



**Omunyokho v Omunyokho (Environment & Land Case 472 of 2014)
[2023] KEELC 19812 (KLR) (18 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 19812 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 472 OF 2014
DO OHUNGO, J
SEPTEMBER 18, 2023**

BETWEEN

HENRY MADAKWA OMUNYOKHO PLAINTIFF

AND

CHARLES ONDAKO OMUNYOKHO DEFENDANT

JUDGMENT

1. Proceedings in this matter commenced through plaint dated 27th August 2012, which the plaintiff filed in the High Court against the defendant who is his stepbrother. The matter was later transferred to this court. The plaintiff averred that he was the registered proprietor of the parcel of land known as Butsotso/Shikoti/2310 which ceased to exist in the year 1997 when he subdivided it into Butsotso/Shikoti/7122 and Butsotso/Shikoti/7123, after which the said subdivisions were further subdivided. That the foregoing notwithstanding, the defendant purported to subdivide the parcel of land known as Butsotso/Shikoti/2310 in the year 2001 into Butsotso/Shikoti/7164 which he registered in the plaintiff's name and Butsotso/Shikoti/7165 which he registered in his name.
2. The plaintiff further averred that the subdivision by the defendant was illegal and a nullity. He stated that there had been litigation between the parties in Kakamega CM Miscellaneous Application No 38 of 1983, Kakamega CMCC No 792 of 1989 and HCA No 27 of 2010. He therefore prayed for judgment against the defendant for nullification or cancellation of Butsotso/Shikoti/7164 and Butsotso/Shikoti/7165, costs of the suit and any other relief that the court deems just and expedient.
3. The defendant filed a defence and counterclaim in which he averred that the subdivisions known as Butsotso/Shikoti/7122 and Butsotso/Shikoti/7123 were nullified through orders made in Kakamega CM Miscellaneous Application No 95 of 1997 and that Butsotso/Shikoti/7164 and Butsotso/Shikoti/7165 were created pursuant to orders in Kakamega CMCC No 792 of 1989. He further averred that he was the registered proprietor of Butsotso/Shikoti/7165 while the plaintiff was the registered proprietor of Butsotso/Shikoti/7164 and prayed that the plaintiff's suit be dismissed, a



declaration be issued that Butsotso/Shikoti/7164 and Butsotso/Shikoti/7165 are the only valid titles created from Butsotso/Shikoti/2310. He also prayed for costs.

4. Citing reasons of the defendant being bedridden and having obtained from the defendant power of attorney registered on 2nd November 2018 as Power of Attorney No 2793, the defendant's son Alex Kwatera Ondago moved the court through Notice of Motion dated 10th December 2018, seeking to substitute the defendant. The application was allowed by consent on 10th December 2018.
5. At the trial, the plaintiff testified and stated that he was the initial registered owner of Butsotso/Shikoti/2310 which he acquired in 1983 from his father Stephen Munyokho Tsimbwere before his father's death in 1984. That it was his late father's wish that he holds the parcel in trust for himself and his younger brother Justo Kwatera. That the defendant was given his land but refused, instead demanding a bigger share for himself and his two brothers hence their shares remained in the name of the plaintiff's father in Butsotso/Shikoti/2306.
6. The plaintiff further stated that in 1981, he filed Kakamega CM Miscellaneous Application No 38 of 1983 and was granted an eviction order against the defendant herein, which order was executed. That the defendant went back to the land and settled on it in 1989, and the plaintiff filed another case being Kakamega CMCC No 792 of 1989 wherein the court ordered for sub-division Butsotso/Shikoti/2310. That in 1997, he subdivided Butsotso/Shikoti/2310 into two equal parcels being Butsotso/Shikoti/7122 and Butsotso/Shikoti/7123. That he further subdivided Butsotso/Shikoti/7122 into two parcels being Butsotso/Shikoti/7207 and Butsotso/Shikoti/7208 and that he is holding parcel number Butsotso/Shikoti/7123 in trust of his younger brother Justo Kwatera Omunyokho.
7. The plaintiff also stated that he transferred parcel number Butsotso/Shikoti/7208 to his sons Stephen Omeno and Dennis Inyangala who then subdivided it Butsotso/Shikoti/14314 and Butsotso/Shikoti/14315 registered in their names. That parcel Butsotso/Shikoti/7207 was subdivided into parcels Butsotso/Shikoti/15427 and Butsotso/Shikoti/15428 which were then registered in the names of the plaintiff and one Johngray Shiraku Madakwa respectively. That notwithstanding the earlier subdivisions, the defendant purported to cause a second subdivision of Butsotso/Shikoti/2310 into Butsotso/Shikoti/7164 and Butsotso/Shikoti/7165 which he registered in the plaintiff's name in the year 2001 after which he transferred Butsotso/Shikoti/7165 to himself. That the parcels created by the defendant are fictitious since they were created after the plaintiff's subdivisions of 1997.
8. The plaintiff went on to state that he is aware that there was a ruling in CMCC No 792 of 1989 in which the court ordered that Butsotso/Shikoti/2310 be divided into two and that one portion should go to the defendant. That he complied by subdividing the land into two parcels: one for himself and a second parcel which is in his name but which he is holding for his brother Justo in accordance with their father's wishes. That he appealed against the decision in CMCC No 792 of 1989 through HCCA No 20 of 1995 but the appeal was dismissed after which he appealed to the Court of Appeal through Kisumu Civil Appeal No 202 of 1996. That the Court of Appeal referred the parties to the Land Disputes Tribunal and that the defendant lodged a claim against him before the Land Disputes Tribunal whose decision was adopted through Kakamega Misc. Award No 80 of 2009.
9. The plaintiff's case was then closed.
10. Alex Kwatera Ondago testified as DW1. He stated that the defendant Charles Ondako Omunyoko who was his father passed away. He adopted the defendant's witness statement dated 27th February 2015 as his evidence in chief. The defendant had stated in the witness statement that he was the registered owner of parcel number Butsotso/Shikoti/7165 and that the plaintiff who was his stepbrother was



the registered owner of parcel number Butso/So/Shikoti/7164, both parcels being subdivisions of parcel number Butso/So/Shikoti/2310. That the plaintiff caused a parallel subdivision of Butso/So/Shikoti/2310 resulting into Butso/So/Shikoti/7122 and Butso/So/Shikoti/7123, which were in turn nullified and reverted to Butso/So/Shikoti/2310 through an order issued in Kakamega CM Misc. Application No 95 of 1997.

11. The defendant further stated that parcel numbers Butso/So/Shikoti/7164 and Butso/So/Shikoti/7165 were created pursuant to orders issued in Kakamega PMCC No 792 of 1989 and that the plaintiff appealed against the said orders through Kakamega HCCA No 20 of 1995 but the appeal was dismissed. That, consequently, the only valid subdivisions of parcel number Butso/So/Shikoti/2310 are parcel numbers Butso/So/Shikoti/7164 and Butso/So/Shikoti/7165 and that the plaintiff's appeal to the Court of Appeal through Kisumu CA No 201 of 1996 was referred to the Land Disputes Tribunal. He added that the plaintiff and his sons filed the following suits concerning parcel number Butso/So/Shikoti/2310: Kakamega RMCC No 38 of 1983, Kakamega PMCC No 792 of 1989, Kakamega HCCA No 20 of 1995, Kisumu Court of Appeal Civil Appeal No 201 of 1996, Kakamega SPMCC No 95 of 1997, Kakamega HCCC No 31 of 2002, Kakamega CMCC No 80 of 2009, Kakamega HCCA No 27 of 2010 and Kakamega HCCC No 417 of 2014.
12. DW1 went on to testify that the plaintiff did not do subdivision as was ordered in Kakamega CMCC No 790 of 1989 and that as of the date of his testimony, there were cases pending in court including CMELC No 70 of 2019, CMELC 155 of 2019 and criminal cases in which the plaintiff was litigating either in person or through his children. That as of the date of his testimony, the defendant's family was residing on parcel Butso/So/Shikoti/7165 while the plaintiff was in occupation of both parcels Butso/So/Shikoti/7164 and Butso/So/Shikoti/7165.
13. Joseph Makokha Wetumbile testified as DW2 and stated that the plaintiff and the defendant were his cousins, and that the plaintiff was given parcel number Butso/So/Shikoti/7164 which had a clear boundary marked by eucalyptus trees. That the plaintiff removed the boundary after the demise Stephen Tsimbwere Omunyokho who was the father of both the plaintiff and the defendant. That the plaintiff has forcefully established his home on the defendant's portion which is Butso/So/Shikoti/7165 and the plaintiff's actions led to disputes and the many court cases.
14. The defence case was then closed. Parties thereafter filed and exchanged written submissions. I have noted the respective submissions.
15. I have considered the parties' respective pleadings, evidence, and submissions. The issues that arise for determination are which of the two sets of subdivisions known as Butso/So/Shikoti/7122 and Butso/So/Shikoti/7123 on the one hand and Butso/So/Shikoti/7164 and Butso/So/Shikoti/7165 on the other are valid and whether the reliefs sought by the parties should issue.
16. The plaintiff's case as is manifest from his testimony is that he validly subdivided the parcel of land known as Butso/So/Shikoti/2310 in the year 1997 into Butso/So/Shikoti/7122 and Butso/So/Shikoti/7123 pursuant to orders made in Kakamega CMCC No 792 of 1989. A perusal of the judgment in in the said case which was delivered on 23rd February 1995 shows that his case was dismissed. The court found that the defendant herein was entitled to 5 acres, but the plaintiff herein used tricks to get a bigger portion. While declining to order eviction of the defendant herein, the court went ahead to order the plaintiff to subdivide and transfer to the defendant the portion that the defendant was occupying and in default the executive officer of the Subordinate Court to do so on his behalf.
17. In his testimony before this court, the plaintiff claimed that he complied with the judgment in Kakamega CMCC No 792 of 1989 by subdividing Butso/So/Shikoti/2310 into Butso/So/



Shikoti/7122 and Butso/7123 and that he kept one of the parcels for himself and his children while holding the second one in trust for his younger brother Justo Kwera. Clearly, he disregarded the judgment in Kakamega CMCC No 792 of 1989 when he refused to transfer land to the defendant as was ordered. He has now approached this court seeking to sanitize his contemptuous actions.

18. On the other hand, there is ample evidence on record that orders were issued on 15th June 1999 and on 23rd July 2001 in Kakamega SPMCC Miscellaneous Application No 95 of 1997 in which subdivision of Butso/7123 into Butso/7123 and other subdivisions were cancelled, and the title reverted to Butso/7123. There is also evidence that Butso/7164 and Butso/7165 were registered in September 2001, after the cancellation and after the judgment in Kakamega PMCC No 792 of 1989. Parcel Butso/7164 was registered in the name of the plaintiff herein while parcel Butso/7165 was registered in the name of the defendant herein, in accordance with the judgment.
19. Further, there is evidence that the plaintiff appealed against the judgment in Kakamega PMCC No 792 of 1989 through Kakamega HCCA No 20 of 1995 and that when the appeal was dismissed, he further appealed to the Court of Appeal through Kisumu Civil Appeal No 201 of 1996. The Court of Appeal resolved the appeal on 22nd January 1997 by referring the parties to the Land Disputes Tribunal. Subsequently, the defendant filed Lurambi Land Disputes Tribunal Claim No 119 of 2009 and the tribunal upheld his claim in its verdict dated 14th October 2009. The plaintiff's appeal to the Provincial Appeals Committee was dismissed and his subsequent appeal to the High Court through Kakamega HCCA No 27 of 2010 was equally dismissed and the titles in Butso/7164 and Butso/7165 upheld.
20. In view of the foregoing, I find that the subdivisions known as Butso/7122 and Butso/7123 are invalid and were cancelled in Kakamega SPMCC Miscellaneous Application No 95 of 1997. I further find that title numbers Butso/7164 and Butso/7165 are valid. It follows therefore that the plaintiff's case is without merit and is therefore dismissed. On the other hand, the defendant has established his counter claim and is thus entitled to relief.
21. Costs normally follow the event and in litigation between close family members, the court tends not to impose costs on any party, with a view to avoiding fraying the family fabric any further. That said, costs are at the discretion of the court and are in fact a useful consideration in discouraging endless litigation. The plaintiff herein has kept the defendant busy with several cases in the justice system. It is now time to dissuade him from filing more cases on this dispute. I am persuaded that imposing costs on him will be a significant consideration on whether he files more suits.
22. I therefore make the following orders:
 - a. The plaintiff's case is dismissed.
 - b. It is hereby declared that Butso/7164 and Butso/7165 are the only valid titles created from land parcel known as Butso/7123.
 - c. The defendant shall have costs of the suit.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 18TH DAY OF SEPTEMBER 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:



Mr Kombwayo holding brief for Mr Manyoni for the plaintiff

Mr Ligare holding brief for Mr Amasakha for the defendant

Court Assistant: E. Juma

ELCC No 472 of 2014 (Kakamega) Page 2 of 2

