



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ELC NO. 9 OF 2018

**JOHN OUMA ONYANGO (Suing as the Administrator of the
Estate of Onyango Ogutu).....PLAINTIFF**

VERSUS

HERBERT ONGORA OCHIENO.....DEFENDANT

JUDGEMENT

1. The Plaintiff – **JOHN OUMA ONYANGO** – filed this suit here on 8th February, 2018 vide a plaint dated 7th February, 2018. He filed it as the administrator of the estate of his late father – **ONYANGO OGUTU**. He complained that the defendant – **HERBERT ONGORO OCHIENO** – fraudulently registered himself as co-owner of land parcel **NO.SAMIA/LUCHULULO/BUKHULUNGU/44** (“disputed land” hereafter) sometimes in April 1977. According to the plaintiff, the disputed land was supposed to be solely owned by his late father but the defendant fraudulently ensured that he was registered as a co-owner.
2. The particulars of fraud consisted in the defendant taking advantage of the plaintiff’s father’s illiteracy or ignorance; violating a custom which dictated that as an adopted son, he couldn’t inherit more land than the plaintiff and his brothers who were biological sons of the plaintiff’s late father; waiting until death of the plaintiff’s late father to declare or reveal that he co-owned the land; and, finally, hiding the transaction from other family members.
3. The defendant was said to have further caused illegal subdivision of the disputed land sometimes in 2015, in the end unlawfully creating land parcels NOS 2011 and 2012. The plaintiff would wish that the land register is rectified so that the land reverts to its former status, with further action desired to be taken to remove the defendant’s name from the register as a co-owner.
4. In a more specific way, the following are the prayers made by the plaintiff:
 - (i) *An order that the Land Register for SAMIA/LUCHULULO/BUKHULUNGU/44 be rectified by cancelling the partition of the same.*
 - (ii) *An order that the name of the defendant be deleted as a co-owner of SAMIA/BUKHULULO/BUKHULUNGU/44.*
 - (iii) *Costs of the suit be paid by the defendant.*
5. The defendant filed his defence on 21st March, 2018 and counter-claimed. He denied all the material parts of the plaintiff’s claim. In his counter-claim, he pleaded that he is a joint-owner of the disputed land with the plaintiff’s late father. He further accused the plaintiff of trespassing into his portion of the disputed land and putting up a semi-permanent structure. The plaintiff is also said to have started cultivation.
6. While doing all this, the plaintiff was said to have been misusing his position as the area assistant-chief at the time. His actions were said to have humiliated and injured the defendant’s feelings by causing him ridicule from his family, friends, and neighbours. He pleaded that he suffered loss and damage. In a bid to ensure that the problem came to an end, the defendant decided to subdivide the land. The disputed land was then subdivided into SAMIA/LUCHULULO/BUKHULUNGU/2011 and SAMIA/LUCHULULO/BUKHULUNGU/2012. But before the boundaries could be fixed, the plaintiff filed this suit.
7. The defendant accused the plaintiff of filing the suit without the requisite *Locus Standi*; seeking to rectify the register to de-register a duly registered title holder under first registration; seeking to rectify a register of a land title obtained without fraud or mistake; and generally failing to show any fraud or mistake about the manner he became a registered owner.
8. The defendant prayed for the following orders:

(i) A declaration that the defendant is the lawful registered owner of the land parcel known as SAMIA/LUCHULULO/BUKHULUNGU/2012 measuring 2.30 Ha and is a lawful holder of the title deed issued on 8/5/2015.

(ii) A mandatory injunction to issue compelling the relevant government land surveyor to proceed with the survey process and ascertaining and demarcating the proper boundaries of the two parcels of land namely SAMIA/LUCHULULO/BUKHULUNGU/2011 and SAMIA/LUCHULULO/BUKHULUNGU/2012.

(iii) An injunction restraining the plaintiff, his servants, and/or agents from occupying, tilling, cultivating or in any other way interfering with the defendant's parcel of land SAMIA/LUCHULULO/BUKHULUNGU/2012.

(iv) Damages against the plaintiff for trespass including aggravated damages.

(v) Costs of the suit and interest

(vi) Any other relief that this honourable court may deem fit and just to grant.

9. The plaintiff filed a reply to defence and defence to counter-claim on 13th April, 2019. He averred that he had the requisite grant to represent the estate of his late father and is therefore seized of the capacity to file this suit. He also denied the defendant's counter claim.

10. The court started hearing the matter on 14th November, 2018. The plaintiff's side called two witnesses, the plaintiff himself as PW1 and one **Sylvester Oduori Ouma** as **PW2**. From their evidence, one gathers that the plaintiff's late father inherited the defendant's mother who by then had already given birth to the defendant. At that time, they were all living at a place called **BURUNDU** but at some point, the plaintiff's late father left Burundu with his family and went to live at a place called **SIWONGO**. The defendant's mother also went to Siwongo later, leaving the defendant behind. The defendant himself is said to have also followed his mother later on.

11. The land in dispute is at **SIWONGO** and that is where the parties and their families live. The plaintiff's father was illiterate and the defendant was said to have taken advantage of him. The plaintiff said he got information in the year 2015 that the disputed land was going to be surveyed. He rejected the idea as there were no prior deliberations. It is at this time that the plaintiff got to know that the defendant had registered the disputed land in his name. He said that he was not aware that all along the disputed land was in the joint names of his late father and the defendant. The subdivision of the disputed land was said to have been caused by the defendant alone.

12. According to the plaintiff, the subdivision should be revoked to allow for family deliberations. It is not acceptable, he said, that the defendant, an inherited or adopted son, should get half of the disputed land, while he himself and his brothers, who are true biological sons of his late father, are left to share out the other half. Even the customs, the plaintiff continued, forbid it. The defendant is only entitled to a small portion. PW2 in particular expressed surprise that the defendant was registered as a co-owner of the disputed land with the plaintiff's late father. He said that all along, he and other villagers thought or knew that the disputed land belonged to the plaintiff's father alone.

13. The two witnesses were cross-examined but the cross-examination did not change the positions expressed in their evidence.

14. The defence called six (6) witnesses, with the defendant (DW1) being the first, while **Alphonse Ahenda Bwire**, **David Andiega**, **Emmanuel Ojiambo Ouma**, **Robert Ogola** and **Denis Bruno Oduori** gave evidence as DW2, DW3, DW4, DW5 and DW6 respectively. DW1's evidence started with a historical narrative that shows, inter alia, that the ancestors of the local community had deserted the area called **SIWONGO** and migrated or dispersed to Luo land, Uganda, and another place called Busibi. But they started coming back in later years to inherit their ancestral land.

15. The defendant's father was one of those who started coming back. He was ailing and stopped over at Burundu where he later settled with his wife Nandako. The defendant's father died at Burundu. But before he died, he had already welcomed and accommodated the plaintiff's father at Burundu. The plaintiff's father was a relative. Like the defendant's father, he was also going to Siwongo, but before reaching there, he settled at Burundu, courtesy of defendant's father. When the defendant's father died, the plaintiff father inherited his wife, Nandako, and that is how the situation was by the time the plaintiff father eventually moved to Siwongo. Customs demanded that the plaintiff's father could not move to a new place, **SIWONGO** in this case, and set up a home with an inherited wife. He therefore moved with his other wife, Nageri, and established himself at Siwongo. But the defendant's mother moved there later and a home was built for her. The parties here are children of these parents and that is how they found themselves living on the disputed land at Siwongo.

16. The defendant got married in 1967. The plaintiff's late father showed him where to put up his home. That is where he lives up to now. At around that time also, land demarcation and adjudication was going on in the area. The defendant and the plaintiff's late father were registered as co-owners of the land at **SIWONGO** and this happened with full knowledge or concurrence of the plaintiff's late father.

17. Then sometimes in 1993, a disagreement arose between the defendant and the plaintiff. The plaintiff was the area assistant chief at the time. He is said to have misused the powers of his office and encroached into the defendant's land. It was at this time that the defendant started thinking about formal subdivision of the disputed land. By then, the defendant also had grown-up sons who also required homes of their own. Subdivision of the disputed land would ensure that he allocated them places to put up their homes. The subdivision process went on well but never reached conclusion since the plaintiff ensured that survey work on the ground was frustrated. But the formal records are complete and the defendant even has a title deed. This suit itself is seen as part of the frustration caused by the plaintiff.

18. The evidence of the other defence witnesses is generally aligned to that of the plaintiff with DW2, for instance, stating that "by the time of land demarcation in 1967 by the government, the defendant and the deceased (Onyango Ogutu) had already moved to their ancestral land in Siwongo and that's how they were registered as co-owners of the parcel of land (SAMIA/LUCHULULO/BUKHULUNGU/44) since they were all of age and had identity cards". DW2's more unequivocal support of the defendant is to be found in his statement thus:

“That according to my understanding which I fully believe, Herbert Onyora Ochieno has a right to equal ownership to his parcel of land being his father’s share of the ancestral land”.

19. This kind of support is to be found also in DW4’s evidence where he expressed himself in his written statement as follows:

“That indeed the plaintiff’s argument that the defendant got himself registered as a co-owner of the parcel of land (SAMIA/LUCHULULO/BUKHULUNGU/44) is not true because at the time of land demarcation by the government, land matters were communal and as a community, we are fully aware that both the defendant and the plaintiff’s deceased father were of age, sound mind and in consultation agreed to be registered as co-owners owing to the fact that the land belonged to Ochieno and Onyango”.

This supportive thrust is generally manifest in all the other defence evidence.

20. Hearing over, written submissions followed. The plaintiff’s submissions were filed on 15th April, 2019. According to the plaintiff, customs injunct the son on an inherited wife, particularly one like the defendant who is not the biological son of the inheritor, from sharing equally with the biological sons of the inheritor. And the rationale for that is that such son would also be entitled to a share of the property of his biological father. It was reiterated that the defendant took advantage of the illiteracy of the plaintiff’s late father to get himself registered as a co-owner of the disputed land at the time of adjudication. To emphasise the point, the plaintiff wondered why the defendant revealed the fact of his co-ownership of the disputed land after the death of the plaintiff’s father. He questioned why the defendant had kept it a secret all along.

21. The plaintiff also disputed the defendant’s assertion that the co-ownership was a joint tenancy. It is tenancy in common, he submitted, where what is owned by the deceased does not become owned by the surviving co-owner. It instead remains the property of the deceased and is devolved to the beneficiaries of the estate of such deceased. The court was then asked to grant the plaintiff the prayers he is seeking.

22. The defendants submissions were filed on 1st April, 2019. He submitted that he owns the land and his rights as a proprietor are protected by the relevant law. More specifically, he made reference to Sections 25 and 26 of Land Registration Act, No. 3 of 2012 to make his point and also cited the decided case **BERNARD CHOMBA VS FRANCIS WAKABA WAINAINA (2018)eKLR**. And concerning the behavior of the plaintiff relating to the disputed land, the defendant submitted, inter alia, that *“The plaintiff is being dishonest and has not come to court with clean hands. He is well aware that the defendant is a proprietor of the suit property and it is for that very reason that he could not evict him from there even when he was the Assistant Chief”.*

23. And the co-ownership between the defendant and the plaintiff’s late father was said to be a joint tenancy. In simple terms, the defendant is submitting that when the plaintiff’s father died, the whole of the disputed land became his own by operation of the law. What that in effect means is that the disputed land never became part of the estate of the plaintiff’s late father. The grant held by the plaintiff therefore is of doubtful legal validity. The decided cases of **BENSON MUTUMA MURIUNGI VS C.E.O KENYA POLICE SACCO & ANOTHER: (2016)eKLR**, **MWANGI GAKURI VS BERNARD KIGOTHO MAINA & ANOTHER (2018)eKLR** and **MOSES BII VS KERICHO LAND REGISTRAR & ANOTHER (2015) eKLR** were cited to reinforce the argument.

24. Further, the defendant denied being fraudulent in his dealings with the land. The plaintiff was said not to have proved his allegations of fraud. The submissions put it thus: *“The plaintiff did not tender any substantive evidence before this honourable court to prove his allegations and consequently, he has failed to prove the allegation of fraud which same (sic) must fail for failing to meet the standard of proof or at all”* The court was ultimately asked to dismiss the plaintiff’s suit with costs.

25. I have considered the pleadings, evidence, and rival submissions. My understanding of the dispute is that I am supposed to determine the following issues:

- (1) Whether or not the defendant fraudulently caused himself to be registered as a co-owner of the disputed land with the plaintiff’s late father and whether such registration is a joint tenancy or a tenancy in common.*
- (2) Whether or not the defendant unlawfully and secretly caused the subdivision of the disputed land.*
- (3) Whether or not the plaintiff has encroached into the defendant’s portion of the disputed land.*
- (4) Whether the parties are entitled to the remedies they are seeking.*

26. As regards the first issue, it appears clear to me that the defendant and the plaintiff’s late father were registered as co-owners of the disputed land at the time of Land Adjudication and demarcation in the local area. In other words, they were the first registered owners. It was first registration, if you like. Immediately they became such registered owners, the law applicable was the now repealed Registered Land Act (Cap 300). The plaintiff herein is complaining of fraudulent acts perpetrated by the defendant during the period first registration.

27. Though the suit was filed in 2018 when the Registered Land Act (Cap 300) had long become repealed law, canons of legal interpretation require that it is this same law that should apply in respect of acts alleged to have taken place when the Act was still in force. For this position, I make reference to Section 23 (3) (a) (b) and (c) of the interpretation and General Provisions Act (Cap 2), which are as follows:

23(3) Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears the repeal shall not

(a) Revive anything not in force or existing at the time at which the repeal takes effect; or

(b) Affect the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed; or

(c) Affect a right, privilege, obligation, or liability acquired, accrued or incurred under a written law so repealed.

Just to be clear, I have only cited the provisions that I deem relevant to the matter at hand. Section 23 (*supra*) has more content or substance than that.

28. The plaintiff's complaints relate to two periods. The first complaint relates to the period when the defendant became a registered co-owner of the disputed land. The law to apply for that period is the now repealed Registered Land Act (Cap 300). The second period relates to the time the defendant sought to partition the disputed land. This is also the period he processed the title deed. The laws applicable to this period are the Land Registration Act, 2012, and, where and if applicable, the Land Act, 2012. The two complaints however are inter-related from a factual perspective. It is not possible to completely divorce each from the other. I say this because when the plaintiff set out to partition the disputed land and process the title deed he was trying to crystallise or actualize what had become vested in him when he became a co-owner of the disputed land. In other words, the process of subdivision of the disputed land and the subsequent processing of title were a logical sequel to the fact of registration of the defendant as co-owner of the land many years earlier.

29. And because the two complaints have a clear relationship, if the fact of registration of the defendant as co-owner had sound or legitimate legal basis, the subsequent process of partitioning the disputed land and procuring a title deed cannot also be faulted in law. As pointed out earlier, the plaintiff wants the registration of the defendant as co-owner nullified because of fraud. That registration was first registration. Section 143 (1) of the Registered Land Act (Cap 300), now repealed, stated as follows:

Section 143 (1)

Subject to subsection 2, the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

30. A careful reading of the above provision shows that first registration was lawful at the time even where it was fraudulent. The provision is simply saying that you cannot rectify the land register or order cancellation or amendment merely because there was fraud or mistake. This applied only to first registration. The defendant's co-ownership of the disputed land with the plaintiff's late father falls in this category. What this in effect means is that even if the plaintiff herein were to prove fraud against the defendant, that would not amount to anything because the defendant was protected by the applicable law at the time. In other words, fraud would not be a ground to cancel a title obtained through first registration.

31. But I would wish to consider, just for the sake of argument, whether the plaintiff has proved fraud against the defendant. In my view, he has not. I say this because the plaintiff did not bother to demonstrate well the particulars of fraud stated in the plaint. He was alleging fraud relating to an incident he didn't witness. There is no actual evidence availed by the plaintiff to prove commission of fraud. Instead, what he availed were particulars that would seem to suggest fraud by inference. Prove of fraud is a serious exercise. The standard of proof is high. It is not enough to suggest that this or that might have happened. The requirement of law is that you prove what you allege concerning fraud to a degree higher than a mere balance of probabilities (see the case of **RG PATEL V LALJI MAKANJI (1957) EA 314**).

32. Both the evidence of the plaintiff and the witness he called shows that the discovery that the defendant was a co-owner came much later. It seems to me that the fraud they allege is not something they actually know for a fact to have happened but a conjectural surmising as to how the defendant's name could have found its way in the register.

33. This needs to be contrasted with the evidence of the defendant himself and his witnesses. A credible aspect of that evidence seems to show that the defendant became a registered co-owner not by dint of being an adopted son to the plaintiff's late father, but by virtue of the fact that his own late father, were he alive, would have been entitled to that same portion. A look at the evidence presented by both sides shows that the defendant's side was much more serious in explaining how the defendant became a co-owner of the disputed land. I would therefore hesitate to make a finding that the plaintiff has proved fraud. To me, there is clearer, more believable, preponderant evidence from the defence side showing how the defendant became a registered co-owner of the disputed land.

34. A related aspect of the first issue concerns whether the co-ownership was a joint tenancy or a tenancy in common. It was a joint tenancy according to the defendant. It was not so according to the plaintiff. Here, the defendant is wrong. A look at the documents of ownership show clearly that each co-owner is entitled to half share of the disputed land. What this clearly means is that ownership is already divided. In joint tenancy, ownership is usually undivided, with owners owning the whole land jointly in undivided shares. When one joint owner dies, the surviving owner automatically becomes entitled to ownership of the entire land. In the matter at hand, ownership is clearly divided in the documents of ownership. Each owns a half. That is what is known as tenancy in common. It was therefore wrong and dis-ingenious for the defendant to argue that he is entitled to the whole land and that it is out of his good concern that he is allowing the plaintiff and his siblings to own a portion. The plaintiff and his siblings have equal rights to own the half share vested in their late father.

35. The second issue concerned the manner in which the plaintiff caused the subdivision of the disputed land. According to the plaintiff this was done secretly and unlawfully. The determination of this issue is a matter of evidence. In my view, the evidence adduced by the defendant's side shows clearly that everything was done in the open. The plaintiff was not kept in the dark. During cross-examination on this issue by the defence, the plaintiff himself admitted being summoned by the land registrar about the issue but he refused to honour the summons as he had already filed this suit in court. And the exercise or process was not unlawful either. Having found that the co-ownership of the disputed land by the defendant was legal or lawful, how then could it be unlawful for him to seek to partition the land and process title deed for a portion that was his anyway? There is no law barring the defendant from doing what he did.

36. The other issue, which is the third one, relates to allegations by the defendant that the plaintiff has encroached into his land. The evidence availed by the defence side has it that there was a time the plaintiff was the area assistant chief. He encroached onto the defendant's side of the disputed land and build a semi-permanent structure. He also started cultivation. This is not convincingly denied by the plaintiff. In fact his position seems to be that he is where he is on the disputed land lawfully. The defendant, the plaintiff believes, is not entitled to the portion of the land he is claiming to be his. He is only an adopted son and should not get half share of the disputed land. It appears to be clear that the plaintiff was even ready to tolerate the survey that was planned but when he realized that the portion he appropriated to himself would go to the defendant's side, he decided to frustrate the exercise. Given this scenario, I make a finding that on balance, the plaintiff is shown to have encroached. But by how much or to what extent, only a conclusive survey can show.

37. The fourth and final issue is whether the parties are entitled to the remedies they are seeking. Given what I have said concerning the plaintiff's case heretofore, it is clear that he has not demonstrated sufficiently what he set out to prove. His case is therefore for dismissal and I hereby dismiss it with costs. The defendant has a counter-claim. His claim is largely successful and I grant prayers (i), (ii), (iii) and (v). Prayer (iv) is about damages and I was not addressed on it. I think the defendant should have done more than just stating it in the plaint and leaving it to the court to grant it. I decline to grant this prayer. Prayer (vi) requires the court to grant any other relief it may deem fit and just. In my view, the prayers I have granted are enough. I grant nothing under this head also.

Dated and signed at Kericho this 20th day of May, 2020.

.....

A. K. KANIARU

JUDGE

Dated, signed and delivered at Busia this 27th day of May, 2020.

.....

A. OMOLLO

JUDGE