

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC NO. 215 OF 2014

ZEPHANIA AWITI NDEDA PLAINTIFF

VERSUS

ADILIA OPILE OKONYOLE 1ST DEFENDANT

SYLVANUS OCHIENG OKONYOLE 2ND DEFENDANT

AND

PETER OUMA MUCHEMBERE INTERESTED PARTY

JUDGEMENT.

Vide the plaint dated 21st July, 2014, which was later amended and replaced with the amended plaint dated 6th February, 2024, the plaintiff sought orders that;

- a) an order for the resurvey be done on the land parcel number KISUMU/MANYATTA 'A'/186 to confirm the actual size on the ground and an amendment of the register for the suit land parcel to reflect the actual acreage.
- b) the 1st and 2nd defendants be jointly and severally compelled to subdivide the part of parcel No. KISUMU/MANYATTA 'A' /186 to the plaintiff, such that the plaintiff justifiably gets the rightful portion he is occupying (which was rightfully purchased for him by his

late mother) as per the existing physical boundary on the ground.

- c) a declaration that the plaintiff is the rightful owner of the part of parcel title No. KISUMU/MANYATTA 'A'/186 (which has been developed for the last thirty years and is the permanent residence of the Plaintiff.
- d) The costs of the incidental of this suit.
- e) Any other relief that the court may deem fit to provide.

The plaintiff's case, as pleaded in the amended plaint dated 6th February 2024, is that in the year 1980, his mother, Christabel Olang Ndeda, deceased, bought a portion of land for him (purported to be approximately 0.03 ha, 0.045 ha in size) from Adilia Opile Okonyole, the 1st defendant herein.

That while the plaintiff signed the agreement on behalf of his mother, Teresa Anyango (the 1st defendant's eldest daughter) signed the agreement on behalf of the seller.

That the suit land, although measuring 0.05 ha on the title deed, actually measures 0.095 ha on the ground.

That after the purchase of the property, the plaintiff's mother did in the year 1982, construct a semi-permanent building, toilets, in the year 1985, put up a live fence sub-dividing the plaintiff's portion and the defendants' portion in the year 1988, constructed a

permanent building and a borehole in the year 2002 on the portion of land sold to her.

That the plaintiff has been in actual and physical occupation of the said portion with physical boundaries on the ground from the year 1982 to date.

That the 2nd defendant is sued herein merely by virtue of being the current title holder (of title No. KISUMU/MANYATTA 'A'/186) because of a transfer made to him as a grandson of the 1st defendant. That at some point, the plaintiff filed a case before the Land Disputes Tribunal but the Tribunal was disbanded before the case could be concluded.

That the contentious matter in the suit is the manner in which the suit land was transferred from the 1st defendant to the 2nd defendant without involving the plaintiff or before giving the plaintiff his rightful portion.

In reply to the amended plaint the defendants filed a Statement of Defence dated 8th July, 2015, which was later amended and replaced with the amended Defendants' Statement of Defence dated 19th February, 2024.

The defendants denied the plaintiff's claim and prayed that the same be dismissed with costs.

The Interested Party, Peter Ouma Muchembere, sought, vide the Notice of Motion dated 26th September, 2022 that leave be granted for him to be included in the suit as an Interested Party. The application was allowed by consent on 2/11/2022. Consequently, the Interested Party filed a list of documents dated 29th November, 2022, with a bundle of the listed documents attached, and later filed a witness statement.

The evidence

The plaintiff, Zaphania Awiti Ndeda, testified as PW1 and called 2 witnesses. He adopted the contents of his witness statement dated 21/7/2014 as his evidence in chief. He produced documents as exhibit inclusive of land sale agreement between his mother and the 1st defendant, a letter dated 21/12/1988, an OB report, certificates of official search for land registration number KISUMU/MANYATTA 'A'/186 dated 23/11/1995 and 20/11/2006, Limited Grant of Letters of Administration in Kisumu HC. SUCC C. NO. 781 OF 2014, Certificate of death for his Mother Christabel O. Ndeda, letter forwarding proceedings from the Land Disputes Tribunal and Surveyor's report dated 14/12/2023.

On cross-examination, PW1 stated that the problem between him and the 2nd defendant was the boundary. That the land sale agreement does not show the size of the land that was sold.

That land parcel No. 2807 MANYATTA "A" is the one that he had been allocated a portion of measuring 0.03HA.

That there is no encroachment. That if the surveyor's report dated 10/7/2023 were allowed, he would lose the borehole, water tank, and part of his house.

That it was the 1st defendant who sold land to the Interested Party, and as a result, the defendants' share became small, and therefore, the problem began. That his portion measures 0.45 Ha, and that a resurvey should be done.

That the water tank, borehole, and house were developed in the lifetime of the deceased 1st defendant, who never complained of encroachment.

PW2 was Eunice Akinyi Odhiambo. She testified that since she started staying on the land as a tenant in the year 2010, she found the water tank and borehole on the land.

PW3 George William Rasawa stated that he was a tenant of the 1st defendant staying on the suit land. That when he came to the land, he found the plaintiff on the land. That the plaintiff had already built thereon. That at some time, a new fence was erected, which blocked the toilets. That the toilets were on the side of the plaintiff.

On behalf of the defendants, the 2nd defendant, Silvanus Ochieng Okonyole, testified as DW1. He stated that the plaintiff had

encroached on their land gradually. He prayed that the report of the Land Registrar dated 10/7/2023 be adopted as his exhibit.

He stated that the plaintiff had built a water tank and bore hole on their land. Although the title deed shows that the land measures 0.05 hectares, the Land Registrar's report shows that the land measures 0.095 hectares on the ground. That the size given in the Land Registrar's report is the correct size of the land.

The 2nd defendant testified that he was willing to transfer to the plaintiff a portion measuring 0.035 Ha as per the Land Registrar's report.

On cross - examination, DW1 stated that he was not there when the water tank and the borehole were constructed. That his grandmother, the 1st defendant, did not file any case on the encroachment.

That the dispute is about the boundary. He prayed that diagram 3 on the Land Registrar's report be adopted, as it shows the size of each party's portion of the land.

The Interested Party also testified. He relied on the contents of his witness statement dated 12/4/2024 as his evidence in chief. He produced his National Identity Card, a copy of Banker's Cheque, Demand Notice and receipts as exhibits. He testified that the size of his land is 0.025 Ha as per the surveyor's report. That by the

time his portion was sold to him, the plaintiff was already in occupation of his land, where he had a water tank, toilet and a permanent house which are within the plaintiff's portion.

Submissions

At the close of the evidence, parties filed written submissions on the case.

Written submissions dated 29th September, 2025, were filed by P. D. Onyango & Co. Advocates on behalf of the plaintiff.

It was submitted that on behalf of the plaintiff that the evidence is clear that the suit land is bigger on the ground than 0.05 Ha, as it appears on the search, and that therefore an order should be made for the amendment of the register to reflect the actual size, which according to the government surveyor's report is 0.095 Ha.

Counsel submitted further that the plaintiff's portion is 0.045 Ha. That the boundary separating the two portions of land was put in place when the 1st defendant was alive. That the building, the toilet and the borehole fall within the portion belonging to the plaintiff. That it was the portion that was measured by both the private and government surveyor and found to measure 0.045 Ha. That the conclusion by the surveyor that there was encroachment onto the defendants' land was not supported by any evidence.

That there is no boundary case ever initiated by the defendants. That the defendants did not bring any witnesses to confirm that there was an encroachment.

On whether the defendants should be compelled to subdivide the suit land and transfer a portion measuring 0.045 Ha thereof to the plaintiff, Counsel submitted that what the plaintiff is claiming is a portion of the suit land that he is in occupation of. That the contestation is on the size thereof. Counsel referred to Section 30 of the Registered Land Act (repealed) which was in operation at the time the land was transferred into the 2nd defendant's name and relying on the case of Munyu Maina - vs Hiram Gathiha Maina, Nyeri Civil Appeal number 239 of 2009 where the right of the person in possession or actual occupation of registered property was recognized as one of the overriding interests under section 30 (f) of the Registered Land Act, Counsel submitted that the 2nd defendant is not right in the circumstances to submit that his title is indefeasible.

Counsel further referred to the case of Gatimi Kinguru vs Muya Gathangi (1976) KLR 253 and Mbui Mukangu vs Gerald Mutwiri Mbui (2004) eKLR where it was held that beneficial occupation and possession confer equitable rights capable of protection under Kenyan law.

That the survey report dated 14th December, 2023, identified a distinct and quantifiable portion measuring 0.045 Ha for the plaintiff.

Counsel urged the court to allow the claim and relying on the provisions of Section 27 of the Civil Procedure Rules and the case of Supermarine Handling Services Ltd - vs Kenya Revenue Authority (2010) eKLR urged the court to award costs to the plaintiff.

On behalf of the 2nd defendant, written submissions dated 21st July, 2025, were filed by Ben Aduol Nyanga & Co. Advocates.

On whether the 1st and 2nd defendants should be jointly and severally compelled to subdivide the part of parcel No. KISUMU/MANYATTA 'A'/186 to the plaintiff. Counsel submitted that this issue speaks to the indefeasibility of title, namely that once a person is registered as the legal owner of a property, their title to the property is protected against most claims and cannot easily be challenged.

Counsel relied on the case of Munyu Maina - vs - Hiram Gathiha Maina [2013] eKLR and Dr. Joseph Arap Ngok - vs - Justice Moiwa Ole Keiwua & 5 others to support the submissions.

Counsel submitted that vide the survey report dated 10th July, 2023, the measurements of every person were ascertained and that it was clear that the plaintiff's portion measured 0.035 Ha.

That the plaintiff is trying to expand his land. That the plaintiff should stick to the original boundary as per the agreement between the 1st defendant and the plaintiff's mother.

Counsel urged the court to award costs to the defendants based on Section 27 of the Civil Procedure Act and the case of Cecilia Karuru Ngayu - vs - Barclays Bank of Kenya & Another [2016] eKLR, where it was held that the issue of costs is in the discretion of the court and is used to compensate the successful party for the trouble taken to prosecute or defend the case and not to penalize the losing party.

Issues for determination

Having carefully considered the pleadings, the evidence, and the submissions herein, I find that the following material issues are not in controversy;

- i. The 2nd defendant is the current registered owner of the suit land after the same was transferred in his favour in the year 2006 by the 1st defendant, now deceased, who was the original registered owner thereof.
- ii. Before the suit land was transferred in favour of the 2nd defendant, the 1st defendant had sold a portion thereof to the mother of the plaintiff.

- iii. Before the suit land was transferred to the 2nd defendant, the plaintiff had taken possession of the portion that he bought from the 1st defendant and carried out some developments thereon.
- iv. The Interested Party is entitled to a portion measuring 0.025 Ha of the suit land, which he also bought.
- v. The size of the suit land is bigger on the ground than in the title deed.

The sole issue that emerges for determination is the size of the portion of the suit land that the plaintiff is entitled to.

Analysis and determination

The plaintiff pleaded in the amended plaint that his mother, by the name of Christabel Olang Ndeda, bought for him a portion of the suit land (purported to be approximately 0.03 ha, 0.045 Ha in size) from the 1st defendant.

In the prayers in the amended plaint, the plaintiff sought that the 2nd defendant be compelled to subdivide the suit land such that he (Plaintiff) justifiably gets his rightful portion he is occupying as per existing boundary on the ground. He further sought for a declaration that he is the rightful owner of the part of the suit land measuring 0.045 Ha with physical boundaries on the ground (which

have been developed for the last thirty years and is the permanent residence of the plaintiff.

In his testimony in court, the plaintiff produced the land sale agreement vide which his mother bought the portion of land from the 1st defendant. On cross - examination, the plaintiff admitted that the said sale agreement did not indicate the measurements of the sold portion of land. The plaintiff also produced a surveyor's report conducted by a private surveyor.

The defendants denied that the plaintiff is entitled to 0.045 HA but 0.035 Ha as established by the surveyor.

I have considered the evidence and submissions. There is no evidence of how much of the suit land the plaintiff's mother bought. The report by the surveyor dated 10th July, 2023, was done pursuant to a court order obtained by consent of all the parties. It shows the sizes of the respective portions that each of the parties is entitled to.

I find that the correct sizes of the portions of land the parties are entitled to are as set out in the surveyor's report dated 10/7/2023.

Prayer 1 of the amended plaint has been answered by the surveyor's report dated 10/7/2023, as the report is a product of a resurvey, which found that the size of the suit land on the ground is 0.095 Ha.

Based on the evidence placed before the court, I find that it has been proved that the suit land's actual size is 0.095 ha, that the size of the portion of the suit land that the plaintiff is entitled to is 0.035 ha, and that the Interested Party's claim to a portion of the suit land measuring 0.025 ha is uncontested.

Having so found, I enter judgment and make the following orders in favour of the plaintiff and the Interested Party and against the 2nd Defendant: -

- a) Resurvey of the suit land parcel No. KISUMU/MANYATTA 'A'/186 having been done, an amendment of the register in terms of prayer (a) of the amended plaint, be made in compliance with the Survey report dated 10/7/2023, so that the acreage of the suit land is amended to read 0.095 Ha instead of 0.05 Ha.
- b) The 2nd defendant do transfer to the plaintiff a portion measuring 0.035 Ha of the suit land parcel No. KISUMU MANYATTA 'A'/186 as occupied by the plaintiff on the ground in accordance with diagram 3 of the Survey report dated 10/7/2023.
- c) The 2nd defendant do transfer to the Interested Party a portion measuring 0.025 Ha of the suit land parcel No. KISUMU/MANYATTA 'A'/186 as occupied by the Interested

Party on the ground in accordance with diagram 3 of the Surveyor report dated 10/7/2023.

d) Each party to bear its own costs of the suit.

Orders accordingly.

Judgment dated and signed at Kisumu and delivered virtually this 19th day of February, 2026.

**E. ASATI,
JUDGE.**

In the presence of:

Maureen: Court Assistant.

Bagada for the Plaintiff

Akila h/b for Nyanga for the Defendants

N/A for the Interested Party