



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KISII

ELC NO 1123 OF 2016

FORMERLY HCCC NO 527 OF 2012

TOBIAS OMONDI NDEJWE.....PLAINTIFF

VERSUS

ELIJAH OCHIENG OGUI.....1ST DEFENDANT

Consolidated with

ELC NO. 1 OF 2013

ELIJAH OCHIENG OGUI (Alias OCHIENG NDEJWE.....PLAINTIFF

VERSUS

NDEJWE ODERO.....1ST DEFENDANT

BENARD OCHIENG NDEJWE.....2ND DEFENDANT

TOBIAS OMONDI NDEJWE.....4TH DEFENDANT

THE DISTRICT SURVEYOR- MIGORI.....5TH DEFENDANT

THE DISTRICT LAND REGISTRAR -MIGORI.....6TH DEFENDANT

THE ATTORNEY GENERAL.....7TH DEFENDANT

J U D G E M E N T

1. This judgment relates to Kisii ELC No.1123 of 2016 (Formerly Kisii Hccc No.527 of 2012) Consolidated with Kisii ELC No 1 of 2013 the two suits having been ordered consolidated on 15th May 2014. In ELC No.1123 of 2016 the plaintiff claims ownership of L.R No. **Kanyamkago/Kamgundho/1105** a resultant subdivision from L.R No. **Kanyamkago/Kamgundho 1142** which the defendant who is the plaintiff in Kisii ELC No.1 of 2013 claims to have been co-owner of but was allegedly subdivided without any reference to him. The plaintiff in ELC No.1123 of 2016 seeks judgment against the defendant for:-

(i) Declaration that the plaintiff is the sole registered and/or lawful owner of Kanyamkago/ Kamgundho/1105, otherwise referred to as the suit land.

(ii) An order of eviction against the Defendant, his agent and /or servants from LR No.Kanyamkago/ Kamgundho/1105.

(iii) Permanent injunction restraining the Defendant either by himself, gents, servants and /or anyone claiming under the Defendant from entering upon, re-entering, trespassing onto, cultivating, building structures, interfering with and/or in any other manner dealing with the suit land, that is, for LR No. Kanyamkago/Kamgundho/1105 and/or any portion thereof.

(iv) General damages of trespass.

(v) Interest on (iv) hereof of Court rates.

(vi) Costs of this suit be borne by the Defendant.

2. The defendant denies all the averments by the plaintiff and avers that the subdivision of land parcel **LR No. Kanyamkago/Kamgundho/142** was illegally and fraudulently carried out without his knowledge and the defendant in ELC No. 1 of 2013 prays for the annulment and cancellation of the resultant titles following the subdivision of land parcel **Kanyamkago/Kamgundho/142** and for the rectification of the register to the original status and for the subdivision of the original land parcel 142 into two portions of 2.1Ha each and one such portion to be registered in his name. The defendant/plaintiff in the suit also seeks injunctive reliefs restraining any interference with land parcel **Kanyamkago/Kamgundho/142** and or with the resultant subdivisions **1101-1106**.

3. The plaintiff testified and called two witnesses in support of his case while the defendant together with one witness testified in support of the defence case.

4. The plaintiff testified as PW1 and it was his evidence that he was the registered owner of land parcel **Kanyamkago/Kamgundho/1105** having been given the same by his father following the subdivision of land parcel **Kanyamkago/Kamgundho/142**. The plaintiff testified that land parcel 142 at the time of registration following land adjudication was registered in the name of his father, Ndejwe Odero, and his elder brother Bernard Ochieng Ndejwe (then a minor) as Co-owners. He stated that the defendant is registered as owner of land parcel **Kanyamkago/Kamgundho/150** which shared a common boundary with land parcel 142 and after subdivision with land parcel **Kanyamkago/Kamgundho/1105** which now belonged to the plaintiffs. The plaintiff however further stated the defendant had occupied a portion of land parcel 1105 and had constructed three (3) iron sheet houses even though he knew the land belonged to the plaintiff and continues in possession. The plaintiff further testified that the defendant had staked claim of ownership of land parcel 1105 claiming that it belonged to him as he had been registered as Co-owner of land parcel 142 with the plaintiff's father which entitled him (defendant) to half of the parcel of land. The plaintiff however denied that it was the defendant who was registered as Co-owner of land parcel 142 with his father stating that it was his brother (plaintiff's) Bernard Ochieng Ndejwe who was registered with his father and not the defendant. He insisted that the defendant was not known by the name "**Bernard Ochieng Ndejwe**" as he claimed stating that the defendant's name had always been Elijah Ochieng Ogui and that he had never been known by the name Ndejwe Ochieng.

5. The plaintiff further testified that the defendant was an adult during the land adjudication and was then registered as the owner of land parcel 150 and he could therefore not be registered as a Co-owner of land parcel 142 with Ndejwe Odero, the plaintiff's father. The plaintiff maintained it is his brother Ochieng Ndejwe who was registered as a Co-owner of land parcel 142 with his father. The plaintiff testified that his father and his brother were the lawful registered owners of land parcel **Kanyamkago/Kamgundho/142** and lawfully subdivided the same into land parcels 1101,1102,1103,1104,1105 and 1106. He stated that land parcel **Kanyamkago/Kamgundho/1105** was legally transferred to him as his entitlement from his father and denied there was any fraud or collusion in the transfer of the land to himself.

6. The plaintiff stated the defendant had no interest whatsoever in land parcel 1105 or indeed any portion of the original land parcel 142. The plaintiff stated he was not related to the defendant and denied the defendant would have had any beneficiary interest in regard to land parcel 142. The plaintiff additionally stated that the defendant had attempted to get himself registered as owner of land parcel 142 and in that respect swore a false affidavit that he was also known by the name Ocheing Ndejwe and got the Chief Kamgundho Location to write a letter dated 14th January 2000 to confirm the names, **Elijah Ochieng** and **Ocheing Ndejwe** referred to one and the same person. The defendant was charged in the SRM's Court at Migori in Criminal case No.104 of 2003 inter alia under count II with :-

"Giving false information to a person employed in the public service C/S 129 (a) of the Penal Code".

7. The particulars of the offence were as follows:

***Elijah Ochieng Ogui:** On the 7th day of April 2000 at Migori/Kuria District Land Registrar's office within Migori District of Nyanza Province informed Peter Kimani, District Land Registrar a person employed in the public service that he was known as Ocheing Ndejwe which made Peter Kimani to order the Assistant Chief of Kamgundho sub-location to confirm the name of Elijah Ochieng Ogui is also known as Ocheing Ndejwe and is the true owner of the piece of land Kanyamkago/Kamgundho/142 which information he knew to be false intending thereby to cause Peter Kimani to do what he ought not to have done if the true state of facts respecting such information was given to him"*

8. The defendant was found guilty of giving false information and was fined Ksh20,000/= and /or in default 18 months imprisonment.

9. In cross examination the plaintiff said that the Land Adjudication in the area was carried out in 1977. He said his brother Ochieng Ndejwe was then a minor as he was born in 1974 though his identity card indicated he was born in 1979

10. Ndejwe Odero, the plaintiff's father testified as PW2. In his evidence he stated that the defendant was known as Elijah Ochieng Ogui and Ogui was the defendant's father. He stated that he owned land parcel 142 and that he gave a portion of it to the plaintiff, who is his son. He stated that the defendant had entered and occupied a portion of the land without his (PW2's) permission and had refused to vacate therefrom. The witness stated the defendant had no right to occupy the suit land. He denied that he owned land parcel 142 jointly with the defendant. He stated the defendant was not Benard Ocheing Ndejwe insisting that Ocheing Ndejwe was his son. He said the defendant had his own land which shared a boundary with the suit land. He said the defendant was given the land by his father.

11. Bernard Ochieng Ndejwe testified as PW3. He stated PW2 was his father and the plaintiff his brother. He denied he was related to the defendant and/or that the defendant was known by the name Ocheing Ndejwe stating that the defendant was called Ochieng Ogui. He stated his brother owned land parcel 1105 while the defendant owned land parcel 150. He denied that they subdivided land parcel 142 fraudulently

as alleged by the defendant. The witness stated that he was born in 1974 though his identify card indicated he was born in 1979. He stated that he participated in the subdivision of land parcel 142 and affirmed that the defendant's houses occupy a portion of land parcel 1105 and the defendant was therefore in trespass.

12. The defendant, Elijah Ochieng Ogui testified as DW1. He testified that he was also known by the name Ochieng Ndejwe. He stated Ndejwe Odero (PW2) was his uncle and that his father's name was Ogui Mateko. The defendant testified that his father gave to him land parcel **Kanyamkago/Kamgundho/142** but the same was registered, in the joint names of Ndejwe Odero and his (defendant's) name Ocheing Ndejwe during land adjudication in 1977. He stated each of them was to hold $\frac{1}{2}$ share of the land. The defendant admitted he had another land parcel 150 which bordered land parcel 142. The defendant further stated that land parcel 142 was subdivided without his authority or involvement into 6 portions. He stated that it was because of the unlawful subdivision that he filed Kisii ELC No.1 of 2013 where he sought the cancellation and nullification of the subdivision and parcel 142 to be subdivided into two portions for himself and Ndejwe Odero. The defendant admitted that he had been charged and tried and convicted and jailed for 12 months for failure to attend court and swearing a false affidavit.

13. In cross examination by counsel for the plaintiff, the defendant admitted his identity card was in the name of Elijah Ochieng Ogui and he did not have any other documents bearing any other names. He claimed Ndejwe Odero was his uncle as they shared a great grandfather. It was his further evidence that his father was the owner of land parcel 142. He stated that in 1977 he was 24 years, was married and was therefore not minor. The defendant did not however explain how the land parcel came to be registered in the name of Ndejwe Odero and Ochieng Ndejwe (A minor) though he was insisting to have been registered as a Co-owner. The defendant maintained that he bought land parcel 150, which was registered in his name Elijah Ocheing Ogui and not in the name of Ochieng Ndejwe. He stated that he occupied a portion of Land parcel 142 and that it was his son who was in occupation of land parcel 150.

14. Dw2 Johana Obui Achacha testified that land parcel 142 was registered in the name of Ndejwe Odero and Ochieng Ndejwe. He stated the defendant was residing on a portion of land parcel 142 as a joint owner but in 2012 Ndejwe Odero decided to subdivide the land without involving the defendant. According to the witness Ochieng Ndejwe was the same person as Elijah Ochieng Ogui. In cross examination the witness affirmed that he was born on 2nd February 1989 whereas the land adjudication was done in 1977. The witness further stated the defendant was a brother to his father. He stated land parcels 142, 150 and 153 resulted from land adjudication and that his father (DW2's) owned land parcel 153.

15. Having considered the pleading the evidence and the written submissions filed by the parties following the closure of the trial the issues that arise for determination in this matter are as follows :-

(i) Whether Elijah Ochieng Ogui the plaintiff in Kisii ELC No.1 of 2013 and the 1st defendant in Kisii ELC No.1123 of 2016 (formerly HCCC No.527 of 2012) is the same person as Ochieng Ndejwe (minor) registered as co-owner of Land parcel Kanyamkago/Kamgundho/142 during the process of the Land adjudication/

(ii) Whether the subdivision of land parcels Kanyamkago/Kamgundho/142 into 6 portions was lawful done?

(iii) Whether the defendant's occupation of a portion of Land parcel Kanyamkago/Kamgundho/1105 is lawful and/or he is in trespass.

(iv) What orders /reliefs should the Court grant?

(v) Who bears the costs of the suit?

16. Quite clearly the real issue in this matter is whether the person described as Ochieng Ndejwe (minor) and Co-owner with Ndejwe Odero during the registration of land parcel **Kanyamkago/Kamgundho/142** is the same person as Elijah Ochieng Ogui, the defendant herein. The evidence that Elijah Ochieng Ogui was not a minor in 1977 when land adjudication took place is not in dispute. The defendant himself in his evidence before the Court stated that he was 24 years in 1977 and was married and could not therefore have been a minor. By his own evidence, the defendant also indicated he was at the same time (1977) registered as the owner of land parcel **Kanyamkago/Kamgundho/150**. The abstract of title (green card) for the parcel of land shows Ochieng Ogui was registered as owner on 1st April 1977 under entry No.1 and on 26th November 1999 following change of name the title was registered in the name of Elijah Ochieng Ogui.

17. As relates to land parcel **Kanyamkago/Kamgundho/142** the abstract of title (greencard) shows that the land was first registered on 1st April 1977 in the name of Ndejwe Odero and Ochieng Ndejwe (minor) and a title deed issued on 27th January 1994. The defendant has not explained and/or tendered any evidence to explain the odd situation where on one hand he was properly registered as the owner of land parcel 150 in his own name and on the other hand he was registered as a minor in respect of land parcel 142. I do not agree and/or believe that the person described as Ochieng Ndejwe (minor) in respect of land parcel 142 was himself. There is no explanation as to why his father Ogui Mateko was not registered as the owner or Ndejwe Odero registered expressly as his trustee.

18. To the contrary, there is evidence that Ochieng Ndejwe was the son of Ndejwe Odero. Although there was a discrepancy as to his birth date as his identity card indicated he was born in 1979 whereas he stated he was born in 1974, I am inclined to believe that he was in fact born in 1974 and not 1979. His brother, the plaintiff himself owned up that although his identity card showed that he was born in 1984, he was actually born in 1981. The Court takes judicial notice that in the earlier days there was no requirement for people to produce birth certificate before being issued identity cards and as a consequence there was rampant understating or overstating of ages depending on why the identity card was being sought. The identity cards were usually processed and issued in institutions notably schools and the registration officers were accepting whatever information they were given. The Court however hopes that the anomaly was sealed by the government to curb the cheating on ages during the registration of persons. The question of when Ochieng Ndejwe was born and when the land adjudication was done was put by the court to PW2, the father of the plaintiff and Ochieng Ndejwe and he stated as follows in his

evidence:-

“ I cannot remember when the adjudication was done. Plot No.142 was registered in my name and the name of my son Ochieng Ndejwe. Bernrd Ochieng Ndejwe had been born and he was young. At the time the defendant was not a young man. He was an adult”

19. That statement by the father of the plaintiff and PW3 affirmed that indeed Ochieng Ndejwe had been born by 1977 when the land adjudication took place and was a minor.

20. There was yet some other evidence that showed the defendant could not have been Ochieng Ndejwe who was registered as a Co-owner of land parcel 142 as a “minor”. The defendant admitted that he had been charged with a criminal offence of swearing a false affidavit and giving false information to a public officer that he was Ochieng Ndejwe while he was not and was convicted and jailed. The learned trial magistrate in his judgment in the criminal case in finding the defendant guilty of giving false information stated as follows:-

“ finally as regards false information to a person employed in the public service, I find the same proved beyond reasonable doubt. The accused in swearing the false affidavit and presenting it to the Distract Land Registrar was intending the registrar to do something which could have deprived the rightful owner of his land. The accused indeed admitted swearing the affidavit and further indicated that he was interested in land.

21. There was no record availed to show that the defendant appealed against the conviction and consequently the fact of his conviction on the charge is admissible before this Court as evidence. On the basis of the evidence on record and the assessment of the same that I have undertaken herein above, I would answer the first issue in the negative. Accordingly I hold that Ochieng` Ndejwe (minor) registered as a Co-owner of land parcel **Kanyamkago/Kamgundho/142** with Ndejwe Odera was not the defendant but PW3 who was the son of Ndejwe Odera. Therefore Ochieng Ndejwe is not the same person as Elijah Ochieng Ogui, the defendant herein (ELC 1123 of 2016) and plaintiff in ELC 1 of 2013.

22. Having disposed of the primary issue, issues (ii) and (iii) became mute as they are predicated on the determination of the first issue. As I have determined that the defendant was not the registered co-owner of land parcel **Kanyamkago/Kamgundho/1142**, it follows that the defendant would have no interest in the land. The registered owners who were PW2 and PW3 were entitled to subdivide the same as they pleased and therefore the subdivision of the same into land parcels 1101 to 1106 was lawful and they were at liberty to transfer land parcel **Kanyamkago/Kamgundho/1105** to the plaintiff. As the defendant has admitted he is in occupation of a portion of land parcel 1105, his occupation is unlawful and without the permission and/or authority of the plaintiff. The defendant is in occupation of the land as a trespasser and he should vacate.

23.The defendant’s suit against Ndejwe Odera & 5 others in ELC No. 1 of 2013 was entirely predicated on the fact of the defendant having been co-registered owners of land parcel **Kanyamkago/Kamgundho/1142**. I have held that he was not so registered and consequently the suit fails. The defendant has failed to prove the same on a balance of probabilities. The suit is hereby dismissed.

24. As regards ELC No.1123 of 2016 (formerly HCCC No.527 of 2012) I find the same proved on a balance of probabilities. I enter Judgment in favour of the plaintiff on the following terms:-

(a) That the plaintiff is validly and lawfully registered as the owner of LR No. Kanyamkago/Kamgundho/1105 and as such registered owner is entitled to exclusive possession and use of the same without any hinderance.

(b) The defendant, his agents and servants are hereby ordered to vacate and deliver vacant possession of L.R. NO. Kanyamkago/Kamgundho/1105 to the plaintiff within sixty (60) days from the date this Judgment is delivered failing which an order of eviction to issue on application by the plaintiff.

(c) The parties to meet their own costs for the consolidated suits.

25. Judgment accordingly.

JUDGMENT DATED AND SIGNED AT NAKURU THIS 21ST DAY OF FEBRUARY 2020.

J. M. MUTUNGI

JUDGE

JUDGEMENT DELIVERED AT KISII THIS 5th DAY OF MARCH 2020.

J ONYANGO

JUDGE