



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIV CASE 117 OF 1985

**Obaka**

**versus**

**Okoth**

**Judgment.**

The plaintiff Peter Muga is the son of the late Joash Muga who is alleged to have died on January 27, 1984 and brings this suit in that capacity. The plaint was on August 21, 1985; the summons was served upon the defendant on that same date; no appearance was entered and the plaintiff by letter applied for judgment against the defendant in default of appearance on September 25, 1985; the suit was then listed for formal proof after interlocutory judgment was entered for the plaintiff. A date for formal proof was then taken but when the file was brought to me I directed that a hearing notice be served on the defendant and this was duly done on October 14, 1985; today I heard the suit by way of formal proof, the plaintiff gave evidence and called 3 witnesses.

The plaintiff's case is that he is the son of the late Joash Muga who died on January 27, 1984 being survived by some 15 children being eight sons and seven daughters. The deceased lived in Kasewe Sub-Location, West Kabondo South Nyanza.

He owned a parcel of land measuring about 11 acres. During the registration of land the deceased land was surveyed and registered as to 9.5 acres thereof as parcel number Kabondo/Kowidi/164. It is the plaintiff's case that this title 164 only covers a portion of the late deceased's land and leaves out a portion measuring approximately 2½ acres across the road which in the sketch plan annexed to the plaint shows a portion number 165A as belonging to land title number Kabondo/Kowidi/165 measuring 9.5 acres and registered in name of Othuro Okoth the defendant. The plaintiff gave evidence that the arrows indicating the portions 165 and 165 A as belonging to the defendant was drawn in error consequent upon a misrepresentation by the defendant without the permission of the deceased and behind his back when in fact the land shown as 165A should be shown by appropriate arrows as belonging to land parcel number 164 registered in the name of the deceased.

The plaintiff stated that on discovering this error he reported the matter to his assistant chief who called the clan elders who arbitrated the dispute and found the land belonged to the plaintiff on the basis of the evidence available; but the defendant was adamant; he therefore reported this matter to the land registrar who advised that the matter could only be dealt with by this court.

The plaintiff called 3 witnesses all of whom gave evidence confirming the plaintiff's evidence and stating that this land as belonging to the deceased Joash Muga since 1939 when he purchased the land in dispute from one Wanugu who was a neighbour and who was migrating from this land. PW 3 and PW 4 are clan elders of Kasewe sub location and PW 4 was the chairman of the clan elders at the meeting held on the site of the disputed land on March 23, 1984 both confirming that this land belongs to the late Joash Muga and should be properly registered in the name of the plaintiff. I have considered this evidence and inspected the abstracts of title filed in this case as well as the sketch map; I am satisfied that the land marked as 165A and shown as being part and parcel of Number Kabondo/Kowido/165 was fraudulently registered in the name of the defendant Othuro Okoth as a result of misrepresentation of the defendant to the adjudication officers and that it should properly be part and parcel of land title number Kabondo /Kowidi/164 registered in the name of Joash Muga, and I declare it is held by the said Othuro Okech in trust for the heirs of the said Joash Muga. I order that the defendant shall transfer the said land to the

plaintiff failing which the Deputy Registrar is hereby directed to execute all the necessary documents to do so. I order that the costs of this suit be paid by the defendant to the plaintiff: I also order that the defendant be restrained from trespassing on the land parcel shown as 165 A in the sketch map annexed to the abstract of title filed herein.

Delivered on the October 18, 1985,

**Masinde J**