



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MIGORI**

**ELC CASE NO. 96 OF 2017**

**(Formerly Kisii ELC case 108 of 2013)**

SAMWEL OUMA OGALO.....PLAINTIFF

VERSUS

ZEDEKIA OMOLO OGALO.....DEFENDANT

**JUDGMENT**

**A. Introduction**

1. The property in dispute in the present suit is land parcel number North Sakwa/Kadera Lwala/710 approximately 4.0 hectares in area (the original land herein). Apparently, the said land has now been subdivided into title numbers North Sakwa/Kadera Lwala/1793, 1794 and 1795 (the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> suit parcels of land respectively herein).
2. The plaintiff, Samwel Ouma Ogala is represented by learned counsel, Mr. P.R. Ojala of P.R. Ojala and Company Advocates.
3. The defendant Zedekia Omolo Ogalo is represented by learned counsel, Mr. Sam Onyango of Ms. Sam Onyango and Company Advocates.
4. The suit was initially filed at Kisii Environment and Land Court whereby the same was heard by Okongo, J on 15<sup>th</sup> December 2014 when the plaintiff (PW1) testified herein. On 16<sup>th</sup> March 2016, Mutungi J, sitting at the said court did direct that the suit proceed from where it had reached.
5. Subsequently, the suit was transferred to this court for further hearing and determination. On 27<sup>th</sup> July, 2017, I also restated the directions given on 16<sup>th</sup> March 2016.

**B. The plaintiff's case in brief**

6. By a plaint dated 22<sup>nd</sup> February 2013 and filed in court on 19<sup>th</sup> March 2013, the plaintiff is seeking the following reliefs;-

*i. A permanent injunction restraining the defendant from interfering with the plaintiff land parcel North Sakwa/Kadera Lwala/710 (1793, 1794 and 1795 respectively).*

*ii. The defendant be evicted from the plaintiff's land as mentioned above.*

*iii. Declaration that the plaintiff is legal sole owner of land parcel number North Sakwa/Kadera Lwala/710 which has been subdivided into land parcel number 1793, 1794 and 1795.*

*iv. Costs of this suit.*

*v. Any other relief this Honourable court may deem fit to grant.*

7. The gist of the plaintiff's case is that he is registered proprietor of the original land now 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> suit parcels of land as revealed in copies of its title deed dated 12<sup>th</sup> June 1995 (PEXhibit 1), a certificate of official search dated 1<sup>st</sup> November 2012 (PEXhibit 2) and its

register (PEXhibit 3). That before the registration of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> suit parcels of land, the defendant unlawfully put a caution on the original land and encroached into the land where he erected a homestead and started cultivation thereon.

8. The plaintiff further stated that the defendant who owns his own land reference number North Sakwa/Kadera Lwala/712 as shown in a copy of a certificate of official search dated 1<sup>st</sup> November 2012 (PEXhibit 4), has continued to occupy the 2<sup>nd</sup> suit parcel of land of the original land. That he has vehemently pleaded with the defendant to vacate the land in vain thus precipitating the present suit.

9. In his evidence, PW1 stated inter alia, that he owns the original land and that the defendant occupies the 2<sup>nd</sup> suit parcel of land. He relied on PEXhibits 1 to 4 herein and craved for eviction of the defendant therefrom.

10. On 15<sup>th</sup> October, 2019, learned counsel for the plaintiff filed submission dated 14<sup>th</sup> October 2019 whereby the background of the case is given and that by the evidence on record, the plaintiff's claim is unchallenged. Counsel urged the court to grant the orders sought in the plaint.

### **C. The Defendants' Case in brief**

11. By his statement of defence dated 15<sup>th</sup> April, 2013 and filed on even date, the defendant denied the plaintiffs' claim and sought its dismissal. In his statement accompanying the defence, he stated inter alia, that his father Ogalo Odamo (deceased) during his lifetime did establish a homestead for him in the original land while the plaintiff was settled on land reference number North Sakwa/Kadera Lwala/713 in accordance with Luo customs and tradition. That he has lived on the original land for a long period of time and that he even buried children on the land.

12. The defendant further stated that the present dispute was attended to by Joka Limira clan elders under the area chief and it was resolved in his favour. That the plaintiff's son Seth Odhiambo Ouma who established a home on the 2<sup>nd</sup> suit parcel of land where the defendant is in occupation, was ordered to vacate it forthwith.

13. On 30<sup>th</sup> April, 2013, learned counsel for the defendant filed the defendant's list of documents and list of witnesses both dated 26<sup>th</sup> April, 2013. Counsel was given latitude to present the defendant's case and file submission on 6<sup>th</sup> March 2019 and 2<sup>nd</sup> December 2019 respectively pursuant to **Article 50 (1) of the Constitution of Kenya, 2010**. However, the defendant failed to adduce evidence and present submissions in this suit.

### **D. Issues for determination**

14. It is trite law that issues for determination in a suit flow from either the pleadings or as framed by the parties for the court's determination; see the Court of Appeal decision in **Galaxy Paints Co. Ltd –vs- Falcon Grounds Ltd (2000) 2EA 385**.

15. I note the agreed issues dated 24<sup>th</sup> April, 2014 filed on the even date by the plaintiff's counsel. The issues were not signed by the defendants' counsel hence then I consider the same to be the plaintiff's version.

16. I have duly considered the entire pleadings, the evidence of PW1, submissions of the plaintiff's counsel and the agreed issues. As such, I am of the considered view that the issues for determination herein are condensed thus:-

*a) Is the plaintiff the legal proprietor of the original land together with the attendant 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> suit parcels of land?*

*b) Is the defendant entitled to the original land or a portion thereof?*

*c) What are the reliefs available to the parties in this suit?*

### **E. Analysis and determination**

17. As regards issue number one hereinabove (a), it was the evidence of PW1 that he owns the original land and he produced PEXhibits 1 to 3 in support of his claim. In examination in chief, he stated that :-

***“I own LR No. North Sakwa/Kadera Lwala/710”.***

18. PW1 further stated that the defendant who is his step brother is in occupation of a portion of the suit. That he is seeking the court to stop the defendant from using it as the latter has another parcel of land reference North Sakwa /Kadera Lwala/712.

19. I note that the original land was registered in the name of PW1 under the Registered Land Act Cap 300 Laws of Kenya (the Repealed Act) as per PEXhibit 1. This court is aware of the absolute nature of PEXhibit 1 as provided for under **sections 27 and 28 as read with section 30 of the Repealed Act**.

20. **Article 40 (1) of the Constitution of Kenya, 2010** stipulates that every person has the right to acquire and own property of any description in any part of Kenya. However, that right is subject to **Article 40 (6) of the same Constitution**.

21. By PEXhibit 1 herein, PW1 is the prima facie current proprietor of the original land. The same is fortified by PEXhibits 2 and 3 as even

envisaged presently under **sections 2 and 26 (1) of the Land Registration Act, 2016 (2012)**.

22. It was the testimony of PW1 that he inherited the original land from his step grandmother. That he tried to subdivide it into the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> suit parcel of land in vain.

23. During cross examination, PW1 testified that :-

***“ I did succession in respect of the estate of Adek Odamo deceased. Adek Adamo was my grandmother. The defendant is my step brother.....”***

24. PW1 further stated as follows;-

***“When I applied for grant of letters of administration in respect of the estate of Adek Odamo the defendant was already in possession of the disputed property during the lifetime of Adek Odamo.” (Emphasis laid)***

25. In the instant scenario;-

***a) Is the plaintiff the absolute proprietor of the original land?***

***b) Does the defendant have any constructive trust over the original land?***

26. In the case of **Munyu Maina –vs- Hiram Gathiha Maina (2013) eKLR**, the Court of Appeal held that when the registered proprietor dangles an instrument of title which is under challenge, that proprietor must;-

***“.....go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrance.”***

27. It is well settled that the estate of the deceased person is vested in the legal representative; see the Court of Appeal decision in **Trouistik Union International and another –vs- Jane Mbeyu and another (1993) eKLR**.

28. The plaintiff failed to produce a grant or a confirmation to the effect that he carried out succession in respect of the estate of the deceased. Therefore he is not the legal representative of that estate of the deceased as defined under **section 2 of the Civil Procedure Act (Cap 21) laws of Kenya and Trouistik case (Ibid)**.

29. The testimony of PW1 reveals that the defendant has been in occupation of the original land even during the lifetime of the deceased. Thus, he has acquired title to the portion he occupies by implied trust by virtue of section 163 of the Repealed Act which provided for the application of common law as modified by equity ; see also **Mumo –vs- Makau (2002) 1 EA 170 and Mutsonga –vs- Nyati (1984) KLR 425**.

30. Quite clearly, this suit was heard and the defendant failed to tender any evidence. However, it is well settled that it is upon the plaintiff to prove his claim on a balance of probability even if the case is heard by way of formal proof as held by the Court of Appeal in **Kirugi and another –vs- Kabiya and 3 others (1987) KLR 347**.

31. In the premises, I find that the plaintiff has failed to prove that he is the legal representative of the estate of **Adek Odamo** (deceased). The plaintiff's claim has not been proved against the defendant to the requisite standard.

32. The upshot is that the plaintiff's suit lodged by way of a plaint dated 22<sup>nd</sup> February 2013 and filed on 19<sup>th</sup> August 2013 be and is hereby struck out with costs to the defendants.

33. It is so ordered.

**DELIVERED, SIGNED and DATED** in open court at **MIGORI** this **29<sup>th</sup> Day of JANUARY 2020**.

**G.M.A ONG'ONDO**

**JUDGE**

**In presence of :-**

Mr. Odhiambo Kanyangi holding brief for Ojala learned counsel for the plaintiff

Tom Maurice – Court Assistant