



**Omurwa v Ongiri & 2 others (Civil Suit 429 of 2014)
[2023] KEELC 15716 (KLR) (21 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 15716 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
CIVIL SUIT 429 OF 2014
M SILA, J
FEBRUARY 21, 2023**

BETWEEN

BONIFACE JUMA OMURWA PLAINTIFF

AND

PAUL ONCHIEKU ONGIRI 1ST DEFENDANT

JONNES ONCHANI ONGIRI 2ND DEFENDANT

MARIA MORAA ONGIRI 3RD DEFENDANT

JUDGMENT

Introduction and Pleadings

1. This suit was commenced through a plaint which was filed on 13 November 2014. The plaintiff has pleaded that he is the registered owner of the land parcel Central Kitutu/Mwamanwa/1616 (the suit land). He claimed that the defendants have illegally taken possession, and in this suit, he seeks an order to have them evicted from the land and to be permanently restrained, together with general and special damages.
2. The defendants filed defence and counterclaim wherein they averred that the suit land was part of the land parcel Central Kitutu/Mwamanwa/396 which was owned by Omurwa Ongiri. They pleaded that Omurwa Ongiri was polygamous and that he is father to the 1st and 2nd defendants and husband to the 3rd defendant. They pleaded that Omurwa subdivided the land without their knowledge and sold part of it, the suit land, to the plaintiff who was his grandson from the first house. They contended that they have been in occupation of this portion of land for 42 years since the 3rd defendant was married. They pleaded that Omurwa sold the land in disregard to their interests and that he had developed an antipathy towards them. They averred that the land was held in customary trust or equitably on their behalf. In the counterclaim, the asked for an order that the subdivision of the land parcel No 396 and creation of the parcel No 1616 in disregard of the defendants offends Section 28 of the Land



Registration Act, 2012, an order to nullify the title of the plaintiff, and a permanent injunction against the plaintiff, his agents and his grandparents from occupying or developing the suit land.

3. The plaintiff filed a defence to counterclaim where he denied that the 1st and 2nd defendants are sons of Omurwa and also denied that they were born and raised on the suit land. He averred that a brother to his grandfather had a wife called Nyaboke Omurwa who had no children at the time that her husband died. He contended that Nyaboke then married the 3rd defendant in accordance with Kisii Customary Law, and therefore the 1st and 2nd defendants are Nyaboke's sons and the 3rd defendant Nyaboke's wife. He denied that Ongiri Omurwa was polygamous. He pleaded that his grandfather (Ongiri) gave him the suit land as the portion of his late father in appreciation for expenses met by the plaintiff's late father for the grandfather. He pleaded that Ongiri did not have any obligation over the defendants and they are not entitled to the property of Ongiri. He pleaded that what the defendants are entitled to is the land parcel Central Kitutu/Mwamanwa/400 which belonged to their "father" and "husband" Nyaboke Omurwa and on which they have always lived and continue to occupy. He denied that the land parcel No 396 was held in trust for the defendants.

Evidence of the Parties

Plaintiff's Evidence

4. PW-1 was the plaintiff. He was 26 years old when he testified in the year 2018. His evidence was taken by Mutungi J. He identified the 1st and 2nd defendants as his uncles and the 3rd defendant as his grandmother. He mentioned that his father is deceased and that Ongiri Omurwa is his grandfather. He testified that the parcel No 396 was subject of a suit, Kisii CMCC No 243 of 1983, where Ongiri Omurwa was plaintiff and one Francis Bosire was defendant. Ongiri succeeded in the case and the land was transferred to him in the year 2003. He stated that this land was not part of family land. The land was 7.5 Ha and his grandfather transferred a portion of it land to him, as his (plaintiff's) late father assisted him with the case. This portion is the suit land, parcel No 1616, described to be on the lower side of the road and has coffee and tea. He stated that there are two houses on the land belonging to the 1st and 2nd defendants. He has not been able to take possession because the 1st and 2nd defendants have prevented him. He stated that before his father died, in the year 1993, he was residing on this parcel of land. He then moved with his grandfather to Gesemba where he lives in a plot. He testified that the 3rd defendant resides in the parcel No 397.
5. Cross-examined, he stated that his mother lives in another subdivision of the parcel No 396 which is on the upper side. His father was also buried on this upper side. The lower side comprises of the suit land, parcel No 1616. It was his grandfather who processed the transfer to his name. He stated that a house that his father had on this lower portion was demolished and that is why they moved to Gesemba. His mother still lives on the upper side. He stated that before his father died, he was living on the suit land. He stated that the defendants occupy the suit land and the parcel No 397. The 3rd defendant occupies the upper portion of the parcel No 397. The 1st defendant constructed a house in the suit land in the year 2003. A parcel No 398 is occupied by his father's brother. Re-examined he testified that the suit land has coffee and tea planted by his grandfather.
6. PW-2 was Ongiri Omurwa. He testified that the plaintiff is his grandson, being the son of his eldest son. He asserted that the parcel No 396 was not ancestral land. He explained that he had a dispute with one Francis Bosire over this land. He lost the case in the Magistrate's Court but the High Court awarded him the land and an eviction order issued against him was set aside. He subsequently obtained title to the land. He testified that the 3rd defendant's land is the parcel No 397 and that she lives here. He holds the title deed in his name. He stated that she is entitled to the lower portion of it whereas he



is entitled to the upper side. Nyaboke, his step mother is registered as owner of the parcel No 400. He explained that the 3rd defendant (Maria) was married by his step mother (Nyaboke). He explained that Nyaboke married Maria in a woman to woman marriage. He denied transferring the suit land without considering the interests of the defendants and he asserted that they have their own land where they have planted tea. He stated that he indeed sired the 1st and 2nd defendants and educated them, but he has his own family of four sons and 7 daughters who have no complaint over the land given to the plaintiff.

7. Cross-examined, he stated that Nyaboke had no children. He elaborated that the purpose of a woman to woman marriage is to continue the lineage of a man who has no sons or a dead person. He stated that Nyaboke got three sons, Patrick Mogeni Omurwa, Siboto Omurwa and Moses Omurwa. He stated that traditionally their 'father' is Omurwa and he only came to assist. Nyaboke approached him to assist her get children with Maria on her behalf. Maria was staying in the parcel No 400 which is registered in Nyaboke's name and she has continued living here. He stated that Nyaboke gave him a portion of the parcel No 400 which he consolidated with the parcel No 397. He denied that the 1st and 2nd defendants were living on the suit land from when they were young. Nyaboke died in the year 1996. He stated that he is the one who educated the 1st and 2nd defendants and has not had a dispute with them. He stated that Francis Bosire acquired the parcel No 396 from a white man. His late son had constructed a house on the suit land. He reiterated that he is not Maria's husband and he was only hired to help her get children. He has sons occupying the upper portion of parcel No 397 and 396.

Defence Evidence

8. The evidence of the defendants was taken by Onyango J, as Mutungi J had been transferred to another station.

DW-1 was the 1st defendant. He was 49 years old when he testified on 5 October 2020. He described Ongiri Omurwa as his father, and the plaintiff his nephew. He stated that Nyaboke Omurwa was one of his grandfather's wives and that she has 3 sons and 2 daughters. He denied that Nyaboke married his mother in a woman to woman marriage. He contended that Nyaboke's land is parcel No 400. He testified that Ongiri Omurwa had two wives and they both stay in the parcel No 396. He mentioned that his step-mother lives on the upper side of the parcels No 396 and 397, while his mother occupies the lower side of both parcels No 396 and 397. He produced the map as an exhibit. He stated that they have lived on the disputed property for as long as they can remember and that he was born on the suit property. He stated that his mother got 6 children but one of his brothers died and was buried on the boundary of the parcel No 396 and 397. He was aware that the suit Kisii CMCC No 246 of 1983, concerned the parcel No 396 which had been registered in name of Francis Bosire who was not related to them. He claimed that his brother and himself helped their father meet the litigation expenses. According to him, his father, Ongiri Omurwa owns the parcels No 396 and 397, and he wants the suit land back.

9. Cross-examined, he affirmed that he was 12 years old in the year 1983. He claimed that he started assisting his father with the case when he started working. He claimed that he built his house in the year 1991. He was aware of woman to woman marriages but denied that Nyaboke married his mother in this arrangement. He stated that he has never lived in the parcel No 400 but lives in the parcel No 396/397 now converted to the parcel No 1616. The other portion, parcel No 1615, is registered in name of Ongiri Omurwa. He claimed that the suit land is ancestral land and that he buried his son on it. He currently occupies the suit land.

Re-examined, he stated that Nyaboke had her own sons and she did not need to marry a wife.



10. DW-2 was the 2nd defendant. He was 31 years old when he testified. He also stated that Ongiri Omurwa is his father. He contended that he never consulted them before he gave the plaintiff the parcel No 1616. He did not know much about the case that Ongiri had with Francis Bosire but according to him the land is ancestral land. He stated that he has a house on the suit land. Cross-examined, he testified that he built his house on the suit land in the year 2017. He also built a house for his mother on the suit land in the year 2017. He averred that the plaintiff's mother lives on the upper side of the parcels No 396/397. He contended that Ongiri has created confusion by giving the plaintiff the suit land which they occupy. He added that they had planted tea, coffer, napier grass and maize and they were the ones plucking the tea while Ongiri was harvesting the coffee.

With the above evidence the defendants closed their case.

11. Counsel were invited to file written submissions which they did. I have taken note of the same before arriving at my decision.

Disposition

12. I of course took over the matter after both plaintiff and defendants had testified. I did not have the benefit of seeing them give evidence in court but I have no doubt over the nature of case that they presented, for the record is clear. The case of the plaintiff is that the suit land, parcel No 1616, was originally part of the parcel No 396. This parcel No 396 was the subject of litigation in Kisii CMCC No 246 of 1983 and Kisii HCCA No 9 of 2002.
13. I have gone through the proceedings and decisions in the two cases. What emerges is that the suit land, which was originally parcel No 396, has had a very chequered history of litigation. It was under litigation as way back as 1957 when Francis Bosire and Ongiri Omurwa had their first round of a titanic legal battle over ownership of the suit land, in a case registered as Manga District Magistrate Court, being Land Case No 570 of 1957. Francis Bosire was the plaintiff and Ongiri Omurwa was the defendant. I do not have the benefit of the decision but clearly Ongiri Omurwa lost the case. Undeterred, but after some lapse of time, he pulled back Francis Bosire into the battlefield, this time by filing the suit Kisii CMCC No 246 of 1983. I do not have the plaint in the suit, but there is an annexed defence filed by Francis Bosire, where he inter alia avers that their dispute had been settled by court in the year 1957. Francis Bosire yet again felled Ongiri Omurwa and got a decree in his favour. But he failed to land the knock-out blow by not executing the decree within time. When he tried to execute the decree by seeking an order of eviction in the year 2002, he was met by a defence of limitation. The notice was heard by the Magistrate who was of opinion that since Francis Bosire had a decree in his favour, there was no way that Ongiri Omurwa was going to rely on what the Magistrate considered to be a technicality to snatch away the victory, and he issued the order for the eviction of Ongiri Omurwa from the land. Ongiri Omurwa filed an appeal against this decision, in the High Court at Kisii, which is Kisii HCCA No 9 of 2002.
14. He argued that the decree was time barred and could not be executed against him. The court, Wambiliyanga J, in a judgment delivered on 3 October 2002, upheld the argument of Ongiri Omurwa. In the end, as far as the battle between Francis Bosire and Ongiri Omurwa was concerned, Ongiri Omurwa is the one that ultimately landed the knockout blow. Francis Bosire was deregistered from its proprietorship, and Ongiri Omurwa, after a slugfest that lasted about half a century, eventually became registered as proprietor of the parcel No 396.
15. The defendants contend that the parcel No 396 is ancestral land held in their trust. In his submissions, Mr. Nyambega Mose, learned counsel for the defendants, indeed submitted that the defendants have demonstrated that the land parcel No 396 was family land and that the defendants have a legitimate



expectation over their ownership. This, I regret cannot be the position. I have taken quite some trouble in the preceding paragraphs to demonstrate how Ongiri Omurwa obtained title to the parcel No 396. It was never handed to him by his ancestors. It was never part of land that his family owned. It is not land that has been passed over through generations. This was land that had been registered in the name of one Francis Bosire, a person who was a stranger in the family of the Omurwas. Ongiri Omurwa got this land after battling Francis Bosire for it, for close to half a decade, and ultimately emerging victor. I wonder on what basis the defendants contend that this is ancestral land. This is land that Ongiri got by his own sweat after a lengthy legal battle. He in fact only got title to it after the year 2002 when the 1st and 2nd defendants had been born. They cannot claim that when they were born, this land was in the hands of the family. Neither can the 3rd defendant claim that when she was married this land was land belonging to the family. It wasn't. As I have demonstrated it belonged to Francis Bosire up to about the year 2003. I am not persuaded that this is ancestral land.

16. The whole case of the defendants is based on the assertion that this is family land and with my holding that this was not family or ancestral land, their counterclaim collapses. The position is that Ongiri Omurwa, upon being registered as proprietor of the land after the year 2002, held this land fully as his own, without any encumbrances, including any trust. He could as well have decided to sell the whole of that land as it was fully within his rights to do so.
17. But let me go a little further. The 1st and 2nd defendants contend that they are sons of Ongiri Omurwa, and being his sons, they are entitled to settle on the suit land. I am moved to consider this bit of their argument. First, are the 1st and 2nd defendants really 'sons' of Omurwa Ongiri and is the 3rd defendant really his wife? The facts direct me to hold otherwise. It was the evidence of Omurwa Ongiri that he only stepped in to help the family of Nyaboke get children. It will be recalled that it was his evidence that Nyaboke was second wife to his father and that she never got children. She therefore brought in Maria (3rd defendant) to sire children on her behalf in a woman to woman customary marriage. This is not an unusual arrangement in African customary law. A wife who has no children, and sometimes who has no male child, is permitted to 'marry' another woman for purposes of having this other woman sire children on her behalf. She will be considered the 'husband' of this other woman, but since you need a man to sire children, a man will be invited to do so. The children who will be a product of this union will not be considered the children of the man who sired them but the children of the woman who did not have children in the first place. This practice was affirmed to exist within the Abagusii community in the case of *Agnes Kwamboka Ombuna v Birisira Kerubo Ombuna* [2014] eKLR where the Court of Appeal stated as follows :-

“in the appeal before us, we think it was satisfactorily demonstrated that among the Abagusii community, the practice of woman to woman marriage did exist and both parties accepted it as being of binding force of law.”

18. The practice of having a woman to woman marriage was not disputed herein. What was contested was whether indeed, Maria was married under a woman to woman arrangement, or whether she was a second wife to Omurwa Ongiri. This was a contest on the facts and in such instance a court will determine the issue on a balance of probabilities based on the evidence provided by the parties. Weighing the scales, I am persuaded that the balance of probabilities tilts towards the conclusion that Maria was married under a woman to woman arrangement. First, the evidence of Omurwa Ongiri on this point must be given considerable weight. He is the one who sired the 1st and 2nd defendant and he has intimate connection of the type of arrangement which made him sire these children.
19. I do not see how, the evidence of the children, by itself, can supercede the evidence of the person who fathered them. The 1st and 2nd defendants who were the children are the only ones who testified.



The 3rd defendant, who of course would be aware of the type of union that brought forth the 1st and 2nd defendants, did not testify. No other person was called by the 1st and 2nd defendants to buttress their contention that they are from the second house of Ongiri Omurwa. You would expect that someone elderly from the larger family would know of what arrangement was there between Maria and Omurwa. Even a person from Maria's own family could testify as to who brought dowry, and affirm whether it was Omurwa Ongiri or Nyaboke. They did not bother to call any witness. They only averred that Nyaboke could not have married Maria because she had her own children. But they did not bother to call any of these children, let alone name them.

20. As I have mentioned, their sole evidence cannot outweigh the evidence of Omurwa Ongiri on the kind of union that led to them being here on earth. Thus, purely based on the evidence provided, the balance of probabilities favours the conclusion that the 1st and 2nd defendants are not of the second house of Ongiri Omurwa, but are, under custom, the children of Nyaboke. Ongiri Omurwa stated that he helped raise them but their entitlement is within the land parcel No 400 which is owned by Nyaboke and this must be given serious weight.
21. But let us even assume that the 1st and 2nd defendants are actually children of Ongiri Omurwa; would they have a right to force their father to settle them on the suit land? I do not think so. I will reiterate that the parcel No 396 is not ancestral land and the defendants have no ancestral or customary rights over the land. If they have any ancestral rights as sons to Ongiri Omurwa, then it would be in the parcel No 397, which is also under the name of Ongiri Omurwa, and which appears to have been his entitlement after land was distributed amongst his siblings. In his own wisdom, Ongiri Omurwa thought it fit to subdivide the parcel No 396 which he fully owned and allocate the same to one of his grandsons. There being no customary trust over the land, this was completely within his right as the registered proprietor. The manner in which a person wants to distribute his land which is not held in any trust needs to be respected. If a person has land and subdivides it into three portions, and decides to give portion A to the first born child, portion B to the second born child, and portion C, to the third born child, that is his prerogative, unless very special circumstances are demonstrated which would militate against this.
22. Sometimes, in these sort of arrangement, some realignment on the ground is inevitable. If we cannot respect the way in which one wants to allocate his own land, and everyone wants land allocated only in the way they think it best, then you would have a situation of anarchy. The defendants are behaving as if the suit land is their land which it is not. They cannot force Omurwa Ongiri to subdivide and allocate his land as they wish as if this was their land. It is not their land and they need to respect what Omurwa Ongiri wants to do with it.
23. In our case, the evidence shows that Omurwa Ongiri opted to subdivide his parcel No 396 and transfer one of the resultant subdivisions, the parcel No 1616, to the plaintiff who was his grandson. From the evidence, I have gathered that this portion has tea and coffee. The defendants could not have been the ones who planted this tea and coffee. In fact, from the proceedings of the 1983 case before the Magistrate, between Ongiri Omurwa and Francis Bosire, it was said that it was Francis Bosire who planted this coffee. The 1st and 2nd defendants have not presented any evidence whatsoever that they are the ones who planted the tea. The 2nd defendant admitted in his evidence that he built his house and a house for the 3rd defendant on the suit land in the year 2017 after this case had been in court for three years. They cannot move into the land after a suit has been filed then assert rights over it. Even assuming that they had some structures on the land, that still does not give them a right to deny Ongiri Omurwa the right to distribute this land as he wishes. At most, the 1st and 2nd defendants had a mere licence to utilize the land, but this licence could be revoked by the owner of the land. Ongiri himself was categorical that where Maria (3rd defendant) lives was in the parcel No 397 though her rights should be in the parcel No 400. She has not been denied land to live in.



24. In fact, PW-2 admitted moving her into the suit land after the dispute. I see no special circumstances whatsoever which would make the defendants hinge on any legitimate expectation that would override the proprietary rights of Ongiri Omurwa to deal with the land in the manner that he did.
25. I have gone through the authorities provided by Mr. Nyambega, for the defendants, and they in no way assist the defendants. The first case cited was that of *Francis Kamula vs Kambua Wilfred Muinde & Another*, Makueni ELCA No 18 of 2019. The appellant in that case wished to be registered as owner of certain land that was initially an adjudication section. He claimed that he was the one originally entitled to it and/or he is entitled to it by way of adverse possession. The issue therefore was whether the land was properly adjudicated to the appellant. That is not what we have in this dispute as there is absolutely nothing related to land adjudication.
26. The second case was of *Jacob O. Odhoch vs Tom Ondiek & 2 Others*, Kisumu ELC No 788 of 2015. That was a case where the plaintiff alleged to have purchased land from the grandfather of the defendants. Ultimately, the court was not persuaded that there was any such sale and also held that the transfer was not executed by the original owner. That again is not what is in issue in this case. There is no allegation that the transfer executed in favour of the plaintiff was not executed by Ongiri Omurwa. Counsel also cited the case of *Joseph Muturi Wainaina vs Clement Kungu Waibara* (2021) eKLR (ruling of 24 September 2021) and *Sagalla Ranchers Limited vs Wilmot Mwadilo & Others* (2021) eKLR (ruling of 20 December 2021). These two cases were in respect of applications for interlocutory injunction. We are not dealing with any interlocutory injunction at this stage of the suit and the rulings in those two cases are completely irrelevant to what we have here.
27. I have not seen any fraud in the manner in which the suit land was transferred to the plaintiff. The seller himself, Ongiri Omurwa, has explained that he transferred the suit land voluntarily to the plaintiff. There is nothing wrong with the title of the plaintiff. Being the title holder, it is the plaintiff who is vested with all proprietary rights over the suit land. These are enshrined in Section 24 of the *Land Registration Act*, which provides as follows:-
24. Interest conferred by registration.
Subject to this Act—
- (a) 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; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.
28. As can be seen from the above, it is the registered proprietor who is entitled to exercise rights over the said land. Those rights include the right of ingress and egress, the right to use, and the right to occupy. It is the plaintiff who is now vested with those rights. The defendants have not demonstrated that they have any right to be or continue being on the plaintiff's land parcel No Central Kitutu/Mwamanwa/1616. It follows that the defendants now need to respect the rights of the plaintiff over this land.
29. I have no reason not to allow the plaintiff's prayer that the defendants be evicted from the said land and be permanently restrained from it. I will however give a window of 60 days for the defendants to



completely vacate the land and pull down whatever structures they have and give vacant possession. This will give them time to relocate to land that Omurwa Ongiri has mentioned is where they are supposed to reside. If they do not move within the 60 days, the plaintiff is at liberty to have them forcefully evicted, but I hope that this is something that can be avoided by peacefully abiding by the judgment of the court.

30. The plaintiff also prayed for general damages for trespass. In my discretion, considering the character of the land, I award the plaintiff the sum of Kshs 300,000/= as general damages for trespass jointly and/or severally against the defendants, the same to attract interest at court rates from the date of this judgment. In as much as the plaintiff sought special damages, none were pleaded and nothing was provided to prove the same. I make no order as to special damages. The defendants had a counterclaim which is devoid of merit. The counterclaim is dismissed. Costs will follow the event. I award costs of the main suit and of the counterclaim to the plaintiff. Judgment accordingly.

DATED AND DELIVERED THIS 21 DAY OF FEBRUARY 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT AT KISII

