

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ELC LAND CASE NO. E003 OF 2023

THOMAS OMONDI OLENDO;.....
PLAINTIFF

VERSUS

MAURICE ODUOR ODHIAMBO.....
DEFENDANT

JUDGEMENT

BACKGROUND

- 1 This suit was commenced by way of plaint which was subsequently amended on 15/08/2024 and filed on 20/8/2024. The plaintiffs claim revolves around Plot No. South Ugenya/Rangala/556 (herein suit property).
- 2 It is pleaded that the suit property belonged to the defendant's grandmother and the plaintiffs' mother who are both deceased. That the defendant fraudulently obtained letters of administration on 26/8/2020 without informing the other beneficiaries to the estate of the deceased and proceeded upon confirmation of the grant to transfer the suit property into his name. The particulars of fraud are listed at paragraph 2D of the amended plaint.
- 3 It is pleaded that the plaintiff has at all times through grant and confirmation been the beneficiary of half share of the suit property belonging to Mariam Nyahuma

Nyaboro. That following cancellation of the defendants grant and the fraudulent title above, the suit property was subdivided into two equal parts between the plaintiff and the defendant's auntie Rose Adhiambo Owinyo. The plaintiff was issued with title deed for Plot No. South Ugenya/Rangala/1943 (1.6 Ha). It is pleaded that the defendant has without the plaintiff's express authority entered the Plot No. South Ugenya/Rangala/1943 and constructed his home on a portion thereof and has refused to give vacant possession to the plaintiff despite demands.

- 4 Consequently the plaintiff prays that;
- a) A permanent injunction restraining the Defendant, his agents and or servants from entering, encroaching and or in any manner interfering with the Plaintiffs use and occupation of Plot No. South Ugenya/Rangala/1943
 - b) Compensation for the part of his parcel, the Defendants house
 - c) Cost and Interest of the suit
 - d) Any other alternative relief this Honourable court may deem fit to grant.
- 5 The defendant responded vide a replying affidavit sworn on 2/04/2024 which was by consent of the advocates on record for the parties agreed would serve as the Defendant defence- See the proceedings of 16/12/2025. It was also adopted as the witness statement during the hearing of the matter.

- 6 It was the defence case that the Plaintiff has own separate land from the defendant's family. He avers that the suit property was registered in the names of Masiana Nyaboro and Mariam Nyahuma Nyaboro and he was issued with grant of letters of administration in Succession Cause No. 75 of 2020 in Ukwala Magistrates Court which was also confirmed. Pursuant thereto the suit property was transmitted to him and title deed issued. That he later discovered that the plaintiff had filed parallel succession proceedings in Ukwala Succession Cause No. 105 of 2021 and obtained grant of letters of administration.
- 7 It is averred that the defendant moved the court in Ukwala for setting aside of the orders where the court directed that the two causes be consolidated for hearing and determination. The said affidavit also questioned the court jurisdiction to hear and determine the present suit.

Hearing

- 8 The matter was heard on 19/3/2025 and 28/5/2025.
- 9 Thomas Omondi Olendo the plaintiff testified as PW1 and adopted his witness statement dated 14/02/2024 and 15/08/2024 as his evidence in chief. He produced the documents in the Plaintiffs List of Documents dated 14/02/2024 (PEX 1- 2). He asked the court to give him his land since the defendant constructed a house the ½ portion belonging to the plaintiff and cultivating thereon. The witness statement largely echoed the averments on the amended plaint herein.

- 10 Cross examined the witness confirmed that the grant in Succession Cause No. 105 of 2021 issued to him and Rose Anyango Awinyo (herein Rose) was revoked and fresh grant issued in the plaintiff's name, Rose and the defendant (herein Morris). That the court directed that the three do a fresh redistribution of the estate which has not happened. PW1 confirmed he was occupying his share and the defendant was awaiting to be given his share. He conceded that in the absence of distribution the court would not be in a position to tell if the entire suit property belongs to the plaintiff.
- 11 PW1 clarified in re-examination that both sides of the divide were to seat and distribute their half share and therefore it was not for the three administrators to seat and distribute. That Miriam's family had done their distribution to everybody's satisfaction.
- 12 PW2 was Eunice Juma Ochieng. The witness adopted the witness statement dated 4/2/2025. According to the witness statement PW2 is the sister to the Plaintiff. She states that the Defendant went to do succession for her parents together with her sister-in-law who was married to PW2 step brother. That the brother and sister-in-law were named the administrators with consent of PW2 which she authorised. That after processing the grant, the Defendant started claiming that the Plaintiff, is not a son of the late Ochieng and should therefore not inherit Ochieng's property. It was her evidence that Plot No. SOUTH

UGENYA/RANGALA/556 belonged to the late Marsiana Anyango Nyaboro alias Gor Nyaboro and the Late Miriam Yahuma Nyaboro alias Yahuma Nyaboro who was her step mother respectively.

- 13 Further that the sisters of the Plaintiff agreed to let the plaintiff inherit their mother's parcel of land as they are all married and have their own homes. She was aware the Defendant had also done succession and obtained a title deed to the land without their knowledge but the title deed and grant were cancelled.
- 14 Upon cross examination the witness testified that he was not aware of the cancellation of the grant in Ukwala Succession Cause No. 105 of 2021. She told the court that when Rose and Thomas did the succession, they did not give land to any of Marsiana's children. She was not aware of any pending case because she had already been given their title. She confirmed her witness testament only referred to parcel 556.
- 15 She clarified in re-examination that the defendant was under Marsianas side. That Thomas was given the mandate to distribute Marsiana estate.
- 16 PW3 was Rose Adhiambo Awinyo adopted her witness statement dated 4/2/2025 as her evidence in chief. She sought the court assistance to get them their share of the land. She confirmed on cross examination that the succession is still pending at the Ukwala court. The three

administrators have never sat to distribute the estate and everybody lives on their portions as the way they have always occupied.

17 With the above the plaintiffs' suit was marked as closed.

Defence case

18 DW1 was Maurice Oduor Odhiambo. He adopted his replying affidavit sworn on 2/4/2024 and 15/01/2025 as his evidence in chief and produced the documents in the list dated 20/6/2024. DW1 Ex 1 -8.

20 The witness testified in cross examination that he filed Succession Cause 75 of 2020 where he was listed as the only beneficiary while Thomas and Rose were listed as the beneficiaries in 105 of 2021. He explained that he was the 1st grandson of Marsiana. That Thomas was Miriams last born son. He stated that in the hierarchy of succession a son would take precedence over a grandchild to. That while Thomas was Miriams son he did not obtain his consent to apply for the grant. He confirmed a title was issued in his name (DW1) on 26/4/2022 yet the grant was confirmed on 27/4/2022.

21 DW1 confirmed that the court had directed the suit property is to be divided into two that is between the two families. That they have not sat since Thomas failed to attend and informed them that they had already sat as Miriams children. That in the event the land is distributed he will not get his piece from Miriams side but Marsiana.

- 22 The witness asserted in re-examination that they had not sat to establish the $\frac{1}{2}$ of the two deceased.
23. Nesdor Adundo Okelo testified as DW2. Adopting his witness statement dated 25/09/2024 as his evidence in chief. Summarize content he rehashed the history of the matter , the succession cause filed leading to MAURICE ODUOR being issued with the title deed. The parallel succession cause, consolidation of the two causes, the status and the orders of the court therein.
24. It was the witness evidence that the issues in the present suit shall be dealt with perfectly in two succession Cause as such this court can order the matter to be stayed pending the determination of the Ukwala succession cause No.105 of 2020 and Ukwala succession cause No.75 of 2020. The same were on the same estate and property. Further that the defendant stays in his portion and also the plaintiff stays in his portion as such there is no interference in any way whatsoever.
- 25 Cross examined the witness told the court that where a father dies the wife if alive will inherit or his son or the 1st grandson. That Miriam has a son (Tom Omondi Olendo) who is alive. In Marsianas side the person entitled to inherit is the defendant. The witness clarified in re-examination that he was not aware if the land has been distributed to the beneficiaries.
- 26 With the above the defence case was marked as closed.

SUBMISSIONS

27 Parties filed and exchanged written submissions in compliance to the court directions.

Plaintiffs Submissions

28 The Plaintiff submitted on three issues which are summarised herebelow.

29 Whether the Plaintiff is the rightful beneficiary of land parcel South Ugenya/Rangala/1943. It is submitted that the plaintiff's claim arises from the house of Miriam Yahoma Nyaboro, while the defendant belongs to the lineage of Marsiana Anyango Nyaboro. Consequently, his claim cannot attach to South Ugenya/Rangala/1943, which forms part of Miriam's entitlement. Reliance is placed on **Kosgei v Cheronno (Family Appeal E002 of 2023) [2024] KEHC 1337 (KLR)** where it was emphasized that grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.

30 It is submitted that after revocation of the Defendant's fraudulent grant, the original parcel South Ugenya/Rangala/556 was subdivided equally. The suit parcel, South Ugenya/Rangala/1943, was duly allocated to the house of Miriam Yahoma Nyaboro, and the Plaintiff succeeded it with the consent of his siblings. His proprietary interest is protected by Article 40(1) of the Constitution of Kenya, 2010, guaranteeing the right to own

property, and is legally perfected through registration under Section 26(1) of the Land Registration Act, 2012.

- 31 Whether the Defendant is unlawfully occupying and utilizing the Plaintiff's land. The Plaintiff contends that the Defendant is unlawfully occupying land parcel SouthUgenya/Rangala/1943, which was legally devolved to the house of Miriam Yahuma Nyaboro and subsequently registered in the Plaintiff's name. The Defendant does not claim to derive title through the Plaintiff's lineage, nor has he produced any documentation to justify his occupation. That the subsequent subdivision of the land with the involvement of a court-appointed surveyor, makes it clear that South Ugenya/Rangala/1943 is not within the Defendant's share. That his entry amounts to trespass. Reliance is placed on the case of **Philip Ayaya Aluchio v Crispinus Ngayo [2014] KEHC 7055 (KLR)** where the court held that once property is lawfully devolved and registered, third parties, including relatives, have no right to interfere.
- 32 Whether the Plaintiff is entitled to an order of eviction and permanent injunction against the Defendant. It submitted that in view of the above the Plaintiff is entitled to the reliefs sought. Kenyan courts have repeatedly affirmed that a rightful owner is entitled to exclusive possession and can seek eviction of a trespasser. That an injunction is merited under Section 13(7)(a) of the Environment and

Land Court Act, which empowers the court to issue permanent injunctions to safeguard property rights.

Defendants Submissions

- 33 The defendants' submissions are dated 20/8/2025. It is submitted that the plaintiffs' suit is not justified. The trial court in ukwala had directed that survey be done and land allocated to the beneficiaries afresh. That the plaintiff had no locus standi to enforce and or bring the suit before this court as presented for the reason that the succession court in UKWALA is expecting the parties to submit their summons for confirmation of grant issued to Maurice Odhiambo, Thomas Omondi & Rose Adhiambo. That if this court goes on to issue a judgement in favour of the plaintiff to protect land parcel South Ugenya/Rangala/1943 that was created out of a process that was questionable which was revoked it would be an exercise in futility.
- 34 It is submitted that the defendant still believes that the plaintiff is not entitled to the prayers sought as the surveyor is yet to share out the land as directed by the court in Ukwala Succession Cause 105 OF 2021.

ANALYSIS AND DETERMINATION

- 35 I have perused and considered the pleadings, the oral testimonies of the witnesses who testified and the evidence adduced herein. I have equally perused and

considered the written submissions filed herein by the Learned Advocates for the parties.

36 The main issue for determination is whether the Plaintiff is entitled to the orders sought in the amended plaint filed on 20/08/2024 and dated 15/08/2024.

37 The plaintiffs' case as pleaded is that he is the son of Miriam Yahuma Nyaboro who held $\frac{1}{2}$ share of the property South Ugenya/Rangala/556 together with Marsian Anyango Nyaboro the defendant's grandmother who held the other half. The two are since deceased. That following their death the plaintiff together with the defendant's aunt obtained grant of letters of administration in the year 2021 and which was confirmed but unknown to them another grant had been issued and confirmed in favor of the defendant on 6/04/2021 in respect of both deceased. Following the later grant which was fraudulently obtained the defendant proceeded to have the land South Ugenya/Rangala/556 transmitted into his name.

38 Further that the grant issued in favor of the Defendant was cancelled together with the title issued to the defendant following the plaintiff's application for revocation of grant on 16/3/2023. Following this the plaintiff proceeded under the initial grant issued to him and the defendant aunt to have the suit property transmitted appropriately and then subdivided into two equal parts between the plaintiff and the defendant's aunt. The plaintiff was issued with title South

Ugenya/Rangala/1943 for his mother's part measuring 1.6 Ha in May 2024. That the defendant has unlawfully entered this part erected his home and the plaintiff wants a permanent injunction issued against the defendant and his agents from entering encroaching and or in any manner interfering with the plaintiff's occupation.

39 Even as I delve into the determination of this case the court is alive to the jurisdiction of the ELC court as conferred under Article 162 of the Constitution of Kenya 2010 read together with Section 13 of the ELC Act considering the succession issues that seem to be emerging in the present dispute.

40 It is trite law that he who alleges must prove. This is set out under Section 107(1)(2) of the Evidence Act, which provides as follows:

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

41 The burden of proof therefore was upon the plaintiff to prove that he is the lawful owner of the portion South Ugenya/Rangala/1943 and that the defendant has without his permission encroached thereon.

42 PW1 produced in evidence Certificate of Confirmation of Grant and Official Search of Plot South Ugenya/Rangala

(PEx 1-2). However, upon perusal of the file the court noted that these documents were not filed together with the list of documents. The same documents were referred to have been annexed to the plaintiffs supporting affidavit sworn on 14/2/2024 in the application dated 14/2/2024 but they were also not attached.

43 However the Certificate of Confirmation of Grant dated 27/04/2022 was produced by the Defendant showing that the parcel South Ugenya/Rangala/556 was distributed to Thomas Omondo Olendo (the plaintiff herein) ½ share and Rose Adhiambo Owinyo ½ share. However, this court notes that PW1 admitted in cross examination that this grant was revoked by the court in Ukwala and that he was aware that pursuant to this revocation another grant was issued to Rose (the defendants aunt), the plaintiff and the defendant. This is indeed confirmed by the order dated 24/10/2024 issued by E. Tsimonjero pursuant to objection proceedings filed in Succession Cause No. 75 of 2020 and 105 of 2021 consolidated. This order was produced as part of the defendants' documents in evidence.

44 I will reproduce the contents of the order dated 24/10/2024 as follows; -

1. That the grant issued to the petitioners herein THOMAS OMONDI OLENDO and ROSE ADHIAMBO OWINYO and the resultant Certificate of Confirmation of Grant be and is hereby revoked.

2. That a fresh grant shall issue in the names of THOMAS OMONDI OLENDU, ROSE ADHIAMBO OWINYO and MAURICE ODUOR ODHIAMBO

3. That the three administrators do bring together all the beneficiaries of the Estate of MARISIANA ANYANGO NYABORO and MIRIAM YAHUMA NYABOKO and have them agree on the mode of distribution of the ½ shares of the two deceased persons amongst themselves. The agreed mode of distribution be filed together with a fresh summons for confirmation of grant at the lapse of six months.

4. That confirmation shall be on 7/05/2024.

45 Arising from the above order, it is clear the Certificate of confirmation of grant that was issued to the Plaintiff and Rose was revoked.

46 About the official search for South Ugenya/Rangala/1943 confirming the opening of a register in the name of the plaintiff there was no evidence that the title South Ugenya/Rangala/556 was closed upon subdivision. PW1 evidence according to his adopted witness statement is that he subdivided the land after cancellation of the defendant's fraudulent grant and title and proceeded with transmission whereupon the plot South

Ugenya/Rangala/556 was subdivided into two halves and one portion registered in his name.

47 Firstly, I must state that the alleged title on subdivision was issued on 13/5/2024 during the pendency of the objection proceedings which in my view ought not to have happened and I would lay the blame on the plaintiff who did not stop the same. There was no justification for the plaintiff to proceed with the subdivision as alluded above. My perusal of the order reveals that the trial court did not pronounce itself on the cancelation of the defendant's title. It only cancelled the grant and the resultant certificate of confirmation of grant.

48 It is noteworthy that the plaintiffs' actions of the alleged subdivisions were also based on the grant issued to Thomas the plaintiff and Rose the 1st defendant aunt which was nullified. Consequently, the said subdivision would be of no legal consequence. I say so because the foundation upon which it was based no longer exists. It is an illegality and nothing comes out of an illegality. The title if it at all exists therefore cannot be afforded the protection of Article 40 of the Constitution - See Supreme Court of Kenya decision in **Dina Management Limited vs. County Government of Mombasa & 5 others [2023] KESC 30 (KLR)**

49 It is therefore the finding of this court that the Plaintiff has not proved that he owns a lawful title.

50 The defendant on the other hand claims that the succession proceedings are still ongoing. PW2 confirmed on cross examination that the succession is still pending at the Ukwala court and that the three administrators have never sat to distribute the estate and everybody lives on their portions as the way they have always occupied. PW1 conceded in cross examination that a fresh grant issued in the plaintiff's name, Rose and the defendant (herein Morris). That the court directed that the three do a fresh redistribution of the estate which has not happened. Even DW1 agreed that the three administrators had not sat to distribute the estate.

51 Going back to the orders of the court issued on 24/10/2024 it is clear that the orders of the court at Ukwala have not been complied with and as such the estate has not been distributed. It appears to me that the $\frac{1}{2}$ shares are yet to be clearly ascertained and presented to the probate court for distribution. The plaintiffs' suit in my view seeks this court to distribute the said half share to him and which jurisdiction lies with the court at Ukwala where they are supposed to appear and undertake a confirmation of grant.

52 Based on the material before this court, it is the finding of this court that the plaintiff has not proved to the required standard proof that he is the lawful registered proprietor of the parcel South Ugenya/Rangala/1943.

- 53 The plaintiff having failed to prove the above therefore is not entitled to the orders sought in the amended plaint dated 15/08/2024 and filed on 20/8/2024.
- 54 As to costs the Supreme Court in **Jasbir Singh Rai & 3 other v Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012 [2014] eKLR** held that costs follow the event. The Apex court also guided that there would be discretion in exceptional circumstances. It is clear that the parties in this litigation are relatives and noting that succession proceedings are still pending it is my view that each party should bear their own costs which will encourage peaceful co-existence for there is life after litigation.
- 55 The plaintiff's suit is hereby dismissed. Each party to bear their own costs of these proceedings.

DATED at SIAYA this 10th Day of April 2026

HON. JUSTICE A. E. DENA
JUDGE
10/4/2026

Judgement delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

Mr. Brian Oketch Holding brief for Mr. Okello for the plaintiff

Mr. Ouma Moses for the defendant

Court assistant: Dorothy Awuor

ORIGINAL