



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**ELC CASE NO. 47 OF 2018 (OS)**

**IN THE MATTER OF TITLE NO. SOUTH SAKWA/MIGWENA/2375 (ORIGINAL NO. 681)**

**BETWEEN**

**VINCENT ODHIAMBO KANYANG'ONDA.....PLAINTIFF**

**VERSUS**

**JOHN OKWACH OCHIENG.....1<sup>ST</sup> DEFENDANT**

**BENARD AUDI OWUOR.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

Vincent Odhiambo Kanyang'onda (hereinafter referred to as the plaintiff) has come to court by way of Originating Summons against John Okwach Ochieng and Bernard Audi Owuor praying for a declaration that title No. South Sakwa/Migwena/2375 (Original No. 681) is ancestral land belonging to the Families of the late Nyangonda Aboge and Late Ochieng Odero who have both lived, occupied and settled in the property for over 60 years since the 1950's.

That John Okwach Ochieng & Bernard Audi Owuor through Successions as personal Representatives and heirs of the Late Ochieng Odero hold the property and Title in Trust as family and ancestral land on behalf of the families of the Late Ocheing Odero and the Late Nyangonda Aboge who settled on the said Land and have lived thereon for over 60 years in equal shares.

The plaintiff further seeks an order directing the Defendants John Okwach Ochieng and Benard Audi Owuor as trustees to sub-divide and transfer half portion of Title No. South Sakwa/Migwena/2375 (Original No. 681) to the Plaintiff on behalf of the family of the Late Nyangonda Aboge for distribution amongst the family members and retain the remaining half on behalf of the family of the Late Ochieng Odero.

Moreover, the plaintiff seeks an order that in default of compliance with the order above within a specified period by the Defendants, the Deputy Registrar of this Honourable Court do execute survey mutation and Transfer Forms subdividing Title No. South Sakwa/Migwena/2375 (Original No. 681) into two equal portions and one half be transferred to the plaintiff in trust for the family of the late Nyang'onda Aboge and the other half be retained by the Defendants for the Family of the Late Ochieng Odero. Lastly, the plaintiff prays that the costs of the suit and preparation of survey mutation and Transfer fees be paid by the Defendants in any event.

The summons is taken out on grounds that the Title No. SOUTH SAKWA/MIGWENA/2375 (ORIGINAL NO. 681) is Ancestral and family land belonging to the Families of the Late Ochieng Odero and the Late Nyang'onda Aboge who settled in the aforesaid land in the 1950's and both families have lived and cultivated the land for over 60 years.

The Homes of both Families are built on the subject land and the families have peacefully lived and co-existed in the land for over 60 years with defined portions/boundaries, homes and farm lands for cultivation.

The Late Nyag'onda Aboge died in late 1969 before land Adjudication leaving his two (2) wives and children settled on the suit land. In the early 1970's during land Adjudication, the late Ochieng Odero was registered on the land since the wives of the late Nyangonda Aboge were illiterate and on the understanding that once the children of the late Nyangonda Aboge became adults, the late Ochieng Odero would transfer to them their portion of the land at an appropriate time. Each family had its boundaries clearly marked.

Unfortunately, the late Ochieng Odero also died in the 1970's and both families continued to live on the subject land peacefully in their respective portions until 2017.

In or about 2017 one of the sons of the 1<sup>st</sup> Defendant called Nicholas Omondi Oduko decided to cross the demarcated Boundary and built his home on a portion of the land belonging and occupied by the late Nyang'onda family only to discover that the Defendants had applied for Succession over the estate of the Late Ochieng Odera and obtained a Title Deed No. 1276623 issued on 23/11/17 in their joint names and were in the process of sub-dividing and selling portions of the land.

The Plaintiff reported the matter to the area chief who instructed the Assistant Chief East Migwena Sub – location to convene an urgent meeting on 18/11/17 and the parties agreed that a joint survey would be conducted, the parcel would be sub-divided into two equal parts on the demarcated boundaries and the 1<sup>st</sup> Defendant would compensate the family of the late Nyang'onda Aboge by equal land where his son Nicholas Omondi Oduko had built which was within the Nyang'onda Family Land.

Using the minutes of the meeting and agreement reached at the meeting of 18/11/17 before the Assistant Chief and attended by the clan and family members, the plaintiff registered a Restriction against the land on 14/12/17.

The Plaintiff consequently arranged for the survey and sub-division of the land as earlier agreed through Bondo District Surveyor on 25/05/18 but the Defendants and their family members refused, failed and neglected to attend hence the survey process aborted after the plaintiff had incurred costs in bringing the District Surveyor.

On or about 11/06/18 the Plaintiff instructed an Advocate to write a demand letter to the Defendants which letter was served through the Assistant Chief requiring the Defendants to abide by the agreements and resolutions of the meeting of 18/11/17 but the Defendants have refused, failed or neglected to abide by the agreement, resolutions and demands.

According to the plaintiff, the suit property is ancestral and family land and both families have settled and lived thereon for over 60 years. The Plaintiff's family of the late Nyang'onda Aboge have an overriding interest and rights over the parcel of land and the Defendants though registered on the Title through Succession holds the land in trust for both the families of the late Ochieng Odera and Nyang'onda Aboge in equal shares and should not be allowed to deal with the land as if it was their personal property privately acquired.

The Plaintiff is apprehensive that following the actions of the Defendants, they may secure removal of the restriction and sub-divide and sell portions of the land to unsuspecting third parties to the detriment of the plaintiff and their families.

The Plaintiff's claim is grounded under the provisions of Section 28 (b) of the Land Registration Act and Article 63 (2) (d) (ii) of the Constitution having been born in the land in 1962 when the families were already settled thereon and have both lived therein for over 60 years.

In the supporting affidavit the plaintiff states that he is the surviving son of the late Nyang'onda Aboge together with his step brother Okoth Nyang'onda and was born in 1962 as the last son of the late Nyang'onda Aboge who died in 1969 and the late Clementia Gor Nyang'onda who died in 1976.

Their family has lived on the suit parcel of land since 1950's and have occupied the land equally with the family of the late Ochieng Odera with defined boundaries for the homesteads and farms for cultivations. The homes of both families are built on the subject land and the families have peacefully lived and co-existed in the land for over 60 years with defined portions/boundaries, homes and farm lands for cultivation without any problem. The late Nyang'onda Aboge died in late 1969 before Land Adjudication leaving his two (2) wives and children settled on the Suit Land.

That in the early 1970's during Land Adjudication, the Late Ochieng Odera was registered on the land since the plaintiff's mothers who were the widows of the Late Nyang'onda Aboge were illiterate and on the understanding that once the children of the late Nyang'onda Aboge became adults, the Late Ochieng Odera would transfer to them their portion of the land at an appropriate time. Each family had its boundaries clearly marked on the land with fences and hedges. That unfortunately the Late Ochieng Odera also died in the early 1970's and both families continued to live on the subject land peacefully in our respective portions until 2017.

That in or about 2017 one of the sons of the 1<sup>st</sup> Defendant called Nicholas Omondi Oduko decided to cross the demarcated Boundary and built his home on a portion of the land belonging and occupied by the plaintiffs family only to discover that the Defendants had applied for Succession over the estate of the Late Ochieng Odera and obtained a Title Deed No. 1276623 issued on 23/11/17 in their joint names and were in the process of sub-dividing and selling portions of the land without the plaintiffs knowledge. This was after the death of his two elder brothers, the last having died in early 2017.

The plaintiff reported the matter to the Area Chief who instructed the Assistant Chief East Migwena Sub-location to convene an urgent meeting on 18/11/17 and the parties agreed that a joint survey would be conducted, the parcel would be sub-divided into two equal parts on the demarcated boundaries and the 1<sup>st</sup> Defendant would compensate the plaintiffs family by equal land where his son Nicholas Omondi Oduko had built which was within the Nyang'onda family land belonging to his late mother (Clementina).

That using the minutes of the meeting and agreement reached at the meeting of 18/11/17 before the Assistant Chief and attended by the clan and family members, He registered a Restriction over the land on 14/12/17.

That he consequently arranged for the survey and sub-division of the land as had been agreed through Bondo District Surveyor on 25/05/18 but the Defendants and their family members refused, failed and neglected to attend hence the survey process aborted after he had incurred heavy expenses in bringing the District Surveyor.

That on or about 11/06/18 he instructed an Advocate in Nairobi to write a demand letter to the Defendants which letter was served through the Assistant Chief requiring the Defendants to abide by the agreements and resolutions of the meeting of 18/11/17 but the Defendants have

refused, failed or neglected to abide by the agreement, resolutions and Demands by his family. The Suit Property is Ancestral and Family Land and both families have settled and lived thereon for over 60 years and is not private property of the defendants.

The family members of the late Nyang'onda Aboge including the plaintiff have an overriding interest and Rights over the parcel of land and the Defendants though registered on the Title through succession holds the land in Trust for both the families of the Late Ochieng Odero and Nyang'onda Aboge in equal shares and should not be allowed to deal with the land as if it was their personal property privately acquired.

That the Plaintiff is apprehensive that following the actions of the Defendants, they may secure removal of the Restriction over the land and sub-divide and sell portions of the land to unsuspecting third parties to the detriment of him and their family members.

The plaintiff produced a Certificate of Official Search dated 15/05/18 from the Land Registrar – Bondo District Land Registry, the Maps (Registry Index Maps) for the subject property, the minutes of the meeting held on 18/11/17 signed and stamped by the Assistant Chief- east Migwena Sub-location, the Demand letter dated 11/06/18 together with copies of the ID's of the surviving members of the late Nyang'onda Aboge family.

On the other hand, the Defendants filed a joint replying affidavit stating that the late Nyang'onda Aboge settled on the suit land after the late Ochieng Odero, who was the father to the 1<sup>st</sup> Defendant and grandfather to the 2<sup>nd</sup> Defendant. He gave a small portion of land to the Nyang'onda Aboge to temporarily build a house but the latter was to leave.

The Title No. SOUTH SAKWA/MIGWENA/2375 (ORIGINAL NO. 681) is an ancestral land that solely belongs to the family of the late Ochieng Odero.

The defendants admitted that both families' homes stand on the suit land but they reiterate that the family of the late NYANG'ONDA ABOGE are not entitled to the suit land and their stay on the suit land was out of goodwill from the late Ochieng Odero.

They stated that the land allocation was done around 1965 or thereabouts while the father of the plaintiff was still alive. They averred that if at all the allocation of land was done after the demise of the plaintiff's father and if a portion of the suit was entitled to the family of the late Nyang'onda Aboge, the Adjudication officers could have registered it into the names of the leaving dependants of the late Nyang'onda Aboge his demise notwithstanding.

On the issue of illiteracy, the Defendants stated that the adjudication officers were only interested in the names of land owners and not the level of education when performing their work of registering lands into the names of the owners.

They admitted that a meeting was held before the area assistant Chief but the agreement was that out of good will, they agreed to subdivide to the family of the late Nyang'onda Aboge a portion of the suit land where their home stands being that their father settled on the same portion but it was not to subdivide to them the land into half as is purported.

The restriction applied for by the plaintiff, made the subdivision of the suit land impossible and the fact that the subdivision intended by the District Surveyor as was instructed by the Plaintiff was not as per the agreement as they agreed and are willing to subdivide the portion that their fathers' homestead stands and not half of the suit land. They reiterated that the suit land is a solely a family land belonging to the family of the late Ochieng Odero and not any other person.

The defendants currently don't intend to sell any portion to any third party and the only subdivision and subsequent transfer they are ready and willing is to the family of the late Nyang'onda Aboge but only for the portion that their home stands.

In the Supplementary affidavit, Vincent Odhiambo Kanyang'onda, he states that both families are entitled to the land and that they have been in possession since the 1950's. Adjudication was done after the death of his father and mother.

When the matter came up for hearing, the plaintiff adopted the statement and supporting affidavit as his evidence. He states that his family has occupied 18 acres from the 1950s. On cross examination he states that both families settled on the land in the 1950's after the 2<sup>nd</sup> world war. The registration in the green card was done on 24/6/1974. There is no indication of trust on the green card. The witness states that the late Ochieng Odero of the defendants' family and his father, the late Nyang'onda Aboge came in the late 1940's and occupied the suit property with equal rights and share without either giving a portion suit property to the other as alleged by the defendants. That the defendant witness John Okello was born about late 1940's was either too young or not been born to witness and recall how the Late Nyang'onda Aboge approached late Ochieng Odero for a small portion of suit property to temporary stay. The true factual position is that there was no such agreement and John Okello was nowhere to witness such agreement. The two families are therefore entitled to two equal share of the suit property.

The Plaintiff states that the late Nyang'onda Aboge, Plaintiff's father died on 30<sup>th</sup> September 1969, long before the Land Adjudication started in 1972 with block registration being done in 1974. The suit property was registered on 24/6/1974 in the name of Ocheing Odero as is in the green card. During those days land was not registered in the names of women. The claim by John Okello that Nyang'onda Aboge who had died in 1969 was present together with Ochieng Odero during the adjudication in about 1972 and 1973 is a total lie, inaccurate and deliberate misleading of the Honourable Court. That John Okello is totally untruthful, unreliable and his statement must be disregarded by this Honourable Court in its entirety. That the late Nyang'onda Aboge died in 1969 and could not have been present in 1972/1973 during the adjudication to raise any dispute about the suit property registered in the name of Ochieng Odero as claimed by witness John Okello. That regarding the witness for defendant James Okumu Orwa that he knows that late Nyang'onda Abge approached the late Ocheing Odero is totally false as the said agreement should have taken place in the 40's and the witness was born in late 60's or 70's. He could not have witnesses agreements in the 40's which didn't exist in the first place.

He states that the family of Nyang'onda Aboge is entitled to equal share of the property and cannot rely on the goodwill of late Ochieng Odero family to give them a portion of the land as they wish as claimed by the witness.

The plaintiff urged the court grant him the Declaration and orders as prayed for in his originating summons dated 14/9/2018 and filed on 17/09/2018.

PW2, Mathew Awuora Achieng who was 74 years of age when he testified states that before the two old men died, they had marked their boundaries. They stayed peacefully. The Plaintiff's father died before adjudication whilst the 1<sup>st</sup> defendant's father died in 1974.

DW1 gave evidence that the suit land belonged to his late father. His father gave a portion of the suit land to the late Nyangonda Aboge to temporarily stay on the same. The plaintiff being the son to the late Nyangonda Aboge has since embarked on claiming half of the said land which they are not entitled to. That there are no blood relations between Ochieng Odero and Nyangonda Aboge. That out of goodwill, the family of the said Ochieng Odero have agreed to give a portion where their home stands to them but out of greed and malice, the plaintiff is claiming half of the land. He requested court to dismiss the plaintiff's claim.

On cross examination, he states that the land was registered in the names of his father in 1974. At the time of registration, the plaintiff's father was on the land. There is no demarcation on the land. The dispute started when the 1<sup>st</sup> Defendant took title. Nyang'onda Aboge was buried on the land in 1969. His first wife was buried on the land in 1976. All the sons have been buried on the land. He states that there are boundaries on the upper side marked by sisal. He states that he only wants to give them where they stay.

I have considered the evidence on record and the submissions of counsel and do find that it is a fact that the families of Nyang'onda Aboge and Ochieng Odero entered the suit parcel of land in 1950's. The family of Odero entered first followed by the family of Nyang'onda Aboge. It was stated by the 1<sup>st</sup> Defendant that the land is demarcated on the upper side with sisal plants. The two families occupy differed portions of the parcel of land. The two patriarchs who settled on the land were connected by the fact that they fought the 2<sup>nd</sup> world war and chose to settle on the same portion of land before adjudication. Unfortunately, during adjudication Nyang'onda had died and left behind the widows who could not be registered as proprietors of the suit-land as women were not being registered as proprietors of land at that time. I do find that in the absence of Nyang'onda Aboge, the suit land was registered in the names of Ochieng Odero to hold half of the same in trust of the family of Nyang'onda Aboge.

This case is based on the principle of trust based on the law of overriding interest of the possessor under section 30g of the repealed Registered Land Act Cap 300 Laws of Kenya. These are the rights of the person in possession against the rights of the registered owner. The overriding interests of possession and actual occupation which arise in the said possession and occupation without legal title are equitable rights which are binding on the land and therefore on the registered owner of that land. The equitable interests have a legal sanctity without being noted on the register and have achieved legal recognition and are not subject to interference or disturbance such as eviction.

In this case, the plaintiff's family is in actual possession of half of the suit-land and have cultivated the same to the knowledge of the defendants who have lived on the suit-land together with the plaintiffs for more than 60 years and have seen them live, cultivate, bury their kin on, the land. The plaintiffs overriding interest on the land should be protected by the equitable principle of trust as equity seeks to preempt an injustice and an unjust enrichment.

This court finds that the plaintiff has proved on a balance of probabilities that Ochieng Odero held a portion of the suit land in trust for Nyang'onda Aboge and that on his death, the property was to devolve to the family of Nyang'onda Aboge.

It flows from the above that the suit-land was transmitted to the defendants subject to the existing plaintiff's rights under section 30g of the repealed RLA.

The upshot of the above is that this court declares that Title No. South Sakwa/Migwena/2375 (Original No. 681) is Ancestral land belonging to the Families of the late Nyangonda Aboge and late Ochieng Odero who have both lived, occupied and settled in the property for over 60 years since the 1950's and that John Owach Ochieng & Bernard Audi Owuor hold the property and Title in Trust as Family and Ancestral Land on behalf of the families of the Late Ocheing Odero and the Late Nyangonda Aboge who settled on the said Land and have lived thereon for over 60 years in Equal Shares.

Ultimately, I do grant an order directing the Defendants John Okwach Ochieng and Benard Audi Owuor as trustees to sub-divide and transfer half portion of Title No. South Sakwa/Migwena/2375 (Original No. 681) to the Plaintiff on behalf of the family of the Late Nyangonda Aboge for distribution amongst the family members and retain the remaining half on behalf of the family of the Late Ochieng Odero.

Furthermore, I do grant an order that in default of compliance with the above order within a specified period by the Defendants, the Deputy Registrar of this Honourable court do execute survey mutation and Transfer Forms subdividing Title No. SOUTH SAKWA/MIGWENA/2375 (ORIGINAL NO. 681) into two equal portions and one half be transferred to the plaintiff in trust for the family of the late Nyang'onda Aboge and the other half be retained by the Defendants for the Family of the Late Ochieng Odero.

Last but not least, I do order that the costs of preparation of survey, mutation and Transfer fees be met by all parties to the suit. No orders as to costs as the two families co-existed for a long period of time.

**DATED AT KISUMU THIS 21<sup>st</sup> DAY OF MAY, 2021**

**ANTONY OMBWAYO**

**JUDGE**

**This Judgement 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 2019.**

**ANTONY OMBWAYO**

**JUDGE**