



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

Civil Case 14 of 1990

JAIRO K OTIATO.....PLAINTIFF

-versus -

SAMSON OTIENO.....RESSPONDENT

JUDGMENT

Jairo Kumba Otiato – plaintiff sued Samson Otieno who died before the suit was heard and the son of the defendant John Akoko Otiato was substituted as the defendant.

The story in the plaintiff tells the case of the plaintiff. It is this:-

The defendant’s mother was married to the plaintiff’s father in a levirate custom under the Luo customary law and the defendant thereby he came adopted as a member of the plaintiff’s father’s family after the death of the defendant’s father notwithstanding that he was not sired by the plaintiff’s father, Otiato and therefore has no right to inherit the plaintiff’s father’s land.

The fight accordingly relates to two parcels of land namely Kisumu/Nyalenda B/29 and Kisumu Nyalenda B 278.

Plaintiff says that these two parcels are the only ones his late father owned as should pass on to the plaintiff as heir to his father “under customary law and otherwise”.

The area was declared adjudicated area when the plaintiff was away from home and when he came he found the two parcels registered in name of the defendant. It is the plaintiff’s assertion that the defendant did this as a trustee for the family in general and for the plaintiff in particular.

Plaintiff now prays for:

- (a) a declaration that the land parcels are the plaintiffs’ family land.
- (b) Another declaration that the defendant is not entitled to inherit from the plaintiff’s deceased father the land parcels, two more declaration and then.
- (c) An order that the defendant do transfer to the plaintiff the parcels of land with costs of the suit.

This suit must be dismissed because it has no merit at all and it is misconceived.

It is admitted by the plaintiff that although the defendant was not sired by the plaintiff's father, the latter remarried defendant's mother albeit in a levirate union and thereby adopted or took over the defendant. The plaintiff states that the defendant was there four years and plaintiff's father brought him up till he was an adult, married and has also finally died leaving an adult son who has, as I said, been substituted in the proceedings as the defendant.

It is also not disputed that though this defendant registered the two lands in his name when the plaintiff was away, when the plaintiff came, he subdivided parcel No 29 eking from it parcel 1015 which he gave to the plaintiff and which is now registered in the plaintiff's name. The plaintiff said that 1015 is smaller than 29 – but that is not the issue. The issue is that the plaintiff wants all the two parcels in his name because the defendant was not his blood brother and therefore under Luo customary law not entitled to inherit from him who levirated his mother.

Customary law, if it is alleged it exists, must be proved by evidence. No witness was forthcoming to prove this alleged custom.

The High Court and all other courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law – see the Judicature Act.

I have said that the Luo custom alleged is not proved. And even if, it has proved that customarily there is a law barring a person from inheriting from another person who adopted him at the tender age of four years till the adoptee was an adult, which law would be repugnant to justice and morality. It would also be inconsistent with the written law namely the Law of Succession Act. The Law of Succession Act in its Section 29 defines a dependant as including children whom the deceased had taken into his family as his own.

We are not told when the plaintiff's father died and what the age of defendant was but what the Act interprets is that a person in the position of the defendant should not be left away in the cold when it comes to inheritance just because he was only a foster son of his father or foster father, if you like.

My humble view and findings that the defendant was entitled to inherit and very benevolently and reasonably knew that he was holding the parcels on behalf of himself and his step brother who was away. He gave the brother a piece when he emerged. It is clear that the story would have been entirely different if the defendant was the plaintiff and the plaintiff the defendant.

It should be noted that my reference to the defendant hereinbefore has referred to son Akiko – the substitute defendant. I have also not in detail dealt with his side of the story because it agrees with what has been confirmed by the plaintiff.

For the above reasons, I dismiss the present suit with costs to the defendant.

J MANGO

JUDGE

24/3/93