

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT HOMA BAY

ELCC NO. 28 OF 2021

(FORMERLY MIGORI ELC CASE NO. 48 OF 2017)

ANDREW OTIENO OGWANG.....1ST

PLAINTIFF

TOM OCHOLA ODHIAMBO2ND

PLAINTIFF

GRACE AKINYI OKINDA.....3RD

PLAINTIFF

LUCY OTIENO OCHIENG.....4TH

PLAINTIFF

-VERSUS-

**TOM ODAK (Sued as the Legal Representative and
Administrator of the Estate of the Estate of ZILPAH ODAK-
Deceased) DEFENDANT**

JUDGMENT

1. By a plaint dated 10th February, 2015 the Plaintiffs through Oguttu Mboya Advocates and currently represented by Ochwangi and Company Advocates, sued the Defendant for;
 - (i) Declaration that Plot Number 38, Oyugis Town, which is alluded to and forms the basis of the Defendant's claim is unknown and non-existent and that the portions claimed by and/or at the instance of the Defendant falls on and/or constitutes **LR NO'S CENTRAL KASIPUL/KAMUMA/5844, 5845, 5846 & 5847 (The 1st, 2nd, 3rd and 4th suit parcels of land herein)**, belonging to and registered the names of the Plaintiffs serially and/or respectively.
 - (ii) Declaration that the actions and/or omissions of the Defendant of entering upon, taking possession of and building onto portions of **the 1st, 2nd, 3rd and 4th suit parcels of land**, amounts and/or constitutes Trespass.
 - (iii) An Order of Eviction against the Defendant her agents and/or servants from **the 1st, 2nd, 3rd and 4th suit parcels of land**.

(iv) Permanent injunction restraining the Defendant either by agents, servants, and/or anyone claiming under the Defendant entering upon, re-entering, trespassing onto, fenced structures, operating a Filing station, interfering, with and/or other manner dealing with the **1st, 2nd, 3rd and 4th suit parcels of land** and/or portion(s) thereof, whatsoever and/or howsoever.

(v) mesne profits.

(vi) Interest on (v) hereof at court rates.

(vii) Costs of this suit, together with interest thereon to be borne by the defendant.

2. Briefly, the Plaintiffs' case is that after adjudication and demarcation process at Kamuma Adjudication Section later Registration Section, LR NO. CENTRAL KASIPUL/KAMUMA/1436 (The parent land) was registered in the name of Nyatuga Onyango (Deceased-1) whose estate was succeeded by Peterlis Obondo Nyatuga (Deceased-2) who subsequently sub divided the same into LR NOS, CENTRAL KASIPUL/KAMUMA/4869 and 4870 under the name of Deceased-2. Later, the estate of Deceased-2 was

succeeded by John Odhiambo Odoyo (PW4) who subdivided LR NO. CENTRAL KASIPUL/KAMUMA/4869 into the 1st to 4th suit parcels of land and transferred them to the plaintiffs.

3. It is the contention of the Plaintiffs that on or about the years 2012/2013, they discovered that the Defendant had trespassed into the 1st to 4th suit parcels of land claiming that the said parcels are superimposed upon plot No. 38. Oyugis Town. That the Defendant proceeded to and filed Oyugis CMCC NO. 114 of 2014 seeking to bar the Plaintiffs from taking possession of the 1st to 4th suit parcels of land. That the said Court did not have jurisdiction to entertain the matter thus, it precipitating this suit.
4. In the defence and counter claim dated 3rd April 2022 and amended on 4th February 2022, the initial Defendant (Deceased) whose estate was succeeded by the current Defendant, represented by Odingo & Co Advocates, denied the Plaintiffs' claim and stated that the 1st to 4th suit parcels of land were obtained through fraud by so encroaching into Plot No. 38 Oyugis Town and pleaded particulars of fraud

thereof. That the said plot legally exists and that the Plaintiffs' allegations are baseless and vexatious.

5. By the counter claim, the Defendant states that the Plaintiffs have persistently and without reason been interfering with the ownership of Plot 38 Oyugis Town. That the Plaintiffs be restrained from doing such tortuous acts. That therefore, the Plaintiffs' suit be dismissed with costs to the Defendant and there be a declaration that Plot No. 39 owned by the Defendant, is in existence.

6. In a reply to defence and defence to counter claim dated 19th May 2023, the Plaintiffs stated in part, that the particulars of fraud alleged by the defendant are imaginary and deficient of their contents. They opposed the counter claim and termed it misconceived, bad in law, barred by sections 4 and 7 of the Limitations of Actions Act Chapter 22 Laws of Kenya and that the same was filed by a party who lacks locus standi without leave of the Court. They pray that the defence and the counter claim be struck out and or dismissed with costs and judgment be entered in favour of the Plaintiffs in terms of the plaint.

7. The 2nd Plaintiff (PW1) relied on his statement dated 10th February 2015 as part of his evidence and stated that he has authority of even date from his co-plaintiffs to testify herein. He stated, inter alia, that the original Plaintiff, Zilpah Odak (Deceased) passed on during the subsistence of this suit. He narrated the history of the matter from the parent land through to the registration of the 1st, 2nd, 3rd and 4th suit parcels of land in the name of the 1st plaintiff as per the green card, certificate of official search, title deed and sale agreement (**P Exhibits 6 and 10, 14 and 15**), his (PW1) name as revealed in the green card and certificate of official search (**P Exhibits 7 and 11**), the 3rd plaintiff's name as shown in green card and certificate of official search (**P Exhibits 8 and 12**) and the 4th Plaintiff 's name as per the green card and certificate of official search (**P Exhibits 9 and 13** respectively. That the initial Defendant sue the Plaintiffs in Oyugis PMCC No. 114 of 2014 as discerned in the plaint (**P Exhibit 16**) and he further relied on supplementary bundle of documents dated 1st July 2016 S/Nos 1 to 12 (**P Exhibits 18 to 29** respectively) as well as

the further supplementary list of documents dated 19th May 2023 (**P Exhibit 30**) and Land Registrar's report dated 3rd February 2017 (**P Exhibit 31**) herein.

8. **PW2, Thomas Tontone Oluoch Nyakado**, Land Surveyor told the Court in part that he accompanied PW3, WYCLIFFE KWENDO OLONYI to the 1st to 4th suit parcels of land more than once and that the said parcels existed on the ground occupied by a petrol station in Oyugis Town and contained in Map Sheet No, 19, Kamuma Registration Section. That they were further sub divisions of the parent land.

9. PW3, testified on 12th March 2024 that he was a retired Assistant Land Registrar Kosele Land Registry where he served between June 2017 and June 2020. That he visited the four suit parcels of land to confirm the existence of Plot No. 38 in Oyugis Town and prepared a report dated 3rd February 2017 (**P Exhibit 31**) which reveals that the parcels belonging to the plaintiffs exist but are not related to Plot No. 38. That there is a petrol station and temporary structures thereon **hence, trespass as per (P Exhibit 31).**

That a letter Ref. No. CENTRAL KASIPUL

KAMUAMA/5844, 5845, 5846 AND 5847 dated 30th September 2016 was prepared by J. Osiolo, Land Registrar who worked with him for two years and was conversant with his handwriting and signature annexed to the Plaintiffs' further supplementary list of documents dated 24th January 2022 (**P Exhibit 32**) which produced in evidence but did not undergo cross examination herein.

10. **PW4, John Odhiambo Adoyo**, states that he was a shop attendant and relied upon his statement dated 10th February 2015 which was adopted as part of his evidence. He did not undergo cross examination. In his statement, he stated in part that upon obtaining a certificate of confirmation of grant in respect of the estate of deceased-2, he caused a sub division of the parent land to be transferred to his name and subsequently sub divided the same into the 1st to 4th suit parcels of land which he transferred to the plaintiffs.

11. By the Plaintiffs' submissions dated 27th May 2024, reference was made to the plaint, the statement of defence and counter claim as amended, the evidence of the 1st

Plaintiff (PW1), PW2, PW3 and PW4 that the 1st to 4th suit parcels are registered in their respective names and they have a right to possess and occupy the same. That their registration thereof is protected under sections 24, 25 and 26 Land Registration Act 2016 (2012) against the Defendant, agents and servants are on the suit parcels of land with no reasons and urged the Court to enter judgment as prayed in the plaint ad the Defendant was a trespasser thereon. To fortify the submissions, counsel cited, inter alia, **Ali Wanje-vs-Abdubasil Abeid Said & another (2022) eKLR** and **Sammy Kemoo Arekai-vs-Eliakim W Oweny & another 2021) eKLR.**

12. The Defendant's counsel failed to file submissions. The last time counsel attended Court was on 23rd January 2024 when PW1 testified. Since that time, the Court noted that counsel has never attended Court yet the Plaintiffs' counsel variously notified him of the subsequent dates as disclosed in affidavits of service sworn on 28th August 2024, 11th October 2024, 27th June 2025, among others.

13. It worth to note that the other suit namely **Oyugis PMCC No, 114 of 2014** involving the same subject matter the same parties and featured in the pleadings and the testimony of PW1, was dismissed for want of prosecution as per the proceedings of 1st November 2018 therein.
14. It is trite law that the issues for determination in a suit generally flow from either the pleadings or as framed by the parties for the Court's determination; see **Galaxy Paints Company Ltd-vs-Falcon Guards Ltd (2000) eKLR.**
15. I have duly considered the parties' respective pleadings and evidence as well as the plaintiffs' submissions. So, the issues for determination are captured in a statement of agreed issues dated 6th July 2015 duly signed by both parties and are condensed to whether;
- (1) The parent land registered in the name of Deceased-1 arose and/or resulted from the Adjudication and Demarcation Process at Kamuma Adjudication Section (Now Registration Section) was succeeded by Deceased-2 followed by PW4 then sub-divided giving rise to the 1st, 2nd, 3rd and 4th suit parcels of land respectively.

(2) The 1st to 4th suit parcels of land lawfully belong to the Plaintiffs who have acquired legitimate rights thereon upon sub-division of the parent land, mutation, resultant creation of the said parcels and transfer of the same to the plaintiffs.

(3) Plot Number 38, Oyugis Town, does exist.

(4) The parties are entitled to the prayers in their respective pleadings.

16. On the first issue, the evidence of PW1 was that the parent land was registered in the name of Deceased-1 then Deceased-2 whose estate was succeeded by PW4 following adjudication process in Kamuma Adjudication Section. **(P Exhibit 1)** being the certificate of confirmation of grant in Succession cause No. 25 of 1996 dated 17th October 1996, ascertains unequivocally that the Estate of Deceased-1 was issued to Decease-2.

17. The testimony of PW1 was corroborated by PW2, PW3 and PW4 who confirmed the processes including sub divisions, transfer and registration of the 1st to 4th suit parcels of land as per **P Exhibits 1 to 15, 18 to 29** and

others. Indeed. It is evident from **P Exhibit 31** produced by PW3 that the parent land which is the origin of the 1st to 4th suit parcels of land, was initially registered in the name of Deceased-1 and was distinct and separate from **LR NO. CENTRAL KASIPUL/KAMUMA/1180** but border each other.

18. Moreover, in cross examination, PW1 testified in part;

“...the other plaintiffs and myself took process of obtaining title deeds to the four sub divisions of the original parcel of land herein....”

19. Concerning the second issue, the 1st Plaintiff proved ownership by green card (**P Exhibit 6**) and title deed (**P Exhibit 14**) that the 1st suit parcel was registered on 7th October 2014 under the name Andrew Otieno Ogwang I.D. no. 10936522 who sold it to him. The other plaintiffs including PW1 proved their respective ownership of the 2nd to 4th suit parcels by (**P Exhibits 7 to 15, 18 to 29 and 31**).

20. Section 26(1) of the Land Registration Act 2016 (2012) states;

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer

or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner...”

21. PW3 stated in **P Exhibit 31** that he established that the 1st to 4th suit parcels of land belong to the Plaintiffs. That a petrol station and temporary structures stand thereon hence, trespass as also established by way of **P Exhibit 30**.
22. The Plaintiffs have produced **P Exhibits** including certificates of official searches, green cards and title deed all to prove that they are rightful proprietors of the 1st to the 4th suit parcels of land.
23. As regards the third issue, by the Preliminary Index Diagrams-PID (**P Exhibits 33, 34, 35 and 36**) and that **P Exhibit 34** and **35** capture Plot No. 38 Oyugis Town and the suit parcels of land respectively, that Plot 38 Oyugis Town does not exist. In examination in chief, PW2 referred to PID 28 (**P exhibit 34**) and stated;

“...According to plot No. 38. The same is far from the disputed site. It is found in sheet No. 28 in a different location.”

24. Under cross examination, PW2 stated that Oyugis Town is found in **P Exhibits 35 and 36** and petrol station is located on top of the suit parcels of land and did demonstrate graphically thereof in court. In re-examination, PW3 affirmed that he visited the disputed land further to a court order. That Plot No. 38 is shown in PID 26 (**P Exhibit 34**) and that it is not adjacent to the 1st to the 4th suit parcels of land.

25. Further, having considered the evidence of the two experts namely PW2 and PW3 alongside the testimonies of PW1 and PW4, the same are firm and cogent with no contrary opinion as observed in the case of **Kimatu Mbuvi T/A Kimatu Mbuvi & Bros-vs-Augustine Munyao Kioko (2007) 1 EA 139** where the Court of Appeal held-

“.....such opinions are not binding on the court although they will be given proper respect particularly where there is no contrary opinion and

**the expert is the expert is properly qualified.....
consideration alongside all other available
evidence.....”**

26. As regards the fourth issue, the Plaintiffs have established by their testimonies including **P Exhibits 30** and **31** that the Defendant is a trespasser thereon. Therefore, they are entitled to the two declaration orders, eviction order and a permanent preservation order over the 1st to 4th suit parcels of land as sought in the plaint in line with section 13 (7) of the Environment and Land Court Act 2015 (2011).

27. The Plaintiffs sought mesne profit for trespass, a term defined under **section 2 of the Civil Procedure Act Chapter 21 Laws of Kenya** as the compensation by a person who is illegally occupying or wrongfully in possession of immovable property to the rightful owner. I note that **Order 21 Rule 13 of the Civil Procedure Rules 2010** stipulates the legal framework for award of this relief by the court.

28. Mesne profit must be pleaded and proved. No specific sum was claimed in the plaint thus, the Plaintiffs are not entitled

to mesne profit relief; see **Christine Nyanchama Oanda-vs-Catholic Diocese of Homa Bay Registered Trustees {2020} KECA 536 (KLR).**

29. It is settled law that the burden of proof is always on the Plaintiff to establish his or her case on a balance of probabilities. That burden is not lessened even if the case proceeded by way of formal proof; see **Karugi & another-vs-Kabiya & 3 others {1983} KECA 38 (KLR).**

30. It is therefore, the considered view of this Court that the Plaintiffs have established that they are the proprietors of the **1st, 2nd, 3rd and 4th suit parcels of land** through existence of title deed and certificates of official search lawfully, procedurally and free from any encumbrances as held in the case of **Munyu Maina-vs-Hiram Gathiha Maina 2013 KECA 94 (KLR).** The Plaintiffs' is firm, cogent and established against the Defendant on a balance of probabilities.

31. The Defendant's counsel partly participated in the trial as already stated in paragraph 3. However, the Defendant has failed to offer any evidence and distinctly prove a major

component of the claim namely fraud as pleaded in the counter claim; see **Kuria Kiarie & 2 others-vs-Sammy Magera {2018} KECA 467 (KLR)**. On that score, the counter claim against the Plaintiffs has not been proved against the Plaintiffs in respect of Plot No. 38 Oyugis Town to the requisite standard. Thus, it must fail.

32. Wherefore, I render final orders thus;

- a) Judgment is hereby entered in favour of the plaintiffs against the defendants in terms of prayers (i) (ii) (iii) and (iv) at the foot of the plaint dated 10th February, 2015 as stated in paragraph 1 (i) (ii) (iii) and (iv) hereinabove but eviction be carried out as prescribed.
- b) The defendant's counter claim dated 3rd April 2015 and amended on 4th February 2022, be and is hereby dismissed.
- c) The costs of the suit and the counter claim to be borne by the defendant by dint of the proviso to section 27 (1) of the Civil Procedure Act Chapter 21 Laws of Kenya.

33. It is so ordered.

DATED and **DELIVERED VIRTUALLY** at **KAPSABET** this **5th**
day of **NOVEMBER, 2025**

HON G M A ONGONDO

JUDGE

In the presence of;

1. Mr. P. Ochwangi learned Counsel for the Plaintiffs
2. Walter Kipkorir, Court Assistant