



**REPUBLIC OF KENYA**

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

**AT KISII**

**ELC NO. 554 OF 2016**

**FORMERLY HCCC NO.264 OF 2011)**

**WILLIAM GECHORE OREMO** (Suing as the Legal administrator of the Estate of  
DISMAS OREMO MOGUSU).....**PLAINTIFF**

**VERSUS**

**PACIFICA NYANCHAMA NYABOGA**.....**1<sup>ST</sup> DEFENDANT**

**MAURICE MOSE NYANGAU**.....**2<sup>ND</sup> DEFENDANT**

**J U D G M E N T**

1.The plaintiff suing as the legal administrator of the estate of the late Dismas Oremo Mogusu (deceased) initiated the present suit vide a plaint dated 14<sup>th</sup> November 2011 filed in Court on 15<sup>th</sup> November 2011. The plaintiff claimed that the defendants had unlawfully trespassed onto land parcel **Bassi/Bosingi/1027** (“the suit property”) which was registered in the name of the deceased. The plaintiff prayed for the following orders.

- (i) *Declaration that LR.No.Bassi/Bosingi/1027, is lawfully registered in the name of the belongs to the estate of Dismas Oremo Mogusu, now deceased.*
- (ii) *permanent injunction restraining the Defendants by themselves, agents, servants and/or anyone claiming under the Defendants, from re-entering, trespassing onto, cultivating, the suit land, that is, LR No.Bassi/Bosingi/1027.*
- (iii) *General damages for trespass.*
- (iv) *Costs of this suit be borne by the defendants*
- (v) *Interest on (iii and iv) hereof at Court rates.*

2.The defendants in their joint defence dated 10<sup>th</sup> January 2012 filed on the same date averred that the deceased was a brother and uncle to the 1<sup>st</sup> and 2nd defendant respectively and that he was registered as owner of the suit property in trust for the 1<sup>st</sup> defendant and her children. The defendants claimed they had been utilizing the suit property over a long time and denied being trespassers on the land.

3. The suit, was part heard before Okong’o J who took the plaintiff’s (PW1) evidence. PW2 Nelson Nyangara who was the Assistant Chief for the area where the suit property is located testified before me and he clearly brought out the close relationship of the parties in the suit. The deceased was brother of the 1<sup>st</sup> defendant and thus the plaintiff was a nephew to the 1<sup>st</sup> defendant who was therefore his aunt. This prompted the Court with the concurrence of the parties to direct that the parties attempt to have the matter mediated. Senior Advocate Mr. Jeremiah Soire was with his consent and agreement of the parties nominated by the Court to lead the mediation/arbitration process and make a report to Court.

4. Mr. Soire Advocate duly compiled a comprehensive report which incorporated a full record of the evidence from all the witnesses, exhibits and his reasoned decision/judgment. The decision was in favour of the plaintiff and against the defendants.

5. Although the Court had ruled that the matter proceed to trial as there was no agreement as envisaged in mediation, the parties decided that the proceedings before Mr. Soire Advocate be admitted as part of the Court record and the Court makes an evaluation of the evidence

adduced before Mr. Soire advocate and to make a judgment. The Court in the premises made the following directions /order on 21<sup>st</sup> May 2019.

**“As the parties agree I vacate my order of 22<sup>nd</sup> November 2018 requiring the suit to proceed to formal hearing and direct that the parties file their comments/submissions on the report filed by Mr. Soire advocate who was the Court nominated mediator. The proceedings before Soire advocate are deemed part of the Court record for purposes of these proceedings. The parties to exchange their comments/submissions within the next 45 days from today”.**

6. The record of the evidence establishes that the suit property **Bassi/Bosongi/1027** was registered in the name of Dismas Oremo Mogusu (the deceased). The date of first registration was 25<sup>th</sup> March 1969 as evidenced under part ‘A’ –property section of the copy of title produced in evidence. Entry 2 registration on 14<sup>th</sup> June 1993 shows a change of name was registered and the deceased was issued a title deed on the same date in the name Dismas Oremo Mogusu.

7. The plaintiff testified before the mediator and it was his evidence that his deceased father was the registered owner of the suit property and had been using the land until he died. He stated his father had bought the suit property from Nyangau Nyaboga alias Javan who was the father in law of the 1<sup>st</sup> defendant. The plaintiff was his late father who had planted the tea bushes and the trees that the defendant and her children were plucking and cutting respectively.

8. The plaintiff’s mother Agnes Kemuma Oreo (PW2) testified before the mediator. She stated that her late husband bought the land around about 1960 and initially paid Kshs1000/= which was used to refund one Sikweya Nyaboga who apparently had been sold the same land. She stated that her husband made a further payment of Kshs6,000/= which she witnessed and was given possession. She explained that they planted tea bushes next to the river and were cultivating food crops on the side while they planted blue gum trees on the hill side. She stated the 1<sup>st</sup> defendant invaded the tea farm and started picking tea leaves. She explained the defendant’s father in law migrated to Tanzania after selling the land to her husband. It was her further evidence that before her husband bought the land it was in the possession of one Sikweya but he moved from the land after her husband paid the final installment of the purchase price. She further stated that her husband bought the land after the 1<sup>st</sup> defendant invited him to purchase.

9. PW3 Florence Nyaboke Nyangau was the 1<sup>st</sup> defendant’s step mother- in law and wife to Nyangau Nyaboga who sold the suit property before he moved to Tanzania . She stated the land was her husband’s “ emonga” which he decided to sell as he wanted some money to cater for his movement to Tanzania. She affirmed the 1<sup>st</sup> defendant’s brother purchased the land and took possession but later the 1<sup>st</sup> defendant started laying claim to the land. She affirmed the land had initially been sold to Sikweya but the sale to him was revoked and it was after that the deceased bought the land.

10. PW4 Nyaboga Nyangau was the son of the vendor Nyangau Nyaboga. He stated his father had allocated the suit land to his step mother Nyaboke (PW3). He stated his father moved his step mother to the land she presently resides on and decided to sell the suit land. He affirmed the suit land was sold to the plaintiff’s father who took possession and started utilizing the same. He stated the tea on the land was planted by the plaintiff’s family and that it was the plaintiff’s family who were cultivating on the land.

11. PW5 Samuel Ongoro Momanyi a brother in law of the plaintiff’s father and the 1<sup>st</sup> defendant testified that Nyangau Nyaboga was his uncle and that he had leased a portion of land from him which was next to the suit land. He affirmed that Nyangau Nyaboga sold the suit land to the plaintiff’s father and that he was present when the portion sold to the plaintiff’s deceased father was delineated and boundary marks placed separating the sold portion from Nyangau Nyaboga’s larger portion. He confirmed the plaintiff’s father took possession of the land sold to him.

12. The plaintiff called Samuel Morata Mose ( PW6) a son of the 1<sup>st</sup> defendant and cousin to the plaintiff as the last witness. The witness in his evidence explained how the plaintiff’s father purchased the suit property. He stated his grandfather sold the land to the plaintiff’s father after the sale to one Sikweya Nyaboga was aborted and he was refunded his money. He stated that after the plaintiff’s father purchased the suit property, his family took possession and started utilizing the land. He explained that the dispute over the land began following a quarrel his mother (1<sup>st</sup> defendant), had with the plaintiff’s father. He stated it was after the quarrel that his mother organized them (her children) to invade the land and chase the plaintiff’s family away from the land. He stated as the eldest son of the 1<sup>st</sup> defendant he knew the land in disputed belonged to the family of the plaintiff.

13. On cross examination by the mother (1<sup>st</sup> Defendant) the witness stated that the land was to be distributed to the 1<sup>st</sup> defendant’s family members after the Oremo’s family was evicted. The witness affirmed he witnessed his grandfather receiving the money from the plaintiffs father though he did not know how much. He further affirmed that the trees on the land that were cut belonged to the Oremo family and that the plaintiff’s father had not surrendered the land to the defendant before he died.

14. Pacifica Nyachama Nyaboga the 1<sup>st</sup> defendant testified as DW1. The 2<sup>nd</sup> defendant had died by the time the suit was heard and had not been substituted. The suit against him had therefore abated. The 1<sup>st</sup> defendant stated that she was sister to the plaintiff’s deceased father. The 1<sup>st</sup> defendant in her evidence stated the plaintiff’s witnesses all had a grudge with her and their testimonies were unreliable .It was her evidence that she had her deceased brother planted tea on the suit land jointly although it was the plaintiff’s deceased father who was registered as the tea grower and he was the one who was receiving all the tea proceeds including bonuses. The defendant said that she was the one who planted the trees on the land. The defendant acknowledged that the plaintiff’s deceased father was the registered owner of the land but she claimed that he was registered fraudulently.

15. DW2 Nyapeni Nyangau was the brother in law of the defendant. His evidence was to the effect that his uncle Sikweya Nyaboga had lent his father Nyang’au Jaran some money Kshs1,000/= to travel to Tanzania and on that account Sikweya was left the land to take care of. He stated that during land adjudication Sikweya Nyaboga wanted to be registered as owner of the land but the family protested and the

plaintiff's father was contacted by the defendant and he gave the money that was refunded to Sikweya Nyaboga. The witness did not know what happened to the land next but he affirmed that the plaintiff's father took possession and started using the land.

16. The Court appointed mediator upon appraisal of the evidence from the witnesses which I have summarized herein above came to the following findings:-

**(a) That the plaintiff's father Dismas Oremo Mogusu is the lawful owner of land parcel No. Bassi/Bosingi/1027.**

**(b) That a permanent injunction should therefore be issued against the defendant herself, her agents, servants and/or persons claiming under her from re-entering, trespassing onto cultivating and/or interfering with the said land.**

**(c) Costs of the suit be borne by the defendants.**

17. The parties having agreed to go by the record of evidence as recorded by Mr. Soire Advocate, the issue for determination by the Court is whether on the basis of the evidence the Mediator was justified to come to the conclusion that he did. The parties as directed by the Court filed their comments/submissions on the report file by the Mediator. I have carefully reviewed the record of the proceedings before the mediator, noted the evidence adduced before him as summarised herein above and I have considered the submissions made by the parties. The issues that arise for determination are as follows:-

**(i) Whether the plaintiff's deceased father was the registered owner of land parcel Bassi/Bosingi/1027 and if so whether he obtained registration fraudulently?**

**(ii) Whether the defendant has any beneficial interests over the suit property?**

**(iii) Whether the Plaintiff's deceased father held the suit property in trust for the defendant?**

**(iv) What reliefs and/or order should the Court grant?**

18. On the evidence adduced there is no dispute that land parcel **Bassi/Bosingi/1027** was registered in the name of Dismas Oremo Mogusu (now deceased). Copy of the search certificate and copy of the title deed were tendered in evidence and they both showed the deceased was the registered owner. Hence on the issue whether the plaintiff's deceased father was the registered owner of the suit property, the answer has to be in the affirmative.

19. Although the defendant alleged fraud, no particulars of fraud were pleaded and the evidence adduced did not establish any fraud. Indeed the evidence adduced clearly pointed to the plaintiffs' deceased father having purchased the parcel of land from Nyangau Nyaboga, the 1<sup>st</sup> defendant's father in law. The 1<sup>st</sup> defendant in fact was the one who informed her brother (plaintiff's father) about the availability of the land for purchase. There is no evidence that the deceased was to buy the land for himself and the 1<sup>st</sup> defendant. The evidence by the witnesses was that after the plaintiff's deceased father purchased the property he and his family took possession and started utilising the land. He planted tea bushes and trees and was cultivating subsistence crops. During the process of land adjudication, the plaintiff's deceased father was registered as the owner of the land and henceforth he became the absolute owner of the land and as such owner he was entitled to have exclusive possession and use of the land. On the basis of the evidence it is my determination that the plaintiff's deceased father lawfully purchased the suit land and was validly and properly registered as the owner following the process of land adjudication. No evidence of any fraud was tendered that could vitiate the title registered in favour of the plaintiff's father.

20. The 1<sup>st</sup> defendant has not proved and/or established that she had a beneficial interest over the suit property. The fact that she may be the one who notified Dismas Oremo Mogusu (her brother) about the land being available cannot afford her a right to claim interest in the suit property. Her own son PW6 Samuel Morata Mose testified that the land in truth belonged to the plaintiffs family. He in fact testified that it was his mother, the 1<sup>st</sup> defendant who incited them (her children) to chase away Oremo's family from the land and the dispute had existed from then. On the evidence adduced before Mr. Soire Advocate there is absolutely no evidence that can justify the finding of the existence of a trust in favour of the defendant. The evidence established the plaintiff's late father bought the land, took vacant possession and utilised the land as his own and was eventually registered as owner. I in the premises make a finding that the plaintiff's deceased father held the suit property as an absolute owner and he did not hold the land in trust for the defendant.

21. In the circumstances it is my holding and finding that the plaintiff has proved his case on a balance of probabilities and is entitled to judgment. Although the plaintiff would be entitled to an award in damages for trespass and costs of the suit, I have considered the family relationship of the parties going way back to the 1960's when the suit property was purchased and determined not to award any damages against the defendant or to penalise her with costs if only to foster unity.

23. The net result is that there will be judgment for the plaintiff in the following terms:-

(1) A declaration is hereby issued that land parcel LR No. Bassi/Bosingi/1027 is lawfully registered in the name of Dismas Oremo Mogusu, now deceased and that his estate is entitled to exclusive possession and use of the same.

(2) A permanent injunction restraining the defendant by herself, agents, servants and/or anyone claiming under her, from entering, re-entering, trespassing onto, cultivating, plucking tea leaves interfering with and/or in any other manner whatsoever, dealing with the suit land, that is, **LR No. Bassi/Bosingi/1027**.

(3) Each party to bear their own costs of the suit.

**JUDGMENT DATED AND SIGNED AT NAKURU THIS 21<sup>st</sup> DAY OF FEBRUARY 2020.**

**J. M. MUTUNGI**

**JUDGE**

**JUDGEMENT DELIVERED AT KISII THIS 5<sup>TH</sup> DAY OF MARCH 2020.**

**J ONYANGO**

**JUDGE**