

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC SUIT NO. 291 OF 2015(O.S)

ELISHA OCHIENG' AJWANG.....1ST

PLAINTIFF

GRACE ADHIAMBO OGOLA.....2ND

PLAINTIFF

VERSUS

JOSHUA OYANGE

POLO.....DEFENDANT

JUDGMENT

1. The Plaintiffs brought this suit against the Respondent by way of an Originating Summons dated 27th October 2015 seeking the following orders;

a) That the Plaintiffs be declared to have acquired prescriptive rights over one-half (1/2) of all that parcel of land known as Title No. Kabondo/Kasewe/953 measuring 1.9 hectares (hereinafter referred to as “the suit property”) by adverse possession.

b) That the Defendant do sign transfer and consent forms in favour of the Plaintiffs, failing which the land registrar of the court be mandated to sign the same.

- c) That the costs of the suit be paid to the Applicants.
2. The Originating Summons was supported by a joint affidavit sworn by the Plaintiffs on 27th October 2015. The Plaintiffs averred that they were the son and wife, respectively, of Ajwang' Ogola, deceased (hereinafter referred to only as "deceased"). The Plaintiffs averred that when the deceased died, he left them residing on the suit property where they had their houses. The Plaintiffs averred that the 1st Plaintiff had lived on the suit property since he was born 31 years ago, while the 2nd Plaintiff had lived on the suit property since she was married 55 years ago.
3. The Plaintiffs averred that upon conducting a search, they found out that the suit property was registered in the names of the deceased and the Defendant as tenants in common in equal shares. The Plaintiffs averred that the suit property was their ancestral land and that the Defendant had his own ancestral land. The Plaintiffs averred that they had had an exclusive, open, and uninterrupted use of the suit property for over 30 years. The Plaintiffs averred that the Defendant had never used the suit property.

4. The Defendant opposed the Originating Summons through a replying affidavit sworn on 18th March 2016. The Defendant averred that he was the son of William Polo Okumbo, deceased (hereinafter referred to as “the Defendant’s father”). The Defendant averred that the suit property was owned by his father. The Defendant averred that it was his father who gave the deceased, Ajwang Ogola (deceased), a half share of the suit property.
5. The Defendant averred that the deceased, his wife, and son (the Plaintiffs) lived at a place known as Kosele and settled on the Defendant’s father’s share of the suit property in 1984 after the death of the Defendant’s father in 1983. The Defendant averred that while the deceased was living at Kosele, he secretly sold a portion of the suit property that was given to him by the Defendant’s father. The Defendant averred that when the deceased put up his homestead on the Defendant’s father’s portion of the suit property, he destroyed the Defendant’s crops.
6. The Defendant averred that he reported the matter to the Police, and the deceased was arrested. The Defendant

averred that at the Police Station, he reached an agreement with the deceased that succession would be done, after which the suit property would be subdivided so that each family could have a separate title for its share of the property.

7. The Defendant averred that the deceased died before they could undertake succession. The Defendant averred that the Plaintiffs were all along aware that the suit property was to be shared equally between the deceased and the Defendant's father. The Defendant averred that he did succession in respect of the estate of his father and was issued with a Grant of Letters of Administration in respect of the said estate in 1996. The Defendant averred that he thereafter transferred his father's share of the suit property to his name, and left the other half-share in the name of the deceased.

8. The Defendant averred that after transferring his father's share of the suit property to his name, he arranged for the subdivision of the property, but the Plaintiffs refused to cooperate with him in the process. The Defendant averred

that the Plaintiff's use of the suit property had been with the consent of his father and subsequently with his consent.

9. The Defendant filed a counterclaim against the Plaintiffs. The Defendant averred that the suit property was owned by the Defendant and the deceased. The Defendant averred that the Plaintiffs sold part of the suit property. The Defendant averred that the 2nd Plaintiff refused to have a survey done on the suit property with a view to subdividing the same. The Defendant averred that the Plaintiffs had encroached on the Defendant's portion of the suit property by putting up illegal structures thereon. The Defendant averred that he had always occupied his portion of the suit property until the Plaintiffs invaded the same.
10. The Defendant sought judgment against the Plaintiffs for a permanent injunction restraining the Plaintiffs from encroaching and/or interfering with the Defendant's peaceful enjoyment of his portion of the suit property, an order of eviction from the Defendant's portion of the suit property, an order for the demolition of the illegal structures the Plaintiffs had put up on the said portion of the suit property at their

cost and failure to do so, the Defendant be at liberty to demolish the same at the Plaintiff's cost, an order that the Plaintiffs sign a mutation form for the subdivision of the suit property or in the alternative, the same be signed by the Deputy Registrar on their behalf, general damages for the encroachment, and the costs of the suit.

11. The Plaintiffs filed a defence to the counterclaim dated 15th October 2024. The Plaintiffs denied the allegations made against them in the counterclaim. The Plaintiffs averred that the counterclaim was incompetent for having not been accompanied by a verifying affidavit. The Plaintiffs averred that the counterclaim was also bad in law for misjoinder of parties.

12. At the trial, the 2nd Plaintiff adopted their affidavits filed in support of the Originating Summons as part of her evidence in chief, and produced a copy of the certificate of official search annexed thereto as an exhibit. She stated that she had occupied the suit property since 1959 when she married the deceased. She stated that the 1st Plaintiff was born in 1984. She stated that the Defendant used to use the

suit property but stopped after he was arrested by the chief following her complaint. On cross-examination, the 2nd Plaintiff stated that the suit property was registered in the name of the deceased and that she was not aware that the suit property was held by the deceased and the Defendant as tenants in common in equal shares.

13. The 1st Plaintiff told the court that his correct name was Elisha Ochieng Agola and not Elisha Ochieng Ajwang. He stated that he was the son of the deceased, Raphael Ajwang Ogola and the 2nd Plaintiff. He adopted their affidavit and supplementary affidavit filed in support of the Originating Summons as his evidence in chief. He stated that they were the ones using the suit property and that the Defendant had never used the same. He stated that the Defendant owned a neighbouring parcel of land. On cross-examination, the 1st Plaintiff stated that he was aware that the suit property was registered in the name of the deceased and the Defendant. He stated that the suit property should have been registered in the sole name of the deceased.

14. The Defendant also adopted his replying affidavit as part of his evidence in chief. The Defendant produced his bundle of documents filed on 22nd February 2017 as D.EXH.1. He stated that he wanted the suit property to be subdivided so that each registered owner could have a separate title for his share. He urged the court to grant the orders sought in his counterclaim.

15. The Defendant called one witness, Patrick Opiyo Adero (DW2). DW2 told the court that he was a licensed surveyor. He stated that the Defendant had instructed him to survey and subdivide the suit property into two equal portions. He stated that he conducted the survey but did not subdivide the land. He stated that he prepared a report which he produced in court as D.EXH.2.

16. After the close of evidence, the parties were directed to make written closing submissions. None of the parties had filed submissions by the time of writing this judgment.

17. I have considered the Originating Summons together with the affidavits filed in support thereof. I have also considered the Defendant's replying affidavit filed in

opposition to the Originating Summons, and the Defendant's counterclaim. I have finally considered the evidence tendered by the parties in support of their respective cases. The Plaintiffs' claim is for a title to a portion of the suit property measuring 0.95 hectares by adverse possession. The Defendant's counterclaim, on the other hand, is for the severance of the joint tenancy in respect of the suit property and the partitioning of the same.

18. In In Kimani Ruchine & Another v. Swift, Rutherford Co. Ltd. & another [1977] KLR 10 Kneller J. stated as follows on proof of adverse possession at page 16:

“The Plaintiffs have to prove that they have used this land which they claim as of right, nec vi, nec clam, nec plecario (no force, no secrecy, no evasion)...The possession must be continuous. It must not be broken for any temporary purposes or by any endeavours to interrupt it or by any recurrent consideration.”

19. In the case of Wambugu v. Njuguna [1983] KLR 172, it was held among others that:

“(i) In order to acquire by statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it.

Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it.

(ii) The limitation of Actions Act, on adverse possession contemplates two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years”.

20. In Githu v. Ndeete [1984] KLR 776 it was held that:

(a). “Time ceases to run under the Limitation of Actions Act either when the owner takes or asserts his rights or when his right is admitted by adverse possessor. Assertion occurs when the owner takes legal proceedings or makes an effective entry into land. Giving notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the Limitation of Actions Act.

(b). A title by adverse possession can be acquired under the Limitation of Actions Act to a part of the parcel of land which the owner holds title.”

21. From the evidence on record, the suit property measures 1.9 hectares. The register of the suit property was opened on 16th November 1976 with Ajwang Ogola and William Polo as the first registered owners as tenants in common in equal shares. On 3rd May 1996, the undivided half-share in the suit property was transferred to the Defendant, Joshua Oyange Polo, as the administrator of the estate of William Polo, deceased. On the same date, the said half-undivided ($\frac{1}{2}$) share of the suit property was transferred to the Defendant as the owner thereof. As at the time of filing this suit and the counterclaim, the suit property was registered in the name of Ajwang Ogola, deceased and the Defendant, Joshua Oyange Polo, as tenants in common in equal shares.

22. From the evidence on record, the Plaintiffs are the son and wife, respectively, of Ajwang Ogola, whom the court was informed is deceased. Ajwang Ogola has a $\frac{1}{2}$ undivided

share in the suit property, which would measure 0.95 hectares. The other $\frac{1}{2}$ undivided share in the suit property measuring 0.95 hectares is now owned by the Defendant. What the Plaintiffs are claiming by adverse possession is the half-undivided share of the suit property owned by the Defendant.

23. The question that I need to answer before I consider the Plaintiff's claim on merit, should it become necessary, is whether the Plaintiffs can acquire a half-undivided share of the suit property by adverse possession. What is the nature and character of land ownership under a tenancy in common?

24. The suit property was registered under the Registered Land Act, Chapter 300 Laws of Kenya (now repealed). Section 103 of the Registered Land Act provided as follows:

(1) Where any land, lease or charge is owned in common, each proprietor shall be entitled to an undivided share in the whole, and on the death of a proprietor his share shall be administered as part of his estate.

(2) No proprietor in common shall deal with his undivided share in favour of any person other than another proprietor in common of the same land, except with the consent in writing of the remaining proprietor or proprietors of the land, but such consent shall not be unreasonably withheld.

25. In Kurshed Begum Mirza v. Jackson Kaibunga [2017] eKLR, the court stated as follows on tenancies in common:

“.....By definition, a tenancy in common is a tenancy by two or more persons, in equal or unequal undivided shares, with each person having the right to possess the whole property but no right of survivorship. The central characteristic of a tenancy in common is that each tenant is deemed to own by himself, a physically undivided part of the entire parcel (see. Black’s Law Dictionary, 9th Edn and Thomas F. Bergin & Paul G. Haskell, ‘Preface to Estates in Land and Future interests 54 2nd Edn, 1984).”

26. In Megarry &Wade, The Law of Real Property, 17th Edition at pages 493 and 494 paragraphs 13-009 to 13-012, the authors have stated as follows regarding the nature of a tenancy in common:

(1).The tenants hold in undivided shares. Unlike joint tenants, tenants in common hold in undivided shares. Each tenant in common has a distinct share in property which has not yet been divided among the co-tenants. Thus tenants in common have quite separate interests. The only fact which brings them into co-ownership is that they both have shares in a single property which has not yet been divided among them. While the tenancy in common lasts, no one can say which of them owns any particular parcel of land.

(2). There is no right of survivorship. The size of each tenant's share is fixed once and for all and is not affected by the death of one of his companions. When a tenant in common dies, his interest passes under his will or intestacy, for his undivided share is his to dispose of as he wishes...

(3). Only the unity of possession is essential. Although the four unities of a joint tenancy may be present in a tenancy in common, the only unity which is essential is the unity of possession. In particular, it should be noted that the unity of interest may be absent and the tenants may hold unequal interests, so that one tenant in common may be entitled to a one-fifth share and the other to four-fifths, or one may be entitled for life and another in fee simple".

27. In John Mbogua Getao v. Simon Parkoyiet Mokare & 4 others [2021] eKLR, the Supreme Court stated as follows regarding the characteristics of a tenancy in common:

“...Therefore, the type of tenure operative in a group ranch under the Land (Group Representatives) Act, is what is known at common law as “a tenancy in common”, as opposed to “a joint tenancy” (the ingredients of which may be clarified in future litigation). Members of the group ranch are “tenants in common” as opposed to “joint tenants”.

[40] At common law, each co-owner is as much entitled to possession of *any part of the land as the others*. He cannot point to any part of the land as his own to the exclusion of the others; if he could, there would be separate ownership and not co-ownership. No one co-owner has a better right to the property than another. Tenants in Common hold in undivided shares. Each tenant in common has a distinct share in property which has not yet been divided among the co-tenants. The only fact which brings them into co-ownership is that they both have shares in a single property which has not yet been divided among them. Therefore, while the tenancy in common lasts, no one can say which of them owns any particular parcel of

land. (See Megarry and Wade, 'The Law of Real Property' 6th Edition Pages 477 and 480)."

28. From the evidence on record, the suit property has not been partitioned. The Defendant led evidence that he attempted to sever the joint tenancy by partitioning the suit property, but the 2nd Plaintiff refused to cooperate in the exercise. This means that the shares of the registered owners of the suit property in the property are still undivided, and as such, none of the registered owners of the suit property has or owns a particular portion of the suit property. The Plaintiffs cannot, therefore, say that there exists a particular portion of the suit property which is owned by the Defendant, which they have occupied as of right for over 30 years, and as such can acquire by way of adverse possession. I am of the view that even if the registered owners of the suit property and their dependants or beneficiaries of their estates were occupying and/or using identified portions of the suit property, the said portions had no settled boundaries. They were simply occupying and/or using the said portions of the suit property as part of their

undivided, distinct shares of $\frac{1}{2}$ each in the suit property rather than as owners of the particular portions. In Gatimu Kinguru v. Muya Gathangi [1976]eKLR Madan J. stated as follows regarding a tenancy in common:

“...each tenant in common is the owner of the whole land but limited to the extent of his share therein because it is not subdivided, in conjunction with his co-tenant in common or joint tenant who also is similarly owner of the un-subdivided land to the extent of his share therein.”

29. This means that the deceased, Ajwang Ogola from whom the Plaintiffs derive their interest in $\frac{1}{2}$ share of the suit property, and the Defendant own the whole of the suit property to the extent of their shares in the property. It is therefore my finding that the Plaintiffs, who are the son and wife of the deceased, Ajwang Ogola, who owns a $\frac{1}{2}$ undivided share in the suit property, cannot claim the other $\frac{1}{2}$ undivided share in the suit property owned by the Defendant, as that share is not yet distinct and separate from the whole property until a partition is undertaken. In view of this finding, I do not need to consider whether the

Plaintiffs have met the threshold of an adverse possession claim over land.

30. The next question that I need to answer, which will address the Defendant's counterclaim, is whether the suit property can be partitioned so that each registered owner has their separate title over their share of the property.

31. Section 104 of the Registered Land Act provides as follows:

(1) An application in the prescribed form to the Registrar for the partition of the land owned in common may be made by -

(a) any one or more of the proprietors; or

(b) any person in whose favour an order has been made for the sale of an undivided share in the land in execution of a decree, and, subject to the provisions of this Act and of any written law by or under which minimum areas or frontages are prescribed or the consent of any authority to a partition is required, the Registrar shall effect the partition of the land in accordance with any agreement of the proprietors in common or, in the absence of agreement, in such manner as the Registrar may determine.

(2) Partition shall be completed by closing the register of the parcel partitioned and opening registers in respect of the new parcels created by the partition and filing the agreement or determination.

32. Section 94 of the Land Registration Act 2012 provides as follows:

(1) Any of the tenants in common may, with the consent of all the tenants in common, make an application, in the prescribed form, to the Registrar for the partition of land occupied in common and subject to the provisions of this Act and of any other written law applying to or requiring consent to a subdivision of land and of any covenants or conditions in a certificate of a land, the Registrar shall effect the partition of the land in accordance with the agreement of the tenants in common.

(2) An application, may be made to the Registrar, in the prescribed form, for an order for the partition of land owned in common by—

(a) any one or more of the tenants in common without the consent of all the tenants in common; or

(b) any person in whose favour an order has been made for the sale of an undivided share in the land in execution of a decree.

(3) The Registrar may, after hearing the applicant and any of the other tenants in common who wish to appear and be heard, make an order for the partition of land having regard to—

(a) whether the provisions of this Act, any other written law regulating the subdivision of land and any covenants and conditions in a land have been or will be complied with if the partition is effected;

(b) the nature and location of the land;

(c) the number of tenants in common and the extent of their respective shares particularly, the extent of the share of any tenant in common by whom or on whose behalf the application has been made;

(d) the value of any contribution made by any tenant in common to the cost of improvements to or the maintenance of the land or buildings occupied in common;

(e) where the tenants in common are spouses or the tenants in common who do not agree on the partition are dependants of or related to the tenants in common, whether the interests of those tenants in common who have not agreed to the partition have been or will be adequately provided for as a consequence of or after the partition is effected, and particularly, a spouse or dependants of the tenant in

common who is applying for the partition will not be rendered homeless by the partition;

(f) in respect of an application made by a person referred to in subsection (2)(b), whether the interests of the spouse or any dependants of the tenant in common whose share is to be sold in execution of a judgment or decree, will be adequately catered for and particularly, any spouse or dependants will not be rendered homeless by the sale;

(g) if the tenants in common are pastoralists, whether the tenants in common who have not agreed to the partition will, after the partition, still retain grazing rights, including grazing rights created by an easement in the partitioned land, to sufficient land of the quality and nature and in the location customarily used by those pastoralists;

(h) the proper development and use of the land and whether it may be adversely affected by the partition applied for;

(i) the hardship that would be caused to the applicant or applicants by the refusal to an order in comparison with the hardship that would be caused to any other person by making the order; and

(j) any other matters that the Registrar considers relevant.

(4) The Registrar may make the order for partition subject to such limitations and conditions, including conditions relating to the payment of compensation to those tenants in common who have not agreed to the partition, by the tenants in common who have applied for the partition and how the expenses and costs of the partition are to be borne, as the Registrar may consider just and reasonable.

33. The Defendant placed evidence before the court showing that he had made an application to the Land Registrar Rachuonyo South & North Sub-Counties for the partitioning of the suit property and that he had even obtained consent of the Land Control Board and subdivision approval from the County Physical Planner, Homa Bay County, for that purpose. The evidence before the court shows that the partitioning of the suit property did not take place because the Plaintiffs refused to participate in the process and filed the present suit on 28th October 2015. Now that the matter is before this court, the court has the power to order the partitioning of the suit property.

34. The Plaintiffs have not persuaded me that they will suffer any prejudice, inconvenience or injustice if the suit

property is partitioned and each of the registered owners is given a separate title for his share in the suit property. I even think that it will be to their benefit. The court was told that they had sold a portion of “their share” of the suit property to a third party. I am of the view that if they obtain a separate title, they would be able to give the said third party his/her title for the sold land.

35. I find no merit in the Plaintiffs’ claim that the Defendant is a land grabber and that his registration as a co-owner of the suit property was either as a result of a mistake by the land registry during the land adjudication or a fraudulent scheme by the Defendant. The evidence before the court shows that the suit property was registered in the name of Ajwang Ogola and the Defendant’s father, William Polo, as the first registered owners on 16th November 1976. The Defendant was registered as the owner of the suit property 20 years later, on 3rd May 1996, as a beneficiary of the estate of his father, William Polo. There is no evidence that the Plaintiffs objected to the registration of the Defendant’s father as a co-owner of the suit property during land

adjudication. The Plaintiffs have also not challenged the succession proceedings under which the Defendant was appointed as the administrator of the estate of his father. This court has no jurisdiction to delve into the validity or otherwise of those proceedings. In any event, the Plaintiffs have sued the Defendant as the lawful registered owner of ½ undivided share in the suit property. If the Defendant held an invalid title in the suit property, the Plaintiffs would not have claimed from him the said share of the suit property by adverse possession.

36. Due to the foregoing, it is my finding that the Plaintiffs' case against the Defendant has not been proved, and that the Defendant has proved his counter-claim against the Plaintiffs.

37. In conclusion, I hereby make the following orders in the matter;

(a) All that parcel of land known as Title No. Kabondo/Kasewe/953 (the suit property) shall be partitioned into two (2) equal parts to enable the

registered owners to have separate titles for their respective shares in the property.

(b) The Land Registrar, Rachuonyo South and North Sub-Counties, and the Government Surveyor in charge of the area, shall visit with notice to the parties, all that parcel of land known as Title No. Kabondo/Kasewe/953 (the suit property) and shall locate and identify on the ground with the assistance of the parties, the portion of the property actually occupied by the Plaintiffs and any third party/parties to whom the Plaintiffs have sold a portion/portion of the suit property.

(c) The Land Registrar, Rachuonyo South and North Sub-Counties, and the Government Surveyor in charge of the area, shall undertake the partitioning of all that parcel of land known as Title No. Kabondo/Kasewe/953 into two (2) equal portions, in favour of the registered owners, **Ajwang Ogola, deceased**, and the Defendant, **Joshua Oyange Polo, to hold in trust for the beneficiaries of the estate of William Polo Okumbo**, due allowance being

given for access roads as may be determined by the surveyor.

- (d) The partition/subdivision of the parcel of land known as Title No. Kabondo/Kasewe/953 shall, as much as is practically possible, respect the homes/occupation on the ground, by the Plaintiffs and the third parties who have “purchased” the portion/s of the suit property from them to the extent that, as much as it is practically possible, the homes of the Plaintiffs and their third party purchasers should fall on the portion of the suit property to be registered in favour of **Ajwang Ogola, deceased**, and the unoccupied portion of the suit property should fall on the portion of the suit property to be registered in the name of the Defendant, **Joshua Oyange Polo to hold in trust for the beneficiaries of the estate of William Polo Okumbo**, but in any event, the partition/subdivision shall ensure that the two (2) portions are equal irrespective of the areas occupied by the Plaintiffs and the third party purchasers on the ground.

(e) The Land Registrar, Rachuonyo South and North Sub-Counties, shall register one (1) of the portions resulting from the aforesaid partitioning of Title No. Kabondo/Kasewe/953 in the name of **Ajwang Ogola, deceased**, and the other one (1) portion in the name of the Defendant, **Joshua Oyange Polo, to hold in trust for the beneficiaries of the estate of William Polo Okumbo, deceased.**

(f) The Land Registrar, Rachuonyo South and North Sub-Counties, shall take all care and attention and shall employ the assistance of the Government Surveyor, in charge of the area, to ensure that, as much as practically possible, the portion of Title No. Kabondo/Kasewe/953, currently occupied by the Plaintiffs and the third parties who purchased land from them, is the one registered in the name of **Ajwang Ogola, deceased**, and the portion of Title No. Kabondo/Kasewe/953, which is not occupied, is the one registered in the name of the Defendant, **Joshua Oyange Polo, to hold in trust for the beneficiaries of the estate of William Polo Okumbo, deceased.**

- (g) The full costs of the visits to the suit property by the Land Registrar, Rachuonyo South and North Sub-Counties, and the Government Surveyor in charge of the area, the survey, partitioning, and registration of the new titles shall be shared by the Plaintiffs and the Defendant equally.
- (h) After the partitioning of Title No. Kabondo/Kasewe/953, and registration of the portions thereof in the names of the parties as ordered above, each party shall keep to its portion of the property and shall not interfere with the other's use and occupation of their respective portions.
- (i) Either party shall be at liberty to apply limited to orders (c), (d), (e), and (f) above.
- (j) Each party shall bear its costs of the suit.

**Delivered and signed at Kisumu on this 18th day of
December 2025**

**S. OKONG'O
JUDGE**

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

N/A for the Plaintiffs

The Defendant in person

Ms. J. Omondi-Court Assistant

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