceased's (Salmon) name on 17.9.69, with a mistyped name OEM for Shem, but the land certificate was not taken. The land was 4.8 ha. as per the registry map sheets (DIA 2, 3). The land fell on both sides of the Kisumu – Kisii Road and has always been in occupation by the Onyango family.

DW2 knew that the Awuor family owned plot no. 293, on the right hand side of the said road as one faces Kisii. It borders plot no. 294. plot 328 borders plot 294 to the left and the disputed land has always been in use by the defendant's family. But then this was disrupted by the plaintiff building a road and a church there since 1994. The plaintiff's family lives on plot 293, though. He destroyed a common boundary between the two plots in 1994, over which the land registrar arbitrated in March, 1995 (Exh. P7). After the finding of the registrar, the plaintiff was given 30 days to file a suit and the present one was the result. If the plaintiff did not file this suit the registrar had threatened to return and plant the boundary

that had been destroyed. This case was filed in Kisii and DW2's father died as it was pending. They buried him on the disputed portion. But the plaintiff sued in KISII CMCC 57/06 (Exh. D.10) and obtained a restraining order not to bury Salmon, according to the plaintiff on plot 293. So Salmon who had been buried on the disputed plot was exhumed and his remains have been in a hospital mortuary since. Costs and expenses related to this amount to Ksh 301,420 (Exh D12, bundle of receipts). At this point it was not so clear to the court but the witness said that an injunction against his family was dismissed yet all were left to abide the out-come of this suit. What is not in doubt, though, is that the exhumation order of Salmon's body from the disputed plot must have followed the satisfaction of the court that the Onyango family should not have buried him on the disputed portion as the dispute was still pending. Anyway the Onyango family built on the disputed plot in 2005 and claims to be using it to date. That the plaintiff has been trespassing over the defendant's land. So he must be evicted and damages paid.

Further, the witness told the court that on 16.5.85 the power company erected lines over the disputed plot and Salmon was compensated (MF1 D13, Exh D13). The witness then referred to witnesses (PW5) James Onyango and PW6 Lawrence Owuor, stating their plot numbers (Exh. D 14, 15). And that Salmon was paid on account of details of his property including trees on the land (Exh MF1 D16, Exh D16).

In cross – examination, DW2 said that his family had always been using their land. Their home-stead initially stood on the portion of the plot to the left of the road as one headed towards Kisii but had since 2005 been built on the right – the disputed portion. It was his father who planted the trees standing there and not Peter Awuor. To DW2 his father told him that the injunction order restrained them from encroaching on plot 293 which they did not, but instead continued to use their plot 294 (Exh. P14,). Even as the injunction of 14.11.2005 (Exh. P15) concerned the disputed portion, DW2 understood status quo to mean to continue using plot 294. He denied that the burial of Salmon on the disputed portion contravened any court orders. The witness gave a break-down of the receipts (Exh D12) and maintained that the total sums therein be awarded. And that the trespass began in 1994, although he filed the counter-claim only in 2007 – 13 years later. There was an explanation that some of the receipts (Exh. D12) had no revenue stamps. They had been issued by those who had given transport services in connection with the burial/reburial of Salmon.

Tom Otieno Mboya (DW3), in-charge of Adjudication and Area Survey, testified next holding Kodumo – East area list. It was dated 5/5/71 and it showed that plot 293 was found in sheet no. 2, measuring 4.8 ha., while plot 294 lay in sheets 2, 3 and it too measured 4. 8 ha. No changes had taken place on these plots (Exh D6). And that 4.8 ha. could work to approx. 11-12 acres.

Patrick Musyoki Mutisya (DW4), a Way Leave Officer from Kenya Power & Lighting Co. Ltd came with records on plots no. 293, 294 Kodumo East regarding plot owners over whose plots his employer erected lines. There was an agreement over plot 294 whose owner was Salmon Onyango Shem. His plot lay on both sides of the road but there was no road between plot 294 and 293. Power lines also passed over plots 293 and 328 (Exh D13). While Petro A. Miyawa of plot no. 293 was paid Ksh 13,385/75, Salmon Onyango of plot 294 was paid Ksh 3,997/= (Exh. D16). In the map brought by DW4, plot no. 294 was on both sides of the road with a brace to show for it. The sketch map he produced was sourced from the land office and payments were prepared in 1986. Payment documents were retained in DW4's finance office and were destroyed 12 years after payment.

Lukio Bonye Manyanda (DW5) of Kabondo knew both Shem Onyango (Salmon) and Petro Awuor as villagers. They were the fathers of the present litigants. While Salmon owned plot 294 Awuor had no. 293. Petro's land fell on the right side of Kisumu – Kisii Road. Salmon had been using his portion of land also on the same right side of the road. Lukio claimed that while he was one of the elders who assisted the committee in adjudicating over the land rights at Kodumo – East, Lawrence Owuor (PW6) was not among the elders. He was in employment as a policeman. Plots 293, 294 shared a boundary. The witness then went over how land adjudication committees were constituted, who participated and who did not and the boundary disputes resolved. It was heard that initially Salmon had his home-stead on the lower portion of his plot as one went towards Kisii but in 2005 he moved it to the upper side. Awuor never used or planted trees on this disputed upper side portion. The witness said that a land registrar once

came and planted a boundary between plot no. 293 and 294 but the plaintiff (Elisha) destroyed it. Then he trespassed on plot 294 by building a church there.

Silvanus Ogot Nyamonyo (DW6) who also knew the original litigants and their sons, now in court, also said that Awuor owned plot 293 while Salmon Onyango had no. 294. The latter lay on both sides of the road as one faced Kisii from Kisumu. Plot 293 was only to the left and the two plots had a common boundary. This witness too was present during adjudication and he repeated that Salmon had always used the disputed portion. Salmon first lived on the portion to the lower side (to the left of the KSM – Kisii RD) and later moved his home-stead onto his portion under dispute.

James Obande Owuor (DW7) owns plot no. 328 in the same area as the litigants Awuor – no. 293, and Onyango, plot 294) in Kodumo – East. His plot borders both plots – 293 and 294. While plot 294 is on both side of the road as one faces Kisii, plot 293 is only on the left of this road – KSU – Kisii. Salmon had built on the disputed plot which he had always put to use. A dispute over a boundary between Petro Awuor and DW7 was resolved in favour of the witness. His plot also falls on both sides of the road.

The plaintiff had made a road on the disputed plot and also built a church there. Each of the litigants planted trees on their respective plots. Elisha Juma destroyed the boundary that the land registrar planted between the 2 plots. With that the trial closed and parties submitted.

Each side went over the pleadings, all the evidence and took a position propped by authorities. Having recounted the pleadings and evidence above this court now focuses on what each side said on issues. The plaintiff set out 14 issues and proceeded to answer them as they supported his case. The defence did likewise. However, in the view of this court, this case may be determined on 3 or 4 broad issues, each incorporating as much as possible, as follows:

Issue: (1) Has the plaintiff the locus

standi?

(2) Who is the registered proprietor

of the disputed portion of the plot?

(3) What reliefs are to issue and to who?

(4)Costs.

The above approach is taken in the light of the plaint and the counter-claim – both of which stake a claim on the disputed portion, lying at a point on the right upper side of the Kisumu – Kisii Rd as one faces Kisii.

To begin with the plaintiff's side, it was submitted that he had capacity to continue his late father's case even when he did so by producing letters of administration ad colligenda bona instead of the grant of letters of administration and the case of Morjaria –VS- Abdala [1984] KLR 490 was cited in support.

Coming to the size of plot no. 293 the court was told that due land certificate was issued on 10.12.71 showing that it was 18.1 acres. It had no common boundary with Salmon's plot no. 294. That plot did not

cross the KSU – Kisii Rd and so the disputed portion was part of plot 293 (of the plaintiff) and not 294. It was added that the plaintiff had always occupied and used this portion for over 40 years. And any alteration to the acreage of plot 293 was by fraud. It was rather curious but the court was told that a suit to recover land can only be brought within 12 years of the accrual of the right and not later. One can only move to do the above after 12 years and not less. Touching on the issue of trespass, the plaintiff submitted that if, as alleged in the counter-claim, that started in 1994, the claim was brought in the counter-claim 12 years later. It was thus time – barred. Nothing was addressed regarding on issue of a continuing trespass. The case cited here seemed to be one alleging fraud and not trespass.

As for burial of Salmon on the disputed portion, the plaintiff urged the court to find that the defendant did so contrary to two orders requiring status quo and in essence barring him from interfering in any way with that disputed portion. That Salmon instead moved to build on the portion in 2005 and in 2006 his sons made to bury him there – all in contempt of court orders. That accordingly, this court should find for the plaintiff and order the removal of the defendant’s structures e.t.c. from that portion. And the expenses claimed in the counter-claim touching on the burial/exhumation of Salmon be rejected. Accordingly, the claim be considered to have been proved and not so with the counter-claim.

The defence side could not agree on any part as submitted by the plaintiff. It was maintained that plot 294 lay on both sides of the KSU – Kisii Rd with the disputed portion being part of that property. It had a common boundary with plot 293 which was located only on the left side of the said road as one faced Kisii. The maps, diagrams and oral evidence attested to this.

It had earlier been submitted that the plaintiff had no locus standi in the cause since he purported to come in and continue the case by producing letters ad colligenda bona. That the defendant had done his best to prove the special damages and so he was entitled to the sum pleaded. Therefore the suit should be dismissed while the counter-claim succeeds. Here now follows the court’s determination.

ISSUE 1: Locus Standi: While the plaintiff maintained that he was properly before this court to continue with his late father’s case, the defence could hear nothing of that and both sides referred to the Morjaria Case (above).

To continue with the suit his father’s commenced the plaintiff placed before this court a grant of letters of administration ad colligenda bona dated 20.11.1995 (Form 47). Such grant is provided for as per rule 36 of the Probate and Administration Rules, Law of Succession Act Cap 10. S. 67.

If that rule be reproduced here, it reads:

“36 (1) Where owing to special circumstances the urgency of the matter is so great that it would not be possible for the court to make a full grant of representation to the person who would by law be entitled thereto in sufficient time to meet the necessities of the case, any person may apply to the court for the making of a grant of administration ad colligenda bona defuneti of the estate of the deceased.

(2) Every such grant shall be in Form 47 and be expressly limited for the purpose only of collecting and getting in and receiving the estate and doing such acts as may be necessary for the preservation of the estate and until a further grant is made.”

In the Morjaria case, the Court of Appeal accepted a grant ad colligenda bona issued to one party to pursue/continue an appeal before it. And although that court determined that such a grant had to be limited to collecting and preserving assets of the estate which are of a perishable or precious nature and thus ought to be taken in and preserved as soon as possible, otherwise they go to waste as an entitled person goes through the motion to obtain a full grant of representation, it nonetheless went on to find that it was a valid grant because:

“ --- the grant of February 24th is specifically limited to “the purpose only” of representing the deceased ---.”

From the above it can only be deduced that the grant before that Court, which it was observed, did not follow Form 47, it had writings or something to the effect that it was limited to “the purpose only” of representing the deceased. And with that the Court of Appeal accepted that the grant before it was valid in terms of rule 14 of the P & A Rules i.e a grant bearing amendments to attain a certain purpose.

The grant herein (Exh. P14) issued to the plaintiff had the following amendment typed thereon:

“For the purposes of filing a suit/proceeding with the case.”

Accordingly, in the light of the Morjaria case, this court is bound by virtue of precedent to accept the plaintiff’s grant as valid for the purposes of continuing with his late father’s case. He had capacity in that regard.

However, this court is led to observe and wonder what validity should be attached to a statutory form amended by, nobody knows who and with whose authority. When provision of law and here rule 36, mandated that a grant ad colligenda bona shall be in Form 47 and limited for the purpose only of collecting with a view to preserve the deceased’s estate, before a full grant of representation issues, it is undoubtedly clear that that is what the law is, as passed by Parliament or an account of delegated legislation. The Form is part of the law – a statutory form. It should always so remain and be applied for the objects intended. Only Parliament or the delegated authority can amend that form. Now if parties or whoever that is, neither Parliament or delegated authority, proceeds to amend that form for its own purpose and benefit can that be accepted as valid? It is greatly doubted because whoever amended that statutory form had no authority/mandate to do so. The act lacks validity. This court would have been inclined to reject the plaintiff’s amended grant on Form 47 (Exh. P14) but for the honour and authority of precedent.

And further this court opines that where there is a valid course to follow, parties should not take short-cuts e.g engaging in amending the law by themselves. For a party to start or continue a suit regarding a deceased person, that party can and should petition for a grant pending litigation – a grant of letters of administration ad litem. However, with all the foregoing Issue 1 is determined.

ISSUE 2: Ownership of the Disputed Portion: From all the evidence i.e from both sides, it has transpired that while the plaintiff’s father owned plot no. 293 the defendant’s father owned plot no. 294. The evidence heard and recorded above is clearly to the effect that while plot no. 293 lies on the left of the KSU – Kisii Rd as one faces Kisii, plot no. 294 is partly to the left of that road and also on the right. The two plots have a common boundary. The maps, diagrams and oral evidence already set out above is overwhelming on this fact which the plaintiff made to deny.

The aerial photograph (Exh P8) showed that plot no. 294 got onto the said KSU – Kisii Rd and appeared to extend to the right. But neither party was able to produce the missing part of that photograph. And the court did not expect to find braces on that photograph showing that plot no. 294 indeed crossed the road. Braces can only be found on drawn maps and these were produced by Andrew Mursoi (DW1) from his Provincial Office in Kisumu. They were made on 28/8/1972 shortly after the title deeds began to issue in Kodumo – East. Peter Awuor took his in December 1971. Salmon did not do so right away but no matter. The 2 maps produced by DW1 (Exh. D4, 5) clearly show braces on plot 294 that it crossed the 120 road reserve as did James Obande’s (DW7) plot no. 328. In any case even the plaintiff’s own evidence showed that while his plot no. 293 was found on Registry Map Sheep no. 2 only (Exh P2), the defendant’s plot no. 294 was on Map Sheets 2 and 3.

The other pertinent evidence to this finding that Plot no. 294 indeed crossed the road and that is the disputed portion, was that while the plaintiff claimed that his father alone was paid compensation by the power company when it passed power lines over this disputed portion, he did not bring evidence to that effect. But the defendant called Patrick Musyoki (DW4) from the power company offices with records that indeed his father got compensated for power lines passing over the disputed plot – part of parcel no. 294. Of course the plaintiff’s father also got compensation but in regard to plot 293 (Exh D13, 14).

This court did not deem it necessary to declare the acreage of each plot. On evidence from both sides there may have been discrepancies in converting acres into hectares. And also for the apparent features that there were entries on the green cards (Exh. P2, 4) for the two plots both typed and in hand. No explanation was given for this. So much as the court would have been inclined to accept the typed bits only – 4.8 acres on either sheet, quite likely the areas are larger or smaller on the ground and that should not be speculated upon by this court. But it found as a fact that while plot 293 of the plaintiff lay only on one side of the KSU – Kisii Rd, that of the defendant (plot 294) went across that road and that extended portion is the one in dispute. It should no longer be. It is part of plot 294.

ISSUE 3: Reliefs: In conclusion this court has found that the plaintiff's claim has not been proved. He gets none of the reliefs sought. But on the part of the defendant, he has proved his counter-claim.

The special damages sought on account of burial/exhumation and storage of the body of the deceased Salmon shall not issue because the defendant buried the body on the disputed portion despite the two restraining orders against that. The fact that an exhumation was ordered is self-evident that the Onyango family should not have buried him on the plot in dispute while this case was pending and the restraining orders related to just that. The plaintiff should have moved to institute contempt proceedings but it was sufficient that the defendant was ordered to exhume Salmon's body. Accordingly the defendant is denied the special damages he claims.

The court however finds that the plaintiff is liable to the defendant in damages on account of trespass. He or his father had no right to move onto the disputed portion found to form part of plot 294 and build there a road, a church or other structures. The trespass as a tort is not time – barred since it started in 1994 or thereabout and has continued to date. The counter-claim was filed in 2007 but the tort has been a continuing one all along. The tort of trespass is actionable *per se* i.e an aggrieved party need not plead and prove a specific damage/loss. On this account this court is minded to award the defendant Ksh 100,000/= only as reasonable general damages.

The plaintiff has built on plot no. 294 belonging to the plaintiff and therefore is in illegal occupation of that plot. He is directed to remove himself from that plot within the next ninety (90) days or the defendant do take the course of execution in hand.

ISSUE 4: Costs. This suit is dismissed with costs while costs and interest are awarded to the defendant on account of his counter-claim.

Judgment accordingly.

Delivered on 11.11.2009.

J. W. MWERA

JUDGE

JWM/hao