



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**ELC CASE NO.197 OF 2014**

**JOHNSON M. OMBUI.....PLAINTIFF/RESPONDENT**

**VERSUS**

**BINSARI PAUSTINA GETERI.....1ST DEFENDANT/RESPONDENT**

**TERESA GETERI**

**T/A NYANSIONGO GENERAL STORES.....2ND DEFENDANT/RESPONDENT**

**JUDGMENT**

1. The plaintiff namely JOHNSON M. OMBUI (Hereinafter referred to as PW1) in a plaint (Fast track) dated 14th April 2014 sued the defendants namely BINSARI PAUSTINA GETERI (1ST Defendant ) AND TERESA GETERI T/A NYANSIONGO GENERAL STORES (2ND Defendant ) jointly and severally for:-

- a. An order declaring title obtained by the Defendants in respect of plot No. 5 'B' as unlawful and rectification accordingly be made on register/Town council office.
- b. An order for an injunction restraining the defendants servants or agents for doing any developments and or continuing to demolish house in Plot No. 5 'B' till the matter is heard and determined.
- c. Cost and incidental of this suit.
- d. Any other and further relief that this court may deem fit and just to grant.

2. S.B. Mbeche and Co. Advocates are on record for the plaintiff (Hereinafter referred to as PW1). The defendants were duly served on 4th June, 2014 as shown on an affidavit of service sworn on 12th June, 2014 by Daniel Miruka, a duly licensed process server. The Defendants failed to enter appearance and or file defence as prescribed hence hearing of the suit proceeded ex parte on 15th May, 2017 .

3. The claim by PW1 in brief is that in the year 1963, he teamed up with his brother, Francis Geteri Ombui (Deceased) who was husband and father to the 1st and 2nd defendants respectively and purchased plot No. 5 'B' situated at Keroka township ( hereinafter referred to as the suit land). It was then shared equally between them (the purchasers). On the suit land, they built a semi-permanent shop which was divided into two and each of them occupied a portion of the shop. PW1 operated a general store while the deceased operated a carpentry business.

4. In 1998, a dispute arose between them concerning the suit land as the Deceased registered it in his

(deceased) name. PW1 filed a civil suit vide Keroka RMCC No. 29 of 1999 against the deceased whereby the court declared, among other things, that the plaintiff was entitled to half share of the suit land. As a result, PW1 took the decree to the then Keroka Township council offices for purposes of execution and the council resolved to have the decree executed accordingly.

5. In the year 2005, the deceased died as half share of the suit land was pending transfer to the PW1. The defendants chased away a son of the plaintiff from the suit land. They then demolished old shops and built a new structure contending that the son was a trespasser thereon

6. The Defendants misrepresented themselves and fraudulently changed the ownership of the suit land from the deceased into themselves. Notably, PW1 has pleaded particulars of fraud and misrepresentation of the defendants in the plaint. The particulars of the same are :-

- a) **The defendants transferring plot No. 5'B' without due process of the law.**
- b) **The 1st defendant misrepresenting herself that plot No. 5 'B' belongs to her knowing very well that she had not obtained letters of administration.**
- c) **Encroaching into the property knowing very well that the subject property was at one time the subject of dispute in court and the court had decreed to have the property sub-divided equally amongst the plaintiff and the deceased.**
- d) **Forging documents to justify ownership.**

7. PW1 testified in conformity with his claim in the plaint. To buttress his testimony, he produced in evidence, the followings documents ;-

- a) A decree dated 3/4/2007 in Keroka **RMCC No. 29 of 1999** in his favour (PExhibit 1).
- b) Full Council meeting minutes of 23/9/2007 by Keroka town council that the suit land be sub-divided into two portions at 12 ½ feet each (PExhibit 2).
- c) Payment receipts numbers 2918941 and 2918940 for plot transfer and application form to transfer the plot respectively (PExhibit 3 a, b).
- d) Demand letter dated 22/4/14 by S.B. Mbeche Advocate to Keroka sub county clerk (PExhibit 4).
- e) Letter dated 12/5/2014 by Keroka sub county administrator that the suit land was in the name of the deceased then transferred to 1st defendant then to 2nd defendant (PExhibit 5).
- f) Injunction orders dated 17/6/14 and issued on 24th June, 2014 in respect of an application by way of Notice of Motion dated 14th April, 2014 by Okongo J. (PExhibit 6)

8. The counsel for PW1 filed submissions dated 12/6/2017 and he gave brief facts and analysis of the case. He submitted that by PExhibit 5, Keroka sub county administrator in Nyamira County Government confirmed that the suit land was owned by Francis Geteri (Deceased) and then transferred to the Defendants in year 2012. He further submitted that the transfer was unlawful as the Deceased had died in the year 2005. The counsel submitted that the Defendants failed to appear to defend the suit and have disobeyed a court order (PExhibit 6). He also submitted that the plaintiff has proved his case on a balance of probability. He urged this court to enter judgment in favour of PW1 against the defendants jointly and severally as sought in the plaint.

9. I have studied the entire plaint, evidence of PW1 and written submissions by his counsel. The decision in **Galaxy Paints Co Ltd-vs-Falcon Grounds Ltd (2000) EA 385** later cited in the case of **Great Lakes Transport Co (U) Ltd-vs-Kenya Revenue Authority (2009) KLR 720** at 732/733, is very instructive. The court stated that it is trite law that issues for determination generally flow from the pleadings or such

issue as the parties have framed for the court's determination. The instant suit is undefended. Counsel for PW1 has not framed issues for determination by this court. It is discerned from the pleadings (plaint) that the issues for determination are;

- a) Is the title obtained by the Defendants in respect of Plot No. 5 "B", unlawful and calls for its rectification accordingly?
- b) Who is to pay costs of this suit?

10. In the case of **PIL Kenya Ltd-vs-Oppong (2009) KLR 442**, it was held that it is the duty of the court to evaluate and analyse all the evidence.

11. Moreover, it is the duty of the court to only rely on the evidence before it; see **Great Lakes Transport case** (supra)

12. On 15/5/2017, PW1 gave evidence that in 1963, he and the deceased jointly bought the suit land approximately 25ft by 100ft in size. He stated that both of them built a shop on it, subdivided it equally between themselves and they carried out business from the shop. He stated, inter alia:

**"In 1963 my late brother Francis Geteri Ombui and I jointly bought plot No. 5 'B' in Keroka Township. We developed it by building ..... the size of the plot was 25ft by 100ft..... We did sub divide it equally between ourselves ..... " (Emphasis provided).**

13. The plaintiff further testified that in 1998, the deceased registered the plot in his own name and the Plaintiff successfully sued him as shown on PExhibit 1. After the deceased passed away in 2005, the defendants transferred the suit land without following due process of Probate and Administration under the Law of Succession Act (Cap 160 Laws of Kenya).

14. It is noted that PExhibit 1 in (c) and (d), the court declared that PW1 was entitled to half share of the suit land and DW1 was ordered to transfer the half share of the suit land to PW1. Moreover, PExhibit 2 reads in part;

***"..And all was resolved and accepted that Francis Giteri Ombui to be given plot (a) and Johnson G Ombui to be given plot (b)."***

15. By PEXH3, PW1 paid fee for transfer of the suit land. The Defendants did not do Succession in respect of the estate of the late Francis Geteri Ombui (Deceased). They did not take appropriate steps to obtain letters of administration for the estate as required under **Section 67 (1) of the Law of Succession Act** and **Rule 12** of the Probate and Administration Rules, 1980. It is clear that the Defendants carried out unlawful transfer of the title to the suit land and are not entitled to the suit land. I am inclined to uphold the submissions by counsel for PW1 thereof.

16. The absence of Defendants from these proceedings is quite conspicuous yet they were duly served as I have already observed in this matter. The suit is undefended. Exhibits 1 to 6 are in favour of PW1. The case for PW1 is cogent and unchallenged.

17. In the result, I find that PW1 has proved his claim against the Defendants jointly and severally on a balance of probability.

18. I accordingly enter judgment for the Plaintiff against the Defendants jointly and severally and order as hereunder;

- a) I grant the declaration sought as order (a) in the plaint and direct that the order shall be served upon Keroka Sub – County Administrator, Nyamira County Government for compliance.
- b) I decline to grant an injunction in prayer (b) in the plaint as the same prayer was dealt with by

the court as demonstrated by PExhit 6 herein.

c) Costs of the suit shall be borne by the Defendants jointly and severally.

**SIGNED, DATED AND DELIVERED** at KISII this **20th** day of December, 2017.

**G.M.A. ONGONDO**

**JUDGE**

**In presence of :-**

**Mr. Moses Mbeche counsel for the Plaintiff**

**Edwin Mong'are and Ruth Moraa, court assistants**

**G M A ONGONDO**

**JUDGE**