



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**CASE NO. 499 OF 2015**

**HELLEN KERUBO NYARIBA.....1<sup>ST</sup> PLAINTIFF**  
**ZACHEUS OMBONGI NYAMBURI.....2<sup>ND</sup> PLAINTIFF**  
**PETER TOERI ABUKI.....3<sup>RD</sup> PLAINTIFF**  
**DOMINIC MUMA KWORO.....4<sup>TH</sup> PLAINTIFF**  
**JUSTUS O. MWAMBA.....5<sup>TH</sup> PLAINTIFF**

**VERSUS**

**JOYCE MOSIARA.....1<sup>ST</sup> DEFENDANT**  
**KENNEDY ONDERI NYAKAWA.....2<sup>ND</sup> DEFENDANT**  
**MORARA ODONGO NYAKAWA.....3<sup>RD</sup> DEFENDANT**

**J U D G M E N T**

1. The plaintiffs initiated the instant suit vide a plaint dated 11<sup>th</sup> November 2015 filed in court on the same date. The plaintiffs claim that they in the year 2004 or thereabouts purchased land parcels of varying sizes from the 1<sup>st</sup> defendant which were to be carved out of the 1<sup>st</sup> defendant's parcel of land **Central Kitutu/Mwabundusi/599**. The plaintiffs aver that the 1<sup>st</sup> defendant indeed caused his said land parcel to be subdivided and he transferred land parcels **Central Kitutu/Mwabundusi/1808, 1810, 1811, 1814 and 1994** being some of the resultant subdivisions to the plaintiffs pursuant to their respective agreements of sale. The plaintiffs are now the registered proprietors of the aforesaid subdivisions and hold titles to the freehold interests thereof.

2. The plaintiffs allege that on or about 9<sup>th</sup> November 2015 they learnt of the death of one, Tyson Omwenga Odongo who they state the defendants were planning to bury in one of the plaintiffs parcels of land (unidentified at time of filing suit). The plaintiffs' position was that they having acquired title to the land lawfully the defendants had no right whatsoever to seek to bury the deceased on any of their parcels of land. The plaintiffs sought an order of injunction barring the defendants from burying the body of the deceased on any of their respective parcels of land.

3. Simultaneously with the plaint the plaintiffs filed a Notice of Motion application seeking inter alia an order of injunction restraining the defendants from burying or interring the remains of the late Tyson Omwenga Odongo on any of the land parcels **Central Kitutu/Mwabundusi/1808, 1810, 1811, 1814 and 1994** pending the hearing and determination of the suit. The court granted an interim order of injunction but although the defendants were served with the suit papers and the interim order of injunction they did not file a response to the application and/or any defence to the suit. On 23<sup>rd</sup> November 2015, when the Notice of Motion was listed for hearing there was no appearance on the part of the defendants and the plaintiffs' counsel informed the court that indeed the deceased had been buried elsewhere and not in any of the plaintiffs parcel of land which rendered the application superfluous as it had in effect been overtaken by events.

4. The suit was certified for hearing by Kullow, J on 15<sup>th</sup> May 2017 and was fixed for hearing on 21<sup>st</sup> September 2017 when the same was listed before me. On the scheduled hearing date the defendants did not attend in spite of having been served with a hearing notice. The court directed the plaintiffs who had not filed their witness statements together with the plaintiff to do so and as the defendants had not appeared and/or filed any statement of defence to also file skeleton submissions in support of their claim. The plaintiffs filed replica statements of evidence on 31<sup>st</sup> October 2017 together with their bundle of documents which included the plaintiffs copies of National Identity cards, copies of title deeds for land parcels **Central Kitutu/Mwabundusi/1808, 1810, 1811, 1814, 1994 and 1995** (which were subdivisions from parcel **1811**) and also a copy of the mutation form for the original land parcel **Central Kitutu/Mwabundusi/599**.

5. The court has perused and considered the witness statements made by the plaintiffs in support of their claim together with the documents tendered in support thereof. The defendants did not appear and/or file any defence with the result that the plaintiffs evidence stands unchallenged in any manner. The copies of the title documents tendered by the plaintiffs show that the plaintiffs are the registered proprietors of the suit parcels of land as follows:-

- (i) Land parcel Central Kitutu/Mwabundusi/1808 – Dominic Muma Kworu (4<sup>th</sup> plaintiff)
- (ii) Land parcel Central Kitutu/Mwabundusi/1810 – Mellen Kerubo Nyabira (1<sup>st</sup> plaintiff)
- (iii) Land parcel Central Kitutu/Mwabundusi/1994 – Peter Toel Oriki (3<sup>rd</sup> plaintiff)
- (iv) Land parcel Central Kitutu/Mwabundusi/1814 – Zachaeus Ombongi Nyamburi (2<sup>nd</sup> plaintiff)
- (v) Land parcel Central Kitutu/Mwabundusi/1995 – Justus Oenga Mwamba (5<sup>th</sup> plaintiff)

Land parcels 1994 and 1995 were subdivisions of land parcel 1811 which like the other parcels was a subdivision out of land parcel 599 which was owned by the 1<sup>st</sup> defendant.

6. Having regard to all the evidence tendered, I am satisfied that the plaintiffs are indeed the registered owners of the suit properties and are therefore in terms of Sections 24, 25 and 26 of the Land Registration Act, 2012 entitled to absolute rights of ownership, use and possession without any hinderance and/or interference from any quarter. I am further satisfied that the plaintiff had reasonable apprehension that the defendants intended to bury and/or inter the body of the late Tyson Omwenga Odongo on one of their parcels of land. The plaintiffs were therefore justified to approach the court for an order of interim injunction to restrain the defendants from executing their intention. The order of interim injunction granted at the ex parte stage may have forestalled the defendants’ intentions. Given that the defendants failed to appear upon being served and/or file any defence it must be assumed that they conceded the plaintiffs claim as being unassailable.

7. Although the plaintiffs conceded that the burial eventually did take place at another place other than at any of the plaintiffs parcels, I consider it is still necessary to grant the plaintiffs prayer for a permanent injunction directed against the defendants to restrain them in any manner from interfering with the plaintiffs parcels of land and/or entering into or taking possession for any purpose.

8. The plaintiffs have urged the court to invoke the provisions of Section 157 (1) (a), (b) and (c) of the Land Registration Act, 2012 presumably with a view of finding the defendants to have committed an offence in respect of which they would be liable to be punished. With respect to the plaintiffs there has been no demonstration that the defendants have committed an offence for which they deserve to be punished. This prayer cannot be granted.

9. Overall, I am satisfied that the plaintiffs have proved on a balance of probability that there was a justified apprehension that the defendants intended to unlawfully enter upon and bury the remains of one Tyson Omwenga Odongo (deceased) on any of the parcels of land belonging to the plaintiffs. I accordingly enter judgment in favour of the plaintiffs in terms of prayer (A) of the plaint dated 11<sup>th</sup> November 2015. I make no order for costs and each party will bear their own costs of the suit.

10. Orders accordingly.

**JUDGMENT DATED, SIGNED and DELIVERED at KISII this 9<sup>TH</sup> DAY of FEBRUARY, 2018.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

..... for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> plaintiff

..... for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants

..... court assistant

**J. M. MUTUNGI**

**JUDGE**