



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 431 OF 2014

DENNIS ONGANYO OMBUI..... PLAINTIFF

VERSUS

YOBESH OGWANGI OMBUI.....1ST DEFENDANT

EVANS NYAOSI OMBUI.....2ND DEFENDANT

GEORGE OMBUI.....3RD DEFENDANT

RULING

1. The parties in this suit are close relatives. Their deceased father one, Gerishon Ombui Kemaisa had two wives who are also both deceased. The plaintiff is the son of Elmelda Ariri Ombui (deceased) who was the second wife of his late father while the defendants are step brothers to the plaintiff from the first wife of his father.
2. The plaintiff vide his plaint dated 10th November 2014 filed in court on 11th November 2014 averred that his late father before he died had subdivided his parcels of land both in Majoge and Gesima Settlement scheme and his late mother was registered as the owner of land parcels **Majoge/Bokimonge/2808** measuring 0.68hectares and **Gesima Settlement Scheme/886** (hereinafter referred to as "suit properties") measuring 5.4hectares. The plaintiff further averred that sometime in October 2014 following the death of his mother the defendants entered onto portions of land parcel **Majoge/Bokimonge/2808** and **Gesima Settlement Scheme/886** and started laying claim to the same. The plaintiff seeks an order of injunction restraining the defendants from encroaching and/or continuing in encroachment of the suit properties.
3. The defendants filed a statement of defence and counterclaim through the firm of Samba & Co. Advocates dated 22nd July 2014. They denied their deceased father subdivided his land before he died stating that he was incapable of making such a decision. They averred that the alleged subdivision of land parcels **Majoge/Bokimonge/616** and **Gesima Settlement Scheme/117** was a fraudulent scheme instigated by the plaintiff as per the particulars of fraud pleaded under paragraph 5 of the defence. The defendants counterclaimed for a declaration that the subdivision of **Gesima Settlement Scheme/117** and **Majoge/ Bokimonge/616** was null and void and sought cancellation of the same and reversion of the titles to their original status.
4. The court given the nature of this case initially made a reference to the land registrars Kisii and Nyamira respectively and their respective surveyors to inspect the suit properties and file their respective reports. The surveyor, Kisii County filed his report respecting land parcels **Majoge/Bokimonge/2808** and **2807** dated 7th September 2016 on 2nd December 2016. The surveyor's report was to the effect that there was a clear boundary separating land parcel 2807 and 2808 which were a result of subdivision of land parcel **Majoge/Bokimonge/616**.
5. The land registrar and County Surveyor Nyamira equally filed their reports dated 7th December 2016 in respect of land parcels Gesima Settlement Scheme/886 and 887 and they were unanimous that there were clear boundary marks separating the two parcels of land save for a small portion on the lower part abutting the road measuring approximately 0.042Ha which was not claimed by any party and therefore christened "no man's land". The land registrar sought guidance from the court on how to deal with the land he deemed to be on "no man's land" which was not claimed by either of the disputants.
6. On 22nd March 2017 the court deemed the reports to be inconclusive and directed the parties to prepare the suit to proceed to full trial. On 9th August 2017 the court fixed the suit for hearing on 26th September 2017. On the said date the parties agreed that as this matter involved a family dispute the same could be referred to the local administration for arbitration. The court acceded to the request and made an order of reference to arbitration in the following terms:-

“The court under Article 159(2) (c) of the Constitution is enjoined to promote ADR. This being a family dispute, the court feels is best suited for the parties to pursue ADR. Accordingly, I refer the dispute for arbitration under the chairmanship of the deputy County Commissioner Borabu assisted by 2 elders each to be nominated by each of the parties.”

7. The order was duly extracted and served on the Deputy County Commissioner who duly heard the dispute and filed a report dated 16th March 2018 in court on 11th June 2018. The findings of the arbitration were to the effect that Mzee Gerishon Ombui Kimaisa subdivided his land parcel Gesima Settlement Scheme/117 into two parcels 886 and 887 and transferred land parcel 886 (referred to as 887 in the report) during his lifetime to his second wife Elmelda Ariri Ombui and therefore the 1st family have no right to claim this land. The Deputy County Commissioner further held that Mzee Gerishon Ombui had subdivided his land amongst the two families as attested by the two reports filed by the land registrars and the only issue that remained was the claim over the “no man’s land” identified in the report by the land registrar.

8. As counsel for the parties were of the view the report was inconclusive the court invited the parties to file their observations respecting the report for consideration by the court. The parties filed their brief comments on the Deputy Commissioner’s report. I have reviewed the comments, the report and the evidence on record.

9. There is no dispute that the late Gerishon Ombui, the father of both the plaintiff and the defendants, was the registered owner of land parcels **Majoge/Bokimonge/616** and **Gesima Settlement Scheme/117** and that these parcels of land were each divided into two portions namely **Majoge/Bokimonge/2807** and **2808** and **Gesima Settlement Scheme/886** and **887**. The late Gerishon Ombui had two wives, the mother of the plaintiff to whom he transferred land parcels **Majoge/ Bokimonge/2808** and **Gesima Settlement Scheme/886** during his lifetime. There is also incontestable evidence that on the ground he had physically subdivided the parcels of land into two portions which had clear boundaries. It does appear his intention was clearly to subdivide his land between his two houses which was in keeping with the custom of the Abagusii. Perhaps he had a premonition that unless he did so during his lifetime there would be squabbles as attested in the present suit. The parcels of land were evidently subdivided equally between the two houses and although the defendants have complained they were not involved when the subdivision was done and have alleged fraud, I find no basis for the allegations of fraud. On the basis of the evidence, I hold no fraud has been established to the required standard of proof. I find no basis to interfere with the award filed by the Deputy County Commissioner save that I will order that the portion identified by the land registrar/surveyor as “no man’s land” between parcel **Gesima Settlement Scheme/886** and **887** should be shared out equally between parcel **886** and **887**.

10. It is my determination therefore that the parcels of land **Majoge/ Bokimonge/2808** and **Gesima Settlement Scheme/886** registered in the name Elmelda Ariri Ombui deceased wife of Gerishon Ombui Kemaisa (deceased) were validly registered in her name and the defendants ought not to interfere with them. However, for purposes of clearly delineating land parcel Gesima Settlement Scheme/886 and 887 the land registrar and County Surveyor, Nyamira County should revisit the two parcels of land **Gesima Settlement Scheme/886** and **887** and apportion the land identified as “no man’s land” in their report dated 7th December 2016 into two equal parts so that the boundary of land parcel **886** and **887** shall be the subdivision line delineating “the no man’s land” into two between the two land parcels.

11. Other than the limited extent in regard to which I have varied the Deputy County Commissioner’s award, the same is hereby adopted as it relates to land parcels **Gesima Settlement Scheme/886** and **887**.

12. On the basis of my observations and findings and the award by the Deputy County Commissioner, it is my view that all the issues in this suit have been resolved and there is nothing left to go to trial. I enter judgment in favour of the plaintiff in terms of prayer (a) of the plaint. Having regard to the nature of this suit which involves close family members, I will make no order for costs of the suit and each party will bear their own costs.

13. Orders accordingly.

RULING DATED, SIGNED and DELIVERED at KISII this 16TH DAY of NOVEMBER 2018.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Kimaiyo for Ogari for the applicant/appellant

N/A for the respondent

Ruth Court assistant

J. M. MUTUNGI

JUDGE