



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CIVIL CASE NO.2 OF 2000**

**BOSIRE TIEBIRO ..... PLAINTIFF**

**VERSUS**

**SAMWEL MARITA OPANDE ..... DEFENDANT**

**JUDGMENT**

The plaintiff BOSIRE TIEBIRO prays to court are for orders to issue for eviction against the defendant SAMUEL MARITA OPANDE, his agents and/or servants from land parcel No.NYAMIRA/NYANKONO/54. He also prays for a Permanent injunction restraining the defendant from entering, tilling, cultivating or erecting any structures or dealing in any way with land No.NYAMIRA/NYANKONO/54. He also prays for costs.

The defendant filed a defence in which he alleged that the plaintiff fraudulently got 3 acres from land parcel No.Nyamira/Nyankono/55 which belonged to his late father ZEDEKIAH OPANDE.

The plaintiff gave evidence and was cross-examined by counsel for the defendant on 9th March 2004. He closed his case and counsel for defendant applied for adjournment to another day for defence case. Later counsels fixed the case for hearing on 28/7/04. On that day both defendant and counsel were absent and court fixed case for judgment. The defendant therefore did not tender any evidence.

The plaintiff (PW1) told court that the defendant was his brother-in-law as he is married to his sister. He said that there was a land buying company called Abanchani. He and his father in law Zedekiah Opande bought one share jointly. They were allocated 23 acres of land. They shared it equally and he was registered as owner of land No.NYAMIRA/NYANKONO/54 and his father in law was registered as owner of parcel No.55 – each was acres. The two parcels of land are adjacent to each other. He said that the defendant has built on his side of land and has taken about 3 acres. He prays that he be evicted.

As I stated the defendant did not tender any evidence. However in his amended defence filed on 26th March 2002 denied in Para.2 that plaintiff is the owner of parcel No.54. In Para.3 he denies entering into the plaintiff's land and occupying 3 acres as claimed by the defendant. He said that he occupies 5 acres of land being part of his late fathers parcel No.55. He further alleged that the plaintiff fraudulently had 3 acres of land allocated and registered in his name. He prayed for an order of rectification of the register to show the plaintiff owns 8.8 acres and owner of parcel 55 to own 13.2 acres.

The plaintiff produced a title deed which shows that he is the registered owner of land No.54 which measures 4.5 ha. Which is about 11.5 acres? It is clear that he and the defendant's father had bought a share from Abanchani Company and were entitled to 23 acres. What however seems to be the bone of contention is the acreage each was entitled to. Though the plaintiff says he was entitled to half share which in 11½ it emerged from defence and cross-examination that he was entitled to only 8.8 acres. Though the plaintiff was careful to avoid bring out issues, it came out that the land was cause of action in other cases – KISII RMCCC.NO.75 OF 1980 and KISII HCCC.NO.2 OF 2000 I checked the two cases. In KISII RM CC.NO.75 of 1980 the court ordered that the plaintiff and the defendant's father share the land in ration of 2:3 – The plaintiff herein was to get 2/5 share of the land.

The decision still stands and has not been appealed against. It should be noted that by then the land had not been subdivided and registered. Subsequently the defendant filed HCCC.NO.2 OF 2000 claiming the same land. However the plaintiff herein applied for the suit to be struck out as being res judicata vide KISII RM.CC.NO.75 OF 1980. The court struck out the suit on that ground. What this means therefore is that the decision in KISII RM CC.NO.75 OF 1980 still stands unchallenged. It seems that subsequent to that ruling the land was subdivided and registered. Plaintiff got 11.5 acres and the father of the defendant got the same. The plaintiff did not explain how he got 11.5 acres. The lower court had ordered he gets 2/5 of 23 acres. 2/5 of 23 is 8.8 acres. It certainly is clear that the order in RM CC.NO.275 OF 1980 was never followed. It is worth to note that the defendants are said to be occupying 3 acres of the plaintiff's land.This possibly is the land which should have gone to his father. There must have been a mistake in the title deed which showed the plaintiff is registered as proprietor of 4.454 (11½ acres) when in fact he should have registered to be the owner of 8.8 acres. He possibly never pointed this to the Land Registrar. He must have been satisfied with the judgment in RM CC.NO.75 of 1980 and that is why he never appealed.

I therefore find that the plaintiff has failed to prove his case. I direct that the register be rectified in respect of the two parcels of land as per the judgment in RM CC.NO.75 of 1980. Plaintiffs be registered as owner of 8.8 acres and the estate of late Opande to own 13.2 acres.

Each party will bear its own costs.

Dated                      at                      Kisii                      this                      21st                      October                      2004.

**KABURU BAUNI**

**JUDGE**

**21/10/04**

Mr.

Ondari

for

Mr.

Soire

for

plaintiff.

**KABURU BAUNI**

**JUDGE.**