



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC APPEAL NO. 192 OF 2017**

**GEORGE OTIENO OJANY.....APPELLANT**

**VERSUS**

**MATHEWS OWUOR OJANY.....1<sup>ST</sup> RESPONDENT**

**JOHN OUMA OJANY.....2<sup>ND</sup> RESPONDENT**

**AGNES ADERA OYUGI.....3<sup>RD</sup> RESPONDENT**

**KESIA ATIENO OSODO.....4<sup>TH</sup> RESPONDENT**

(Being an Appeal from the Ruling of Kisumu East District Land Disputes Tribunal in case No. 1 of 2011 adopted by the Chief Magistrates Court at winam on 3<sup>rd</sup> February 2011).

**BETWEEN**

**MATHEWS OWUOR OJANY.....1<sup>ST</sup> PLAINTIFF**

**JOHN OUMA OJANY.....2<sup>ND</sup> PLAINTIFF**

**AGNES ADERA OYUGI.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**GEORGE OTIENO OJANY.....1<sup>ST</sup> DEFENDANT**

**KESIA ATIENO OSODO.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**BRIEF FACTS**

Mathews Owuor Ojany, John Ouma Ojany and Agnes Adera brought a matter before the Kisumu East District Land Tribunal against George Otieno Ojany and Kesia Atieno Osodo for land parcel number KISUMU/WATHOREGO/139 vide case number 63 of 2009. The matter was heard on 16<sup>th</sup> October 2009 before members of the Tribunal.

Mathews Owuor Ojany upon being sworn in stated that he is the eldest son of the late Ojany and he had brought the matter before the tribunal because George Otieno Ojany had sold part of their father's parcel of land KISUMU/WATHOREGO/139 MEASURING 0.40 Ha.

That George sold part of the parcel of the suit property to Asewe Ogada at a cost of Kshs. 80,000/= who has fenced. He wants the Tribunal to share the parcel of land among the 5 sons of the late Ojany.

The late Ojany's homestead was established in 1968 and was fenced with euphorbia plant. The First Defendant sold all his parcel of land he was given by our mother. That the first Defendant and the 2<sup>nd</sup> Defendant should establish their homes so that the homestead can be subdivided.

On cross examination by the 1<sup>st</sup> Defendant, the 1<sup>st</sup> Plaintiff was asked whether he knows where the title deed of the suit property is and he answered in the affirmative. He went ahead to produce the title deed. That demarcation of land was in Kajulu in 1978 and three people were registered under the suit property. The late Ojany had 10 parcels of land.

The 1<sup>st</sup> Plaintiff was tasked to name all the 10 parcels of land that the late Ojany had. The 1<sup>st</sup> Plaintiff stated that he does not know whether the land in Kowidi was sold to a Kisii man. He further stated that he reported the matter to the Chief and the Assistant Chief who advised him to file this case with the Tribunal.

The 1<sup>st</sup> Plaintiff further stated that he sued Kesia Osodo because she is the one who signed the mutation form. That family members refused to sub-divide the land.

The 2<sup>nd</sup> Plaintiff John Ouma Ojany in his examination in chief stated that he is the 4<sup>th</sup> son of the late Ojany. The 1<sup>st</sup> Defendant and him are still living in the homestead of the late Ojany. The 1<sup>st</sup> Defendant sold part of the land to three people and one of the buyers fenced his parcel of land. One of the buyers who fenced my land fenced together with his crops and denied him access to the garden.

His brother Mathews Owuor bought one piece which was combined with the suit property, 2<sup>nd</sup> piece was for Alex Ojany which was given to him by the late Ojany and the 3<sup>rd</sup> piece is their father's homestead. The 3<sup>rd</sup> piece was left for the sons of the late Ojany to share amongst themselves. The said parcel of land was registered in the names of the 5 sons but later they found out that names of two sons were missing.

When they complained to the elders, the elders informed them that the homestead cannot be subdivided while people are still living on it. The names registered were Mathews Owuor Ojany, Alex Odongo Ojany and George Otieno Ojany and those whose names were omitted were Maricuse Oyuga Ojany and John Ouma Ojany.

The 2<sup>nd</sup> Plaintiff went on to state that he bought land which was not part of the disputed land and their mother asked him to give the land to his brother George Otieno Ojany because it was situated where he could not build a homestead and before he could give out the land, George sold it to Pastor Ocheing.

The 1<sup>st</sup> Defendant has no land since he sold all the parcels of land that he was given.

On cross examination by the 1<sup>st</sup> Defendant, the 2<sup>nd</sup> Plaintiff stated that two parcels were registered in his names. He confirmed that 1<sup>st</sup> Defendant and him were both sons of the late Ojany and he has the two title deeds.

Agnes Adera Oyuga the 3<sup>rd</sup> Plaintiff upon being sworn in stated that she got married to one of the five sons, the late Maricuse Oyuga Ojany. Her mother in law showed her a portion of land before she died. In 2009, someone had fenced her portion of land with a barbed wire denying her access to her garden. She further informed the Tribunal that she lost her husband and son.

George Otieno Ojany the 1<sup>st</sup> Defendant upon being sworn in, informed the Tribunal that the parcel of land in dispute that is KISUMU/WATHOREGO/139 has three pieces of land that is Kochola, Kochondo and Kopot. That Kopot was bought by his mother at KShs. 350/= in 1974 and was registered in the name of Mathews Owuor Ojany.

That Mathews was staying in Kisumu town. Registration of the land was done in 1979 and the homestead was left for him as a last born by his late mother when all family members were present. The 1<sup>st</sup> Defendant informed the Tribunal that he subdivided the land and took his portion KISUMU/WATHOREGO/3488 and Alex Odongo's family took KISUMU/WATHOREGO/3490.

On cross examination by the 1<sup>st</sup> Plaintiff, the 1<sup>st</sup> Defendant stated that the homestead of Ojany was subdivided and given to his mother and he was present when the sub-division took place. The 1<sup>st</sup> Plaintiff was present when the sub-division took place and the 1<sup>st</sup> Plaintiff was the one who applied for the subdivision.

That the 1<sup>st</sup> Plaintiff refused to return the title deed to the land registrar and the title deed for KISUMU/WATHOREGO/139 was cancelled. The 1<sup>st</sup> Plaintiff does not know about the new numbers because he was called by the land registrar and he refused to go. When asked about whether he knows if a caution was lodged on the parcel of land, the 1<sup>st</sup> Defendant stated that he removed the caution with the help of the land registrar. They were 7 family members when they went to remove the caution. That his mother bought land when he was 10 years old.

When asked about who bought land that was in front of Ojany's homestead, the 1<sup>st</sup> Defendant said that the whole land was for his late father Ojany. He was not able to inform the Tribunal who he sold the land to and instead he said that he wants to develop his portion.

On cross examination by the 2<sup>nd</sup> Plaintiff, George confirmed that he is the son of the late Ojany and between him and the 2<sup>nd</sup> Plaintiff, the 2<sup>nd</sup> Plaintiff is the eldest. That it is not a must for the 2<sup>nd</sup> Plaintiff to know if the land is being subdivided because his name was not registered in the title.

His mother was the one who subdivided the land and on the day of sub-division, he did not go to school. When asked who was subdividing the land between his mother and Mathews, the 1<sup>st</sup> Defendant informed the Tribunal that their mother was the chairlady and he gave him land.

The 1<sup>st</sup> Defendant was also cross examined by the elders where he stated that he did not report the dispute to the clan members nor chief. He never called a family meeting. He confirmed that he subdivided the land into three portions and the new numbers are

KISUMU/WATHOREGO/3488,3489 AND 3490. George Otieno Ojany and Mathews Owuor Ojany own KISUMU/WATHOREGO/3488 and Kesia Osodo owns KISUMU/WATHOREGO/3489 and 3490.

Kesia Osodo the 2<sup>nd</sup> Defendant upon being sworn in, informed the Tribunal that she got married to the late Alex Odongo Ojany. When she got married, she found Mathews Owuor Ojany and John Ouma were away but came back later.

That her mother in law gave her two parcels of land namely Kalusi and Kachondo and she has been cultivating them to date. After the death of her husband, she took 8 months to establish her home. She established her home because she was not in good terms with the brother in law, George Otieno and John Ouma Ojany.

After she had established her home, she became sick and she was taken to the hospital where she stayed there for one month. She could not afford to pay the hospital bill and she approached Mathews Owuor Ojany to sell part of her portion of land. She used the money to pay the bill and the balance was used to purchase another land. When she wanted to transfer the land she had bought, her in-law Mathews told her to wait until the land dispute is resolved. However, the buyer advised her to remove her portion of land and then leave the one with a dispute.

On cross examination, she confirmed that the 1<sup>st</sup> Plaintiff had informed her to wait until the dispute is resolved. The 1<sup>st</sup> Plaintiff did not sign the subdivision documents but promised to sign. She wants the homestead of Ojany to be subdivided so that each family member gets their share.

On cross examination by the 2<sup>nd</sup> Plaintiff, she confirmed that the subdivision was planned by both of them.

When she was cross examined by the elders, she stated that she does not know which plan was used to sub-divided the land and the 1<sup>st</sup> Plaintiff told him that he will sign the documents for her.

The Tribunal found out that:

1. KISUMU/WATHOREGO/139 measuring 0.4Ha had been partly sold to some outsiders without the consent of some family members.
2. A fence of barbed wire belonging to some of the buyers out-cross the garden of the 2<sup>nd</sup> Plaintiff, John Ouma Ojany including part of his plantations and denying access to his garden.
3. The title deed for the disputed parcel was produced before the tribunal by the 1<sup>st</sup> Claimant.
4. Kesia Osodo had arranged for a subdivision on behalf of her late husband Alex Odongo Ojany and obtained her portion being a third shown in the title deed.
5. The two sons of Ojany, the 4<sup>th</sup> and the 5<sup>th</sup> sons were still living in the disputed parcel.

The Tribunal in its decision decided that KISUMU/WATHOREGO/139 be sub-divided as follows:

1. Kesia Atieno Osodo; the Tribunal endorses high court succession ruling no.250 of 2009 in Kisumu a portion of 1/3 was done.
2. All other remaining family members to share the remaining 2/3 as follows:
  - i. District surveyor to subdivide land parcel KISUMUWATHOREGO/139 excluding the 1/3 portion of Kesia Atieno Osodo in accordance with the high court ruling in SUCCESSION No. 250 of 2007.
  - ii. Mathews Owuor Ojany
  - iii. John Ouma Ojany
  - iv. Agnes Otieno Ojany
  - v. George Otieno Ojany

That the above to share 2/3 of the parcel KISUMU/WATHOREGO/139 equally.

The Tribunal further held that George Otieno Ojany by virtue of a last born to apportioned areas covering grave yards of his parents, Luo customary law apply.

All title deeds purported to have been issued earlier on subdivision basis on this parcel except one of Kesia Osodo's 1/3 portion be cancelled.

Right of Appeal is allowed within 30 days from the date of adoption by the court at the Provincial Appeal Committee Nyanza in Provincial Commissioner's Office Kisumu.

The Chief Magistrate's Court at Kisumu adopted the award of the Tribunal and the 1<sup>st</sup> Plaintiff Goerge Otieno Ojany being dissatisfied with the Ruling of Kisumu East District Land Disputes Tribunal appealed to this court.

### **GROUND OF APPEAL**

George Otieno Ojany appealed the decision of the Tribunal against Mathews Owuor Ojany, John Ouma Ojany, Agnes Odera Oyugi and Kesia Atieno Osodo based on the following grounds:

1. That the Tribunal erred in law and fact by deciding a case where the land number does not exist due to subdivision earlier done.
2. That the Tribunal erred in its Ruling by deciding a case involving land that had valid title deeds which is beyond its mandate.
3. That the Tribunal erred in totality by not taking into account the Luo tradition whereby the last born inherits the homestead.
4. That the tribunal did not put into consideration that the land was initially meant for three people and as per his statement, it was to be subdivided into three portions as per direction from his late other giving distinctive portions to each son.
5. That the tribunal failed the test in that of the three sons of his father had agreed for subdivision of the land having obtained consent from the Land Control Board.
6. That the Tribunal erred in not taking into consideration the various pieces of land that his father had and their distribution to various sons.
7. That the Tribunal erred by not considering the period under which the first subdivision was done and the last and that means that the Respondents wanted to frustrate him while other family members had put up their homes and are developing.

The Appellant further prayed that the Appeal be allowed as the land had already been subdivided as per the consent and new numbers issued.

On 5<sup>th</sup> March 2018, Hezbourne Ouma Ong'elleh, Dave Odhiambo Oricho, Bernadette Kasyoka Mbala and Grace Awuor through the firm of Nyanga & Co Advocates as interested parties filed a Notice of Motion Application for orders that;

1. The Application be certified urgent.
2. Hezbourne Ouma Ong'elleh, Dave Odhiambo Oricho, Bernadette Kasyoka Mbala and Grace Awuor be admitted as interested parties to the suit.
3. Upon grant of the order above, the Applicants be at liberty to file pleadings in relation to this suit.
4. Costs be provided for.
5. Any other relief that the court may deem just and fit to grant.

The Application was based on grounds that the Applicants are the registered owners of a portion of parcel of land KISUMU/WATHOREGO/139 the suit property which has been subdivided and Titles issued. The Applicants have been in occupation of the land and have been using it for livelihood.

The Applicants were never involved by the parties to this suit during the hearing of the Tribunal case and they have interest in the suit and they ought to be accorded an opportunity to defend their interests.

On 24<sup>th</sup> October 2018, the Notice of Motion Application was dismissed with costs to the Respondents.

### **APPELLANT'S SUBMISSIONS**

The Appellant filed his submissions on 12<sup>th</sup> November 2019 where he submitted that ground number two in the Memorandum of Appeal was challenging the jurisdiction of the Lands Disputes Tribunal to take away the Appellant's title and order for its subdivision to the Respondents.

The Appellant relied in the case of Motor Vessel **M.V. Lillian's vs Caltex Oil (Kenya) Limited (1989) LLR 1653 page 10**

***“Jurisdiction must be acquired before judgment is for this reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on evidence before the court. It is immaterial whether the evidence is scanty or limited.....the moment the court determines that it has no jurisdiction it has to down it's tools and proceed no further.”***

The Land Disputes Tribunal was as a result of section 4 of the Land Disputes Act 1990 which now repealed and the jurisdiction of the Tribunal under section 3(1) states that the jurisdiction of the Tribunal is to:

- a) *The division of or the determination of boundaries to land including land held in common.*
- b) *A claim to occupy or work land.*
- c) *Trespass of land.*

The Appellant submitted that the Tribunal was never given the mandate to take away title. The Tribunal went ahead to compel the District Surveyor to subdivide land parcel KISUMU/WATHOREGO/139. That the Tribunal acted *ultra vires* its powers.

The Appellant relied in the case of Moses **Makokha Osany vs Elekia Mabosio Marenga (2018) eKLR** where **Ho. Lady Justice N.A. Matheka** held that;

***“in my view the tribunal had powers to deal with registered land is incorrect. What the tribunal was prohibited from undertaking is a determination with respect to title to land”***

The Appellant also relied in **Francis Odhiambo Ituru vs Jacton Okula Aduogo (2017) eKLR**.

The Appellant prayed that the Appeal be allowed and the award adopted by the Districts Lands Tribunal together with the Adopted decision be set aside.

### **RESPONDENTS SUBMISSION**

The Respondents through Mathews Ojany submitted that the Land Tribunal came into their home to check what was on the ground and found out that the Appellant had unlawfully sold land with a fake title deed. The Respondent maintained that he was in possession of the original title deed.

He submitted that the Tribunal had jurisdiction to hear and determine the dispute. He further contended that since the decision of the Tribunal was adopted by the court, it is the court that ordered the suit property to be subdivided among the sons of the late Ojany.

He prayed that the Appeal be dismissed and the court do order for a subdivision of KISUMU/WATHOREGO/139

### **ANALYSIS AND DETERMINATION**

The main issue of determination in this Appeal is discussed as follows:

- a) Whether the Land Tribunal had Jurisdiction to determine this dispute.

The Jurisdiction of the Land Tribunals as stated in the now repealed Land Disputes Tribunal Act 303A is stated in Section 3(1) as follows;

***“Subject to this Act, all case of a civil nature involving a dispute as to ;-***

- a. The division of, or the determination of boundaries to land, including land held in common;***
- b. A claim to occupy or work land; or***
- c. Trespass to land,***

***Shall be heard and determined by a Tribunal established under section 4”.***

**Peter Atambo Magoya v Stella Osebe [2019] eKLR** the held as follows;

***“In the present matter, the Tribunal as I have held lacked jurisdiction to adjudicate the dispute before them as it touched on title to registered land. The proceedings before them and the decision they made were null and void abinitio. The consequent adoption of the decision of the Tribunal as judgment of the court by the Magistrate’s Court was of no effect. The Magistrates Court could not give effect to something that was already a nullity.”***

In the case of **Republic -vs- Chairman Siaya District Land Tribunal & Another Ex parte Augustine Ogola Odeny [2009] eKLR** referred to the court by the Respondent, Karanja, J. cited with approval the case of **Jotham Amunavi -vs- Chairman Sabatia Division Land Disputes Tribunal & Another - CA No. 256 of 2002 at Kisumu** where the Court of Appeal observed thus:-

***“...if the implementation of the decision of the tribunal entails, the subdivision of the suit land into two parcels opening a register in respect of each subdivision and thereafter the transfer of the subdivision of half acre its clear that the proceedings before the tribunal related to both title to land and to beneficial interest in the suit land and such a dispute is not within the provisions of Section 3(1) of the Land Disputes Tribunal Act as such dispute can only be tried by the High Court, or by the***

***Resident Magistrates Court where such latter court has jurisdiction.”***

This court finds that the dispute before the Tribunal did not relate to the provisions of Section 3 (1) of the Land Disputes Act, but related to title to land and therefore the Tribunal acted beyond its jurisdiction by compelling the District Surveyor to sub-divide land parcel number KISUMU/WATHOREGO/139. I therefore allow the Appeal and set aside the award /decision of Kisumu East Land Dispute Tribunal. The adoption of the decision of the Tribunal by the Chief Magistrates Court at Winam in case number 1 of 2011 issued on 3<sup>rd</sup> February 2011 is hereby set aside.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 1<sup>ST</sup> DAY OF OCTOBER, 2021**

**ANTONY OMBWAYO**

**JUDGE**

*This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020.*

**ANTONY OMBWAYO**

**JUDGE**