



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELC CAUSE NO. 515 OF 2016

FREDRICK ODHIAMBO.....PLAINTIFF

-VERSUS-

DANCAN OCHIENG.....DEFENDANT

JUDGEMENT

This suit was commenced by way of a plaint dated 20th September, 2011. In the said plaint it is pleaded that the suit land was part of the original land parcel No. KAMAGAMGO/KABUORO/3371(hereinafter called the suit land). The Plaintiff and the Defendant are the sons of one **NAAMAN ODHIAMBO OJWANG** who died intestate.

It is the Plaintiff case that by a decree of the court made on 27th May, 2008 the Plaintiff was to inherit a portion of land parcel No. CENTRAL KAMAGAMBO /KABUORO/3276 and that the Defendant has without any reasonable cause transferred the said parcel of land to his own name.

The Plaintiff therefore filed the instant suit to have the Defendant compelled to sub-divide a reasonable portion from land Parcel No. KAMAGAMBO/KABUORO/3371 and costs of the suit.

The Defendant upon service of summons filed a Defence to the suit and in his defence contends that the suit land forms the homestead of his mother while the Plaintiff resides and occupies L.R. Central Kamagambo/Kabuoro/3039. The Defendant further averred that the portion forming his mother's homestead was alienated and awarded to her by the Rongo land Dispute Tribunal which was eventually adopted by the Rongo Senior Resident Magistrate's Court.

The Defendant also contended that the claim by the Plaintiff amounted to the Plaintiff seeking a share of his mother's parcel while at the same time retaining LR No. Central Kamagambo/Kabuoro/3039.

The Defendant lastly contends that the Plaintiff claim is misconceived as the Plaintiff is not the legal Administrator of the Estate of Naaman Odhiambo Ojwang.

When the suit herein came up for hearing, the Plaintiff testified as PW1. He stated that the Defendant is his step brother and he has filed the suit against him to claim part of LR Kamagambo/Kabuoro/3371 he produced as exhibit proceedings before the Rongo Land Disputes Tribunal which was adopted by Rongo Senior Resident Magistrate's Court. He claims that he was awarded 4 acres which the Defendant has refused to grant him and he thus wants the court to help him get a share of the estate of his deceased father's land.

The Plaintiff further testified that his father had 4 wives and that the land he is claiming a share of is currently occupied by the Defendant and that he was included into the estate of the deceased.

PW 2 Joseph Anado Ojwang testified that he knows both the Plaintiff and the Defendant and they are his cousins. He says that the suit land is not ancestral land as it is situated within Rongo Township and they are the administrators to the estate of the late Naaman Ojwang.

The Defendant testified on his own behalf. He contended his late father had a number of properties that were registered in his own name and among them were L.R. 3276 and 3371 which is a sub-division of L.R. 3276.

He states the suit land is where his mother currently resides and that the same was registered in his own name with the authority of his mother who was settled there by his deceased father and that she was awarded the same by the Rongo Land Disputes Tribunal.

He further stated that the Tribunal rulings were adopted by the Rongo Senior Resident Magistrate's Court and a decree issued resulting in the land transfer and registered in his name.

I have considered the pleadings, evidence and submissions made by learned counsel for the parties and the issue for determination before me are two fold namely:-

Whether the Plaintiff has the requisite locus standi to institute the instant case and whether the suit land is part of the estate of the late Naaman Ojwang.

On the first issue the Plaintiff stated that the suit land comprised part of the estate of his deceased father which the Defendant unlawfully transferred into his name. The Plaintiff in his evidence has not tendered evidence to prove that he is indeed the administrator of the estate of the deceased and has the requisite grant of letters of administration to commence the suit herein. In the case of **CHARLES RATEMO NYAMBATI -VERSUS- JACKTON OCHARO & OTHERS KISII ELC PETITION NO. 33 OF 2013 THE COURT OBSERVED:-**

“Grant of letters of administration is what clothes a person with locus standi to stand in and sue on behalf of the estate of the deceased.”

The Plaintiff lacks the requisite grant and authority which makes his case unable. I therefore find that the plaintiff does not possess the requisite locus to commence the suit herein.

On the second issue of whether the plaintiff has provided sufficient claim over the suit land I find that the Plaintiff has not demonstrated to the court that he has sufficient interest to the suit land. The suit land had come into the possession of the Defendant through the Decree of a court which the Plaintiff did not challenge or appeal if he was unsatisfied. Furthermore the suit land formed part of another parcel the Plaintiff's father settled the mother of the Plaintiff.

From the above it is my finding that the Plaintiff has not discharged the burden of proof on a balance of probabilities to demonstrate that the defendant allegedly disinherited him and transferred the suit land to himself and to the exclusion of others.

In the circumstance I dismiss the plaintiffs suit with costs to the Defendant.

DATED, SIGNED and DELIVERED in open court at KISII on this 23rd day of February, 2018

MOHAMMED NOOR KULLOW

JUDGE

In the presence of:-