



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 961 OF 2016

(FORMERLY HCC NO. 308 OF 2012)

ROBERT ADERA OPIYO.....1ST PLAINTIFF

TERESIA ACHIENG OPIYO.....2ND PLAINTIFF

Both suing as administrator and administratrix of the estate of

JETHRO OPIYO CHIEWU (Deceased)

VERSUS

ROSELINE AMONDI OTIENO.....DEFENDANT

J U D G M E N T

Introduction and Brief Background:

1. The plaintiffs in the present suit are the administrators of the estate of Jethro Opiyo Chiewu (deceased) who at the time of his death on 13th December 2000 was the registered proprietor of land parcel title number **South Sakwa/Alego/148** measuring approximately 7.8Ha (hereinafter referred to as “**the suit property**”). The said suit property was transferred to the deceased, the said Jethro Opiyo Chiewu, on 17th July 1979 by one Paul Olwal (also deceased) who was the grandfather of the defendant, Roseline Amondi Otieno. The dispute relating to the suit property goes back to 1992 when the defendant instituted Nakuru HCC No. 772 of 1992 seeking a declaration that the suit property was illegally and fraudulently transferred to Jethro Opiyo Chiewu (deceased) and seeking the same to be reverted to the estate of the late Paulo Olwal. This suit was not heard on merits and was dismissed by Hon. Justice D. M. Rimita on 14th September 1994 when the suit was scheduled for hearing and there was no attendance by either of the parties.

2. The defendant in 2010 submitted the dispute relating to the suit property to Rongo District Land Disputes Tribunal claiming a beneficial interest over what she claimed to have been ancestral land owned by her grandfather. After hearing the dispute, the Tribunal awarded the defendant 15.5Acres of the suit land and Jane Adhiambo Onyango who was the daughter in law of Jethro Opiyo (deceased) 4.0Acres. An application by the 1st plaintiff herein seeking judicial review of the Tribunal’s decision was declined by the court on 13th June 2011 in Kisii Misc. Application No. 71 of 2010. The decision of the Tribunal was consequently adopted as judgment by the Principal Magistrate’s Court at Rongo vide land Misc. App. No. 19 of 2010 and a decree issued in terms thereof on 14th March 2012. The decree was subsequently executed and the suit property was subdivided into land parcels **South Sakwa/Alego/901** and **902**. Land parcel **South Sakwa/Alego/901** was registered in the defendant’s name on 21st November, 2012.

The Pleadings of the Parties:

3. The present suit has to be viewed against the foregoing background which precipitated the institution of the instant suit. The plaintiff filed the suit vide a plaint dated 13th August 2012 which was subsequently amended on 4th June 2013. The plaintiffs pray for judgment against the defendant for:-

(a) Declaration that the late Jethro Opiyo Chiewu whose estate is administered by the plaintiffs is the registered and/or lawful owner of land parcel title No. South Sakwa/Alego/148 to the exclusion of all and sundry.

(b) Declaration that the decision of Rongo District Land Disputes Tribunal (Awendo Division) dated 6th July 2010 and the decree issued on 14th March 2012 giving a portion measuring 15.5acres of land parcel title No. South Sakwa/Alego/148 to the defendant was/is illegal, null and void.

(c) A declaration that subdivision of land parcel title No. South Sakwa/Alego/148 into two being title Nos. south Sakwa/Alego/901 and South Sakwa/Alego/902 was unlawful, null and void.

(d) The honourable court be pleased to revoke, cancel and nullify the subdivision of the land parcel title No. South Sakwa/Alego/148 into two being Nos. South Sakwa/Alego/901 and South Sakwa/Alego/902 and to uphold the sanctity of parcel No. south Sakwa/Alego/148 in the name of the deceased.

(e) The costs of the suit be born by the defendant.

(f) Such other and/or further relief as the court may deem just to grant in the circumstance of the case.

4. The defendant filed a defence to the amended plaint and further pleaded a counterclaim dated 16th December 2013 which she subsequently amended on 20th May 2014 and filed the amended defence and amended counterclaim on 30th May 2014. The defendant in her defence contended that the deceased Jethro Opiyo Chiewu fraudulently caused himself to be registered as the proprietor of land parcel **South Sakwa/Alego/148**. She averred that the deceased had no proprietary interest in the suit land and that the averment that her grandfather, Paul Olwal, validly executed the transfer documents in his favour (Jethro Opiyo's) was utterly false as her grandfather was illiterate and could not read and/or write.

5. The defendant further averred that the land the subject matter of the present suit was the subject of dispute at the Rongo District Lands Tribunal who heard the dispute and rendered an award that was duly adopted as judgment by the Principal magistrate's Court at Rongo and a decree issued that was executed whereby the suit land was subdivided into two portions **South Sakwa/Alego/901** and **902** in terms of the decree. A Judicial Review Application (Kisii JR Application No. 71 of 2010 challenging the decision of the disputes tribunal was struck out by the court and the defendant avers that the instant suit is *res judicata* and constitutes an abuse of the court process.

6. In the counterclaim, the defendant avers that the suit land was owned by her grandfather Paulo Olwal who died in 1981 and she was bringing the action as the administrator of his estate. She contends that the property was fraudulently transferred to Jethro Opiyo. By the counterclaim the defendant seeks the following orders:-

1. A declaration that the late Jethro Opiyo fraudulently transferred South Sakwa/Alego/148 to himself.

2. A declaration that the defendant (plaintiff herein) is the legal and bona fide owner of South Sakwa/Alego/901 and South Sakwa/ Alego/902.

3. A declaration that the sub-division of South Sakwa/Alego/148 into South Sakwa/Alego/901 and South Sakwa/Alego/902 was lawful.

4. A declaration that defendant (plaintiff herein) is the legal proprietor of all that parcel of land known as South Sakwa/Alego/901 measuring approximately 1.60Hectares.

5. For a temporary injunction against the plaintiffs, their servants and/or agents or otherwise howsoever be restrained from being or remaining or entering all that parcel of land known as South Sakwa/Alego/901.

6. For a permanent injunction against the plaintiffs, their servants and/or agents or otherwise howsoever be restrained from being or remaining or entering all that parcel of land known as South Sakwa/Alego/901 and South Sakwa/Alego/902.

7. A declaration that the defendant is entitled to vacant, quiet and peaceful possession of all that parcel of land known as South Sakwa/Alego/901 and South Sakwa/Alego/902 as against the plaintiffs.

8. General damages.

9. Costs of the counterclaim and interest thereupon at such rate and for such period of time as this Honourable Court may deem fit to grant; and

10. Such further or other reliefs as may be appropriate in the circumstances.

The Evidence of the Parties:

7. The suit was part heard before Hon. Justice Okong'o who took the evidence of the 1st plaintiff who testified as the sole witness in support of the plaintiffs' case. The defence hearing was heard before me and the defendant and two other witnesses testified in support of the defence and the counterclaim.

8. Robert Adera Opiyo (PW1) testified that he was the son of Jethro Opiyo Chiewu while Teresia Achieng Opiyo, the 2nd plaintiff was his mother and that they had brought the suit as the administrators of the estate of Jethro Opiyo Chiewu (deceased). He testified that land parcel **South Sakwa/Alego/148** measuring 7.8Ha was owned and was registered in the name of his father, Jethro Opiyo Chiewu (deceased) as at the time of his death. He stated that after the death of his father they continued to be in occupation and possession of the suit property. He further stated that in May 2010 the defendant made a complaint against one Jane Adhiambo Onyango at the Rongo Land Disputes Tribunal (Tribunal) over the suit property. The Tribunal heard the complaint and rendered an award on 6th July 2010 where they awarded the defendant a portion of the suit land. The defendant was awarded 15.5acres and Jane Adhiambo was awarded 4.0acres from the suit land.

Following the adoption of the award of the Tribunal by Rongo Principal Magistrate's Court the land was subdivided into two portions namely **LR No. South Sakwa/ Alego/901 and 902.**

9. The witness stated that before the defendant lodged the complaint at the Tribunal she had filed a suit at the High Court in Nakuru which was dismissed for non attendance. The witness testified that Jethro Opiyo Chiewu acquired the suit property on 17th July 1979 when he was registered as the owner and was issued a title deed. He produced a copy of the title deed ("**PEX.2**") and stated that they still held the original title deed and have never surrendered the same. The witness explained that they were not party to the complaint made by the defendant before the Tribunal although they appeared as witness before the Tribunal. The witness stated that he was not satisfied with the decision of the tribunal and that he wished the same together with the consequent execution thereof to be annulled and the title of the suit property restored to the name of the deceased.

10. Under cross examination by the defendant's advocate, PW1 admitted that he had never occupied the suit property. He stated that Paulo Olwal was not his grandfather and that his father Jethro Opiyo Chiewu (deceased) was not a son to Paulo Olwal who was the initial owner of the suit property. He could not tell how he was related to Paul Olwal who he said gave the suit land to his father (PW1's) as a gift in 1979. The witness further stated that his late father never resided on the suit property though he was cultivating on the land. He stated that Paulo Olwal was buried on the suit land when he died as was his wife. He agreed that Caleb Otieno, a son to Paulo Olwal and father of the defendant was also buried on the property when he died in 1974. Caleb Otieno's wife, Miriam Otieno also mother of the defendant was equally buried on the suit property.

11. DW1 further in cross examination stated that Paulo Olwal gave his father the property as a gift because they were close family friends. He further stated that his brother (PW1's), Simeon Onyango was buried on the property when he died and that he was the only relative of the plaintiffs who was buried on the property as all their other relatives who had died were buried in Alego, Siaya. He stated Onyango settled on the suit land in 1997. The witness conceded that Paulo Olwal had houses on the suit property at the time of his death. He stated that he was made aware of the tribunal case by Jane Onyango and that he and his mother gave evidence before the tribunal and that he made an application before the Rongo court to be enjoined as an interested party in the application for adoption of the tribunal's award by the defendant. The witness stated that he never knew whether or not Paulo Olwal was literate and could not tell whether he was the one who signed the transfer dated 23rd May 1979. The witness admitted that it was Jane Onyango who was occupying the land at the time the defendant referred the complaint/dispute to the tribunal. The witness conceded the defendant had a right to the property but stated her right was extinguished by lapse of time. He stated the defendant should have brought her claim earlier.

12. DW1, Roseline Amondi Otieno testified that the land the subject matter of the suit **LR No. South Sakwa/Alego/148** belonged to her grandfather and was their ancestral home. She testified that the land was transferred under unclear circumstances on 23rd May 1979 to Jethro Opiyo Chiewu (deceased) who was the father of the 1st plaintiff and husband of the 2nd plaintiff. She averred that as per the transfer documents, the land was transferred as a gift to the said Jethro Opiyo. The defendant asserts that her grandfather was illiterate and could not read or write and therefore denied he could have signed the alleged transfer. In her testimony in court she stated as follows:-

"My grandfather was not able to read or write and he died aged 82years. My grandfather died in 1981 and at the time of his death he was sickly, he was depressed and he could not even talk. There is no way he would have signed the alleged transfer."

13. The defendant's position was that the suit land was acquired by her grandfather and that it was their only known home given that her own parents and her grandfather were all buried on the property and had their homes on the property. The defendant stated that she filed the suit in Nakuru in 1992 against the 1st plaintiff's late father and 2nd plaintiff's husband claiming ownership of the suit property but the suit was dismissed for non attendance and was never determined on merits. The defendant further stated she lodged a complaint at the Rongo Land Disputes Tribunal that the suit land had been fraudulently transferred to Jethro Opiyo. She stated that the late Jethro's estate was represented and participated in the tribunal proceedings. The tribunal made an award whereby the defendant was awarded a portion of the land and the other portion was awarded to the estate of Jethro Opiyo. The defendant stated she was satisfied with the decision of the Tribunal. However, she stated the plaintiffs challenged the Tribunal's award by way of judicial review which was unsuccessful precipitating the filing of the present suit by the plaintiffs. The defendant placed reliance on the bundles of documents she had filed on 5th May 2014 and 20th May 2014 which were admitted as defence exhibits. She also relied on her witness statement dated 5th May 2015.

14. In cross examination by the plaintiff's advocate, the defendant stated that at the Tribunal she lodged the complaint against Jane Adhiambo Onyango since she was the one who was occupying the land and she was not aware that Jane Adhiambo was not the registered owner. She nonetheless maintained that the estate of Jethro Opiyo was represented at the Tribunal proceedings as the plaintiffs appeared and even gave evidence. The defendant further stated she had locus to represent the estate of her deceased grandfather as she had letters of administration issued in 1994. She stated that she had brought the action on behalf of herself and her siblings.

15. DW2, Samuel Otieno Otucha and DW3, Erick Ochieng in their testimonies relied on their witness statements dated 16th December 2013 and filed in court on 20th December 2013. DW2 was the son of the brother of the late Paulo Olwal and was therefore a cousin to the defendant's father. In his statement, he explained the defendant's father Fredrick Caleb Otieno died in a road accident in 1974 leaving a widow Mariam Awuor Otieno with four daughters including the defendant who were all aged under ten years. He explained the wife of the defendant's grandfather, Truphosa Akumu died in 1978 and was buried on the suit land. Paulo Olwal, the defendant's grandfather died in 1981 and was buried on the suit property. The defendant's mother, Miriam Awour died in 1983 and was also buried on the suit property. DW2 stated that Jethro Opiyo attended and participated in the burial of all the defendant's parents and relatives. According to DW2, the late Paulo Olwal in 1978 gave Jethro Opiyo the title deed for the suit land for safe keeping and to hold in trust for his daughter in law (defendant's mother) and grandchildren who included the defendant. In his statement, DW2 inter alia stated as follows:-

"Mzee gave the title deed to Jethro his nephew to keep in trust for his daughter in law and grandchildren only for the latter to transfer the title deed to his name secretly in 1979 without involving the immediate family members. He later decided to settle one of his sons the late Simon Onyango on the said land. He did this on realizing that Paulo's granddaughters had

come to their home to hold a memorial service for their grandparents and parents. By then Fredrick Otieno's permanent five roomed house was still on the land. After the memorial service Jethro's son who had then settled on the land demolished the permanent house and took the iron sheets and bricks to construct a cow shed.

As a close relative I was not aware of the transfer nor any of our relatives. We only came to know of this case during tribunal hearing in Awendo between Roslyne Amondi Otieno and Jane Onyango (widow of Simon Onyango) in 2010."

16. It was the evidence of DW2 that the late Paulo Olwal could not have wilfully gifted the entire land to Jethro and leave his daughter in law and his granddaughters landless yet they were residing on the suit land.

17. DW3 Eric Ochieng relied on his filed witness statement as his evidence. In his statement DW3 averred that his grandfather, Paulo Olwal gave the title to the suit land to Jethro Opiyo for safekeeping and to hold in trust for his daughter in law and the children. He stated his grandfather could not read or write and that it was them (the children) who used to read the bible for him and he would teach them about God. The witness stated that the grandfather never informed any of the family members regarding the transfer of the land to Jethro and all they knew was that Jethro was holding the title deed in trust as their grandfather had become elderly and sickly as he did not want the title to fall on the wrong hands.

Submissions, Analysis and Determination:

18. The parties filed their written submissions following the close of the trial. The plaintiffs submissions were filed on 27th July 2018 and the defendant submissions were filed on 21st September 2018. Having reviewed the pleadings and the evidence adduced by the parties and further having considered the submissions filed by the parties, the following issues stand out for determination:

- (i) Whether the late Mzee Paulo Olwal was the original registered owner of land parcel South Sakwa/Alego/148.
- (ii) Whether land parcel South Sakwa/Alego/148 was validly transferred to Jethro Opiyo Chiewa (deceased) as a gift by the late Mzee Paulo Olwal in 1979 and/or the late Jethro Opiyo Chiewa (deceased) was handed the land title deed to hold as trustee.
- (iii) Whether the Rongo Land Disputes Tribunal adjudicated the dispute relating to the suit land referred to it by the defendant and if so whether this court can properly interfere with that adjudication in these proceedings?
- (iv) Whether the proceedings before the Rongo Disputes Tribunal and the consequent adoption of its decision by the Rongo Principal Magistrate's Court were a nullity by reason of want of jurisdiction?
- (v) Whether the registration of Jethro Opiyo Chiewu as owner of land parcel South Sakwa/Alego/148 constituted him a trustee for the late Paulo Olwal (deceased) and his dependants and/or beneficiaries?
- (vi) What orders and/or reliefs should the court grant?

19. It is not disputed that Paulo Olwal was the grandfather of the defendant, who was a daughter to his only son, Caleb Fredrick Otieno who had died in a road traffic accident in 1974. It is not disputed that before his death Caleb Otieno together with his family were residing on the suit property where his parents were also residing. The late Caleb Otieno had constructed a permanent house on the suit property where his wife continued to reside until she died in 1983. The defendant's grandmother, Truphosa Akumu died in 1978 while the grandfather, Paulo Olwal died in 1981. The defendant's said grandparents, her father and mother were all buried on the suit property when they died. There can be no doubt that the suit property was and constituted the ancestral land of Paulo Olwal and his dependants, as it was there where they settled and resided.

20. The adjudication register dated 28th June 1967 annexed to the defendant's supplementary bundle of documents ("DEx.6") shows that Paulo Olwal was adjudicated as the owner of land parcel Alego (Sakwa) 148 denoting this was indeed ancestral land. The title deed exhibited by the plaintiffs in their bundle of documents ("PEx.2") shows that Jethro Opiyo Chiewu was registered as owner of the suit property on 18th July 1979. The copy of the title on the property section shows that the register of the title was opened on 9th September 1968 and that Paulo Olwal was registered on 9th September 1968 as the first registered owner. Jethro Opiyo Chiewu was registered as owner on 17th July 1979 and issued with a land certificate on 18th July 1979. There is therefore uncontestable evidence that Paulo Olwal was the original registered owner of the suit property before the same was transferred to Jethro Opiyo Chiewu. On the basis of the evidence and the facts, I am satisfied the suit property constituted ancestral land for Paulo Olwal and his family. The transfer of the property to Jethro Opiyo in 1979 by way of gift even if admitted the same was validly done, in my view could not have been intended to take effect absolutely. The transferee never sought to evict the transferor and/or the transferor's dependants from the land after he was registered as owner.

21. The defendant has contended the validity of the transfer of the suit property to Jethro Opiyo Chiewu. The defendant has refuted the transfer in favour of Jethro Opiyo Chiewu was executed by her grandfather. The defendant avers that her grandfather was illiterate and could not read or write yet in the transfer of land dated 23rd May 1979 he is shown to have signed by writing his name. The defendant points to the adjudication register where the grandfather did not sign but affixed his thumb print to illustrate that indeed he was illiterate and could not have signed the alleged signatures on the land board application form and the transfer.

22. The defendant further contends that her grandfather could not have intended to gift the entire parcel of land to Jethro Opiyo who was not even a close relative and render her daughter in law (defendant's mother) and her children who were residing on the suit property landless. Besides, the defendant avers, no other family members was involved in the transaction as is customary in land transactions. The defendant asserts that the said Jethro Opiyo was only handed the title for safekeeping on behalf of the defendant's family but instead the said Jethro Opiyo abused that trust and secretly caused the land to be transferred to himself through fraudulent means.

23. The 1st plaintiff who testified on behalf the plaintiffs stated in his evidence that Paulo Olwal gave the suit property to his father because they were close friends. Although he stated Paulo Olwal was a relative he could not say how they were related. The 1st plaintiff stated that apart from his brother Simeon Onyango who is buried on the suit property none of his other relatives who had died was buried on the property and they were all buried in Alego, Siaya. To the contrary, all the defendant's deceased relatives were all buried on the suit property. The 1st plaintiff further admitted the defendant's family had houses on the suit property. He stated Simeon Onyango settled on the property in 1997. The 1st plaintiff acknowledged there was a variance in the signatures attributed to his father in the application for land board consent and the transfer. He stated in evidence in cross examination thus:-

“...I can see the document is signed by my father and Paul. I don't know if the signature appearing on the document is my father's.”

Further he stated thus:-

“... I can see a copy of the adjudication register for the suit property dated 28th June 1967. It has a thumb print of Paul Olwal (“Paul”). I don't know why in some places Paul put his thumb print while in others he has signed. I don't know my father's signature. I can see the signature of my father as it appears in the transfer of land dated 23rd May 1979 and in application for consent dated 26th April 1979 differs. My father acquired the suit property procedurally.”

24. The defendant explained that in 1992 after she discovered the late Jethro Opiyo Chiewu had secretly and fraudulently transferred her grandfather's land to his name she filed a suit in Nakuru HCC No. 772 of 1992 where she sought to have the title registered in favour of Jethro Opiyo Chiewu cancelled and the land restored to the estate of the late Paulo Olwal. This suit was not heard on merit but was dismissed for failure by the parties to attend at the hearing. Explaining why the suit was not prosecuted the defendant stated in her witness statement that in 1992 she visited the lands registry at Migori with a view of obtaining transfer documents and it is then she found the land had been transferred to Jethro Opiyo Chiewu and on scrutinizing the documents she noted they had anomalies. Her grandfather at the time of death in 1981 could neither read nor write yet the transfer documents indicated both Jethro and her grandfather had signed the same. Her grandfather could only sign by thumb printing as he had done when he got his title. Her grandfather had allegedly transferred the entire land 19.5 acres to Jethro Opiyo in 1979 when he was still alive and residing on the land together with his daughter in law and her children. Further no family member from Paulo Olwal's side was involved or was aware of the said transfer of land. Upon noticing the anomalies the defendant stated in her statement:-

“...I commenced Nakuru High Court Case No. 772 of 1992 where at paragraph 10 of My uncle Jethro's defence he affirms and confirms: ...Paul Olwal being without a male heir it was the deceased's wish amongst other considerations, that the suit premises be registered in the defendant's favour to forestall the possibility of the same falling into the hands of strangers.

My uncle Jethro wrote to my father in law Silfano Futi on 15th October, 1997 acknowledging that I was his daughter and that there was no need for us to court over the land and that we could solve it as a family and he was willing to sit with us on the matter. That I should withdraw the case.

Mr. Opiyo persuaded me to drop the suit.

Subsequently, we started negotiations as to which portion of land he would give us and the acreage. In the meantime, none of our lawyers attended court sessions and the suit was subsequently dismissed for non attendance...”

25. The court has carefully scrutinized the documents said to have been signed by Paulo Olwal (deceased) and Jethro Opiyo Chiewu (deceased). The adjudication register as earlier observed was thumb printed by Paulo Olwal (deceased) and not signed by him. The application form for the Land Control Board consent supposedly was signed by both Paulo Olwal (deceased) and Jethro Opiyo Chiewu (deceased) on 26th April 1979. The form of transfer of land supposedly was also both signed by Paulo and Jethro on 24th May 1979. Jethro Opiyo further also wrote a letter (in dholuo) dated 15th October 1997 to Nyawana Futi which he signed. The signatures signed by Jethro in the three documents are decisively different as to cast doubt as to whether they were signed by the same person. The evidence that Paulo Olwal was illiterate and could not read or write was not rebutted by any evidence. The original document that Paulo Olwal could have signed was the adjudication register in 1967 yet he signed the same by thumb printing. I have grave doubts as to whether the land transfer form was indeed signed by Paulo Olwal and my determination is that it has not been satisfactorily proved that the transfer was in fact signed by Paulo Olwal. The person Joseph Okeyo Mikonga D.O's clerk indicated as being the one who identified the parties to the Magistrate was not called to give evidence. He is the only person who would have shed light as to how the documents were executed in the face of the contest.

26. The fact that no family members particularly from Mzee Paulo Olwal's family was involved in the land transaction whereby he allegedly gifted the whole land to Jethro Opiyo casts doubts on the genuineness of the transaction. Equally, there is no evidence that the local administration were involved yet at the time of the sale, Paulo Olwal was himself alive as was his daughter in law and her children. The court views the attendant scenario as one where Jethro Opiyo Chiewu seized an opportunity to take advantage of a Mzee who had lost his only son through a road accident and who was vulnerable particularly because his deceased son was the only male, within the family and questions of inheritance must have been playing in his mind. Jethro Opiyo no doubt schemed to get the land from Paulo Olwal against the background that under Luo Customary Law, women generally were not supposed to inherit property from their parents. He definitely was least concerned about what would befall Paulo Olwal's daughter in law and the children who were residing on the suit property. As fate would have it, Paulo Ochwal and his daughter in law died in quick succession in 1981 and 1983 respectively with the result that the defendant and her other siblings were hence forth orphaned. Would one truly say the daughter in law of Paulo Ochwal, who was the wife of his son, had no beneficial interest in the suit property such that the same could be dealt with without any regard whatsoever to them? I do not think so. The suit property constituted ancestral land, the son of Paulo Olwal had established a home thereon and was residing there with his

family. The fact that the son, Caleb Otieno died could not extinguish the interest he had on the property. He left a family who were properly entitled to assume the interest he had on the property. The defendant's family's interest on the land was overriding which did not require to be registered.

27. The suit property was held by Paulo Olwal under the Registered Land Act, Cap 300 of the Laws of Kenya (now repealed) which was replaced by the Land Registration Act, 2012. Section 30 of the Registered Land Act provided for overriding interest over land that did not require to be noted in the register. Section 30(f) and (g) provided as follows:-

30. Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same without their being noted in the register:-

(a)

(b)

(c)

(d)

(e)

(f) rights acquired or in process of being acquired by virtue of any written law relating to limitation of actions or by prescription;

(g) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed;

(h)

28. Section 28 of the Registered Land Act (repealed) provided as follows:-

28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject -

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register, and

(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by Section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.

29. The Land Registration Act, 2012 which replaced the Registered Land Act, Cap 300 Laws of Kenya reproduced Section 30 of the repealed Act under Section 28 of the new Act with slight variations but expressly included under Section 28(b) "**trusts including customary trusts**" as an overriding interest that required no noting in the register. Under Section 27 of the Land Registration Act, a transfer made without any valuable consideration would equally be subject to the overriding interests upon which the transferor held the property. Section 27(1) (a) provides as follows:-

A proprietor who has acquired land, a lease or a charge by transfer without valuable consideration shall hold it subject to -

(a) Any unregistered rights or interests subject to which the transferor held it.

30. Section 25 of the Land Registration Act, 2012 reproduces the provisions of Section 28 of the Land Registered Act (set out above). The import of the legal provisions I have referred to is that they make it clear that a registered proprietor of land holds the land subject to any overriding interests the land may have been subject to as at the time of registration in terms of Section 30 of the Registered Land Act (repealed) in case the registration was before the coming into force of the new Act in 2012; and Section 28 of the Land Registration Act, 2012.

31. In the present case, the defendant's family, who included her mother and her other siblings were in occupation and were residing on the land as at July 1979 when the same was transferred to Jethro Opiyo. They were entitled to occupy and possess the land as wife and children of Caleb Otieno who was the only son of Paulo Olwal (deceased), the immediate registered owner of the suit land before the transfer to Jethro Opiyo. Apart from Paulo Olwal holding the land under customary trust in favour of the defendant's family, the defendant's family by virtue of occupation and possession of the land had an overriding interest over the suit land and any transfer could only be subject to their overriding interests over the land. The transfer to Jethro Opiyo Chiewu was thereof subject to the defendant's family overriding interest over the suit property. The said Jethro Opiyo Chiewu in my view following the transfer of the land to himself became a trustee and held the land in trust for the defendant's family.

32. Indeed the conduct of Jethro Opiyo Chiewu in the initial years was consistent with him exercising duties of a trustee. He did not seek to evict Paulo Olwal who resided on the land until he died in 1981. He also did not seek to evict the defendant's family and when the defendant's mother died in 1983 he participated in her burial on the suit property. Jethro Opiyo Chiewu did not himself settle on the suit land and it was not until 1997 that he brought his son Simeon Onyango to settle on the suit land. Up until 1997 the defendant's family houses stood on the land before they were demolished by Onyango (Jethro Opiyo's son). The fact that from 1979 when he was registered as owner upto 1997, when he sought to take control of the land by having his son settle thereon, he had not taken any action to reclaim the land from the defendant's family meant that his action was statute barred in terms of Section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya.

33. Section 7 of the Limitation of Actions Act provides as follows:-

7. An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

The defendants are claiming the recovery of the suit land as the personal legal representatives of Jethro Opiyo Chiewu. By 1997 when Jethro Opiyo's son sought to assert ownership rights, a period of about 18 years had lapsed since Jethro Opiyo had been registered as the owner. His right to recover the land had in my view been caught up by limitation and any recovery action had become statute barred. It is therefore my determination that the title registered in favour of Jethro Opiyo Chiewu in regard to the suit property was firstly subject to the overriding rights the defendant's family had over the property; and secondly the plaintiff's right to recover the property was statute barred by reason of prescription.

34. The analysis and discussion above disposes of issues (i), (ii) and (iii) above and would be sufficient to dispose of the entire case. However, the parties considerably dealt with the issue of the proceedings before the Rongo Land Disputes Tribunal and this judgment would be incomplete if, I did not address that issue. The defendant initiated the proceedings before the Land Disputes Tribunal against Jane Onyango, the widow of Simeon Onyango, who was the 1st plaintiff's brother and son to the 2nd plaintiff. Jane Onyango was the person who was using the suit land and was residing thereon. The 1st and 2nd plaintiffs who were the administrators of the estate of Jethro Opiyo Chiewu participated in the Tribunal proceeding and gave evidence in support to the respondent. The estate of Jethro Opiyo Chiewu was therefore represented during the Tribunal proceedings.

35. The Tribunal upon evaluation of the evidence made a finding to the effect that the interest of the defendant's family in the suit land was not taken into account and that the transfer of the entire parcel of land to Jethro Opiyo was not proper. In a sense the tribunal acknowledged that the defendant's family had overriding interests over the land and the transfer could therefore only be subject to the overriding interests. The tribunal considered that Jane Onyango had been in occupation of the land for a long period from 1997 and decided to award her a portion of 4 acres out of the suit property. The defendant's family was awarded 15.5acres. The decision of the Tribunal was adopted as judgment by the Rongo Principal Magistrates. The 1st plaintiff's challenge of the Tribunal's decision and adoption of the same as judgment by the Magistrate's Court by way of Judicial Review vide Kisii Misc. Application No. 71 of 2010 was dismissed by the court. The award was ultimately implemented and the subject suit land was subdivided in terms of the award and the defendant was issued a title for the portion of 15.5acres awarded to her and her siblings being land parcel **South Sakwa/Alego/901**.

36. The plaintiffs have pleaded that the Rongo Disputes Tribunal lacked the jurisdiction to deal with the matter as the issues it was called to determine did not fall under Section 3(1) of the Land Disputes Tribunals Act No. 18 of 1990 (now repealed). Section 3(1) of the Act provided as follows:

3(1) Subject to this Act, all cases of a civil nature involving a dispute as to-

(a) The division of, or determination of boundaries to land, including land held in common;

(b) A claim to occupy or work land; or

(c) Trespass to land, shall be heard and determined by a Tribunal established under Section.

37. The defendant's family were the next of kin of Paulo Olwal. At the time of his death (Paulo's) in 1981 they were occupying the land as they were in 1979 when the land was "secretly" transferred to Jethro Opiyo. In 1997 when Onyango (Jethro's son) came to the land there were efforts to exclude the defendant's family from the land. In the circumstances, it is evident there were issues as to whether the defendant's family had any right to occupy and/or work on the land and/or whether they were trespassers on the land. In my view, the Tribunal had jurisdiction to determine issues of occupation and trespass and they properly entertained the dispute. The parties willingly submitted themselves to the jurisdiction of the Tribunal. If any party felt that the Tribunal exceeded its mandate when it made its determination, the option which such party had under the Tribunal Disputes Act was to appeal the decision and/or apply for judicial review to quash the decision. The record shows the 1st plaintiff sought to be enjoined as an interested party in the application before the Magistrate's Court to challenge the adoption of the Tribunal's award as judgment which application was rejected. The 1st plaintiff further filed a judicial review in the High Court which was also unsuccessful.

38. It appears that it is only after the door for challenging the Tribunal's award and the Magistrate's adoption of the award as judgment in the appropriate manner was shut that the plaintiff opted for the present option of reviving the challenge through the present suit. Litigation is not a game of trial and error. The parties herein had the dispute adjudicated before the Tribunal and the Tribunal made a decision which has been fully executed. The fact that the Tribunal's decision may not have been what the plaintiffs may have wanted cannot entitle the plaintiffs to present and/or institute a fresh suit as they did through the instant suit. They had their day in court (Tribunal) and had the opportunity to ventilate their case. The present suit is brought in abuse of the process of the court as the matters in controversy have been the subject of previous proceedings at the Rongo Land Disputes Tribunal who made a determination.

39. I may mention that, even if I was to discount the proceedings before the Rongo Disputes Tribunal and the resultant decree that issued following the adoption of the award, I would nonetheless have found the transfer of Jethro Opiyo to have been effected subject to the overriding interest in favour of the defendant's family and would therefore have vitiated or annulled the transfer.

40. Before I conclude this judgment, I need to make a mention of Nakuru HCCC No. 772 of 1992 which was dismissed by the court for non attendance by the parties on the date scheduled for hearing. The plaintiffs contend that by reason of the dismissal the defendant was debarred from lodging the complaint at the Tribunal or even raising a counterclaim in the instant suit as the issues would be deemed to be *res judicata*. I do not with respect agree with the plaintiffs' position as the suit in Nakuru was not determined on merit. The defendant in her evidence explained the circumstances that led to the parties not attending at the hearing. The parties had apparently agreed to seek a negotiated settlement of the matter which unfortunately never happened. To the extent that I have held and determined Jethro Opiyo held the title transferred to him subject to the defendant's family overriding interests he was constituted a trustee and in the premises the Limitation of Actions Act, Cap 22 Laws of Kenya would have no application. The beneficiary of a trust can seek the dissolution of the trust at any time and the statute of limitation has no application.

Conclusion and Decision:

41. Having carefully considered the evidence adduced by the parties, I am not satisfied the plaintiffs have discharged their burden of proof on a balance of probabilities. I accordingly dismiss their suit against the defendant.

42. The defendant pleaded a counter claim where she sought variously declarations. The court has found and held that the transfer effected to Jethro Opiyo was subject to the defendant's family's overriding interests. I have perused the proceedings before the Rongo Land Disputes Tribunal and I am satisfied that on the evidence and the facts the adjudication they made that the defendant's family be awarded 15.5acres out of land parcel **South Sakwa/Alego/148** and Jane Onyango (daughter-in-law to Jethro Opiyo) who had resided on the land since 1997 be awarded 4 acres was justifiable and I find no basis to interfere with that award which at any rate has been executed. It is noteworthy that the defendant except for the present suit was satisfied with the Tribunal's decision and that was the basis for her to seek its adoption as judgment and execution.

43. The net result is that I hold and find the defendant's counterclaim proved and I enter judgment on the counterclaim on the following terms:-

- 1. That land parcel South Sakwa/Alego/148 was transferred to Jethro Opiyo Chiewu subject to the overriding interests the defendant's family had over the land.**
- 2. That the subdivision of land parcel South Sakwa/Alego/148 into land parcels South Sakwa/Alego/901 and 902 measuring 15.5acres and 4.0acres respectively was lawful.**
- 3. That the defendant, Roseline Amondi Arama, be and is hereby declared the lawful owner of land parcel South Sakwa/Alego/901 and land parcel South Sakwa/Alego/902 to vest in the estate of Jethro Opiyo Chiewu (deceased).**
- 4. That the defendant, Roseline Amondi Arama as the proprietor of land parcel South Sakwa/Alego/901 is entitled to vacant possession of the said land and the plaintiffs, their servants and/or agents are hereby ordered to vacate and deliver vacant possession of the land to the defendant within the next 30 days from the date of this judgment failing which an order of eviction of the plaintiffs, their servants and/or agents to issue on the application of the defendant.**
- 5. The parties shall each bear their own costs for the suit and the counterclaim.**

JUDGMENT DATED, SIGNED and DELIVERED at KISII this 20TH DAY of MARCH 2019.

J. M. MUTUNGI

JUDGE

In the Presence of:

Obimbo for Gembe for the 1st and 2nd plaintiffs

Nyantika for Ojienda for the defendant

Ruth Court Assistant

J. M. MUTUNGI

JUDGE