



IN THE HIGH COURT OF KENYA AT BUSIA.

ELC. NO. 49 OF 2013 (FORMERLY CM.CC. 377 OF 2012)

M A O PLAINTIFF

VERSUS

O E..... DEFENDANT.

J U D G M E N T.

M A O hereinafter to as the Plaintiff, filed the complaint dated 12th November, 2012 claiming 7.5 acres out of Samia/Wakhungu – Odiado/648 and costs from Obando Egondi hereafter referred to as the Defendant.

The complaint was clearly filed before Busia CM Court but on 1st July, 2013 was referred to this court for hearing. Though there are no documents to explain this move by the Lower court, this court has seen other complaints forwarded to this court on the basis that the Lower court had no jurisdiction of the Land Registration Act No. 3 of 2012, Land Act No. 6 of 2012 and the Environment and Land Court Act No. 19 of 2011.

The Plaintiff averred that she is a wife to the Defendant who is the registered proprietor of Samia/Wakhungu – Odiado/498. They got eleven children out of whom only four are alive. That the Defendant had given a bigger share of the land to her co-wife and sold 2.0 acres to a third party. That she prays the Defendant be ordered to subdivide the land equally and transfer 7.5 acres to her.

That Defendant filed defence dated 22nd November, 2012 denying that he had distributed his land giving plaintiff a lesser share than her co-wife and selling two acres to a third party. He also denied discriminating against the Plaintiff, her children and grandchildren.

The matter came up for hearing on 3rd March, 2014 but was adjourned to 26th May, 2014. On that day, Plaintiff disclosed she was still living with her husband (Defendant) as husband and wife and the court advised her to seek an out of court settlement with the assistance of elders. The hearing was adjourned to 18th June, 2014 when the Plaintiff told the court the elders had declined to deal with the matter. The hearing then proceeded.

During the hearing, the Plaintiff told the court that her youngest child was married and has children. She said the Defendant owned Samia/Wakhungu – Odiado/1558 and 1449. That parcel Samia/Wakhungu – Odiado/1558 was still in the names of the Defendant while parcel Samia/Wakhungu – Odiado/1559 had been transferred to Bakari Keya Kolongol. The Plaintiff added that she cannot tell the acreage of the land the family of his co-wife who has since died was or the acreage of the portion of the

land she was using but put it to either 2 or 3 acres. Plaintiff prayed for more land to use.

Having considered the evidence adduced by Plaintiff, the court finds as follows;

1. That the Plaintiff and Defendant are husband and wife.
2. That the Plaintiff and Defendant are still living together.
3. That the Plaintiff conceded that she has a portion of land that she uses whose size she gave as about two to three acres. She however said she needed more land to use.
4. That the Plaintiff claim is to have the Defendant ordered to subdivide the land Samia/Wakhungu-Odiado/498 into two equal shares and transfer one share of 7.5 acres to the Plaintiff's house. Even though she did not say for whose benefit the other share would go to, the court takes it that it would go to the house of the Defendant/s first wife who is reportedly deceased.
5. That the copies of the three registers (green cards) Plaintiff availed to the court, the suit land as described does not exist as the register for Samia/Wakhungu- Odiado/498 was closed on 3rd July, 2007 upon the land being subdivided into parcels 1558 and 1559. That parcel 1558 measuring about 6 hectares was left, and the Defendant while parcel 1559 measuring about 0.8 hectares to Bakari Keya Kolongol on 31st July, 2009.
6. That the above shows that by the time this suit was filed, land parcel Samia/Wakhungu-Odiado/498 did not exist and the Plaintiff did not amend her pleadings to substitute the suit land with the correct reference now in the names of the Defendant.
7. That as the court cannot grant a property not clearly pleaded and the owner given the opportunity to be heard by being served with the appropriate, the Plaintiff's suit fails on a technicality that the suit land does not exist. That for reason that the property Plaintiff sued Defendant for does not exist, this suit is dismissed with no orders as to costs. It is so ordered.

S. M. KIBUNJA,

JUDGE.

DATED AND DELIVERED ON 17th DAY OF JULY, 2014.

IN THE PRESENCE OF;

JUDGE.