



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 160 OF 2014

BENSON MBUTHA ORUKO.....PLAINTIFF

VERSUS

GLADYS BUYUKA

PETER AKOLO

MORIS ANYANGE.....DEFENDANTS

JUDGEMENT

This case is that, the plaintiff is the absolute owner of the parcel of land known as KISA/IKOMERO/2026. Early 2014 all three defendants without any colour of right and the consent of the plaintiff trespassed on the suit property by tilling it and planting thereon maize, beans and bananas and they thereby continue to trespass on the suit property unless restrained by this honourable court. The plaintiff avers that the defendants' act of trespassing on the suit property is illegal and without any justification whatsoever. The plaintiff named in the plaint.the plaintiff prays for judgment against the defendant for;

- (a) A mandatory injunction restraining all defendants whether by themselves, their servants and/or agents or non so ever from trespassing upon the suit property.
- (b) A temporary injunction restraining all defendants whether by themselves, their servants and/or agents or non so ever from trespassing upon the suit property until final determination of this suit.
- (c) General damages for trespass.
- (d) Costs of this suit.
- (e) Any other remedy deemed fit.

The plaintiff testified that the three defendants are his blood relatives. The plaintiff's father, the late Jeremiah Oruko, (Jeremiah) and the late husband of the first defendant and father of the second and third defendants, John Nandwa Sakwa, (John) were the sons of one Peter Sakwa, (Peter) now deceased, from different mothers. The plaintiff is thus a nephew of the first defendant and a cousin of the second and third defendants. That he inherited the ancestral land through a court order.

The plaintiff who was born in 1966 has lived on the same land since that time. In the year 2002 the parcel of land known as land parcel No. KISA/IKOMERO/37 (the mother title) was registered in the name of John Nandwa. The plaintiff claimed ownership of part of the parcel of land comprised in the mother title and instituted proceedings in the Khwisero Land Dispute Tribunal (Tribunal) against John Nandwa Sakwa. The Tribunal decided to divide the parcel of land comprised into the mother title into two parts, one to be given to the plaintiff and the other to be retained by the John Nandwa Sakwa. John Nandwa Sakwa appealed against this decision to the Provincial Land Dispute Appeal Tribunal (Appeal Tribunal) which upheld the decision of the Tribunal. As a result the parcel of land comprised in the mother title was duly subdivided and on 8th November, 2010 the mother Title Number KISA/IKOMERO/37 was closed and two new Titles issued namely Title Number KISA/IKOMERO/2025 which was registered in the name of John and Title Number KISA/IKOMERO/2026 which was and is still registered in the name of the plaintiff. The plaintiff produced a copy of Title Number KISA/IKOMERO/2026 (the suit land) which confirms that he is the registered proprietor of the suit land since 14th June, 2011.

The plaintiff submitted that, since 5th July, 2007 when the Appeal Tribunal rendered its verdict ordering the subdivision of the mother title

into two parcels of land and 14th June, 2011 when the plaintiff was duly registered as the absolute proprietor of the suit land the defendants who are adults and were aware of all proceedings that took place in both the Tribunal and the Appeal Tribunal have never taken any legal steps in the matter whatsoever. Instead, as they admitted in their oral testimony in court, they took the law in their own hands and in 2014 started tilling the suit land and planting thereon their own crops.

The defendants in evidence dispute that finding of the tribunal and insist the land belongs to them. They dispute the plaintiff's allegation that the plaintiff buried his biological father the late Jeremiah Oruko in this suit portion of land KISA/IKOMERO/2026 which is a sub-division of L.R KISA/IKOMERO/37 done in the year 2011. For the plaintiff's biological father JEREMIAH ORUKO was allocated a portion of land by his father the late Peter Sakwa after him the plaintiffs father and his brother refused to go back to the grave of their mother the late Buluma Sakwa who died and was buried in her land, allocated to her by her husband the late Peter Sakwa in Busia County and then the plaintiff's father died the plaintiff herein at that time was very young but the rest of the family members buried the plaintiff's father in his portion of land parcel NO. KISA/ IKOMERO/38 which later the plaintiff herein became the registered Proprietor of the same L.R. KISA/IKOMERO/38, in the year 1999 and it is in this portion of land that plaintiff's mother and brother were also buried.

The defendants submit that after the late Peter Sakwa partitioned his land in 1957 to his family, in 1965 and as per the boundaries demarcation showed and this was the L.R. No. KISA /IKOMERO/38 was given to the late Jeremiah Oruko and L.R. No. KISA/IKOMERO/37 was issued to the late John Nandwa Sakwa as they waited to be issued with title deeds as owners after the physical survey was completed. And the plaintiff became of age then followed up the Registration of his late father Jeremiah Oruko and him the plaintiff became the registered proprietor of L.R. No. KISA/IKOMERO/38 in the year 1999 and the Defendant's father became the Registered Proprietor of the L.R. No. KISA/IKOMERO/37, which the plaintiff herein illegally sub- divided into the L.R Nos. KISA/IKOMERO/2025 and 2016. That the plaintiff herein started forcing himself into their land parcel No. KISA/IKOMERO/37 in the year 1996, when he dislodged the 2nd Defendant from his portion of land as you have seen in the diagram above. The Defendant's father the Late John Nandwa Sakwa tried to remove him from the same portion but him the plaintiff being financially able managed to silence all the elders whom the Defendant's father approached to help him push the plaintiff herein out and that is when the plaintiff started pushing for more land of the Defendant's through the Khwisero Land Tribunal.

The Defendants submit that they challenge the legality of the title deed Nos. KISA/IKOMERO/2025 and 2026, for the plaintiff herein is not a grandson to Fronica Bushuru Sakwa their grandmother, not a son to the late John Nandwa Sakwa their father and/or the plaintiff did not buy the portion of land that he claims to have been given by (1st the late John Nandwa Sakwa on the grounds which the plaintiff claims that the defendants father inherited his mother the late Rosebella Halo Oruko and 2nd claim is that the courts gave him the same on unrevealed grounds.

They further submit that because the L.R NO/ KISA/IKOMERO/37 was illegally sub - divided and title deed No's KISA/IKOMERO/2025 and 2026 was produced on unfounded grounds that the same Nos. KISA/ IKOMERO/2025 and 2026 to be closed in order to allow the defendant's herein to file the succession of their father's land parcel NO. KISA/IKOMERO/37. The defendants submit that because the plaintiff herein forcefully constructed in their land parcel NO.KISA/IKOMERO/37, it is their prayer that the plaintiff herein be ordered out of this land parcel so that it allows them the defendants to build and settle in their land without the interference of the plaintiff herein.

This court has carefully considered the evidence and submissions therein. The Land Registration Act is very clear on issues of ownership of land and Section 24(a) of the Land Registration Act provides as follows:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

Section 26 (1) of the Land Registration Act states as follows:

“The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –

a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or

b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

The law is clear that, the Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except – On the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

This court in considering this matter referred to the case of Elijah Makeri Nyangw'ra –vs- Stephen Mungai Njuguna & Another (2013) eKLR where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. Hon. Justice Munyao Sila in the case while considering the application of section 26(1) (a) and (b) of the Land Registration Act rendered himself as follows:-

-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.

The plaintiff submitted that he sued the defendants for trespass as he is the sole proprietor of the suit land. The plaintiff obtained the said title

through a court order Misc Award no 37 of 2002 at the Kakamega Chief Magistrates Court. The defendants never appealed this decision. Instead the defendants in their statement of defence have gone into long winding matters of succession and how they feel the land should be subdivided. There was no evidence adduced by the defendants that the title was obtained illegally, unprocedurally or through a corrupt scheme. I find that the plaintiff has proved ownership of land parcel No. KISA/IKOMERO/2026, which ownership is not contested, the plaintiff is entitled to the rights of a registered absolute proprietor of a parcel of land, which is exclusive, peaceful, unfettered and unimpeded possession, occupation and use thereof as stipulated in the Registration of Land Act. General damages were not proved and the same will not be awarded. I find that the plaintiff has proved his case on a balance of probabilities and grant the following orders;

1. A mandatory injunction restraining all defendants whether by themselves, their servants and/or agents from trespassing upon the suit property land parcel No. KISA/IKOMERO/2026.
2. Costs of this suit to the plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 24TH DAY OF JULY 2018.

N.A. MATHEKA

JUDGE