



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**  
**AT KISUMU**  
**Civil Appeal 41 of 1994**

1. ODHIAMBO OWUOR.....1<sup>ST</sup> APPELLANT
2. DEDE OWUOR.....2<sup>ND</sup> APPELLANT
3. DANDA OWUOR.....3<sup>RD</sup> APPELLANT
4. DORSILA AJWOGA (MRS).....4<sup>TH</sup> APPELLANT
5. LUKA AGUMBI OKODO.....5<sup>TH</sup> APPELLANT
6. ANDITI OJWANG'.....6<sup>TH</sup> APPELLANT
7. JOSHUA ADA.....7<sup>TH</sup> APPELLANT
8. ODINDO ORWA.....8<sup>TH</sup> APPELLANT
9. OKUMU OKODO.....9<sup>TH</sup> APPELLANT

**AND**

**JACTON OSINO OYOO.....RESPONDENT**

**(Being an appeal from the judgment and orders of the High Court of Kenya at Kisumu(Mr. Justice J.A. Mango) dated the 21<sup>st</sup> day of July, 1993**

**IN**

**H.C.C.C. NO. 63 OF 1987)**

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**JUDGMENT OF THE COURT**

According to James Agot (D.W.5.) who testified for the appellants in the superior court, he and the respondent are from the same clan and both had a common ancestry with the appellants at the level of the third generation backwards.

Before 1901, their common ancestors lived on and around the piece of land now known as North

Sakwa/Maranda/7, the suit land. During this year, they migrated from this area owing to an epidemic of sleeping sickness. The area remained unoccupied until 1955 – 54 years later – when D.W.5 and the respondent arrived at the area. It was forested and still unoccupied. The two settled on their respective portions of land in this area and in 1959 the respondent prepared a farm plan and accordingly informed Government Agricultural Officers. The latter prepared the requisite notice in this regard and the same was read on three different occasions in the Locational Chief's Barazas the object of which being to ask the people of the local area whether they had any objection to the respondent's farm plan. None was raised. Consequently, the respondent demarcated the land comprised in the farm plan and erected its boundary.

In 1966, the first appellant, his father and two others entered into the respondent's demarcated land and claimed that that land originally belonged to the first appellant's grandfather – Agumbi Odhiambo. The respondent immediately reported them to the local sub-chief who took no action. Angered by this, the respondent destroyed the house that had been constructed on his land by the first appellant's father. He was arrested for this act, charged before the District Magistrate's Court at Bondo and fined Kshs.150/=. He was later accused before a meeting of 25 elders by the 1<sup>st</sup> appellant, his father and the two others who had entered into his land where he defeated them on the issue of ownership of this land and this land and they were told to quit his land. Subsequently, in 1967 he filed a land case at Bondo Third Class District Magistrate's Court where he obtained judgment on 14<sup>th</sup> January, 1969 against the first appellant, his father and two others who were ordered to vacate his land within a period of two months from the date of judgment. In the same year – 1969 – the first appellant's father died before vacating the respondent's land and he was buried on the said land.

Meanwhile, an appeal against the decision of the Third Class District Magistrate's Court at Bondo in the Resident Magistrate Court at Kisumu was on 18<sup>th</sup> July, 1972 dismissed with cost to the present respondent. A second appeal against the decision of the Resident Magistrate's Court at Kisumu to the High Court of Kenya at Kisumu was also dismissed with costs to the same respondents on 22<sup>nd</sup> June, 1974. When dismissing this second appeal, the second appellate judge said this:

“ The whole case was that the respondent had been allowed to take over a piece of land which had been hitherto neglected. There was a period of non-user due to sleeping sickness. Then in 1955 the local authorities allowed the respondent, after due notice to all concerned, to go back into possession. In the next decade the appellants began to filter back and claim title by ancient occupation of their forebears. The land was held by the District Court to have been granted to the respondent without demur. He had himself an ancient right to the land. The District Court rightly found in my view that the respondent had proved his title as supported by the Chief and other dignitaries. The judgment of the lower court is affirmed and this appeal is dismissed with costs.”

Subsequent objection to the adjudication register by the first appellant and another was on 12<sup>th</sup> August, 1975 dismissed by the Siaya Land Adjudication officer who in doing so said as follows:

“Having perused previous courts proceedings and sketch map of land Case No. 61 of 1967, I am therefore convinced beyond reasonable doubt that this case involved the same parties who had been defeated before (the court of law, except that you people remained to lodge their objection.

I dismiss (the) claim of Odhiambo Owuor and Ochieng Abwal because the case is RES JUDICATA. The disputed land remain to (be that of ) JACTON OSINO.”

In the meantime, the first appellant and others were evicted from the disputed land in 1973 and the respondent was put in possession of the same. On 14<sup>th</sup> August, 1986 the land demarcated by the

respondent in 1959 was registered in the Siaya District land Registry in his name as title number North Sakwa/Maranda/7 as is set out at the beginning of this judgement and on the same day a land certificate in respect thereof was issued to the respondent. This land measured approximately 60 hectares.

On 7<sup>th</sup> March, 1987 at about 8.00 a.m. the first appellant and 8 other armed with rungas, pangas and spears invaded the suit land. On doing so, they put up houses where they are living to date. The respondent reported the matter to his local Assistant Chief who gave him a letter to take to the police which he did and the local police told him that they do not deal with land matters. He therefore went to court and filed Civil Case No.63 of 1987 in the High Court of Kenya at Kisumu on 3<sup>rd</sup> April, 1987. His complaint in that suit was that the appellants had trespassed and continued to trespass unto the suit land thereby depriving him of the peaceable user and enjoyment of the said land. He therefore inter alia sought judgment against the appellants jointly and severally for the possession of the suit land and general damages for trespass. Meanwhile, the appellants had occupied 50 hectares of the said land.

The appellants' defence was that prior to 1955 the suit land belonged to the first appellant's grandfather – Agumbi Odhiambo. However, they seemed to concede that there had been cases concerning the ownership of part of the said land between the respondent and some of them who were claiming the same through Agumbi Odhiambo and in particular the first appellant and his now deceased father, Petro Owuor Oyoo, whose decisions were in favour of the respondent. They too were claiming entitlement to 50 hectares of the suit land through Agumbi Odhiambo on the ground that the respondent held the same in trust for them as they had no other land to turn to. They also alleged that the respondent had obtained registration of the suit land by fraud and that having jointly and severally been in possession of part of the said land from time immemorial, they had acquired prescriptive rights under the Limitation of Actions Act, Chapter 22 of the Laws of Kenya.

In his judgment dated and delivered on 21<sup>st</sup> July, 1993, the learned trial judge, Mango, J., observed that the appellants were, according to the 4<sup>th</sup> appellant, evicted from the suit land in 1973. He then said:

“this land was the subject of the suit – Bondo Land Case No. 61/67. The plaintiff now was the plaintiff thereon and the 1<sup>st</sup> defendant was one of the four defendants therein. The plaintiff won the suit and as result an eviction order was issued against the defendants. The plaintiff says that they were actually evicted. There was an appeal against the decision of the Bondo District Magistrate. This was Kisumu Resident Magistrate's land Appeal Number 56/71. The appeal was dismissed and there was a further appeal to the High Court in Kisumu and the appeal was dismissed, the present plaintiff being affirmed as the owner of the disputed land.

During the adjudication process, the objection of the defendants or at least of defendant No. 1 was dismissed and the plaintiff became the first registered owner of that land. As I have said, one of the parties in all these battles was the 1<sup>st</sup> defendant herein and those who were parties to the suit on his side must have had the same basis for their claim i.e. that they were claiming as descendants of either 1<sup>st</sup> defendant's father or grandfather.

The reason why this is important is this, a matter such as this must be allowed to come to some finality. The issue of ownership had been decided and cannot be allowed to raise its head again. The plaintiff never brought it up. He simply says that these people are trespassers and must be ordered to give possession to the plaintiff.

The land certificate shows that the plaintiff is the registered owner of the land. It is a first registration and it was done after an objection by the (1<sup>st</sup>) defendant (and another) was dismissed. How can it be said

then, to have been fraudulent. Even if it was, it would make no difference being a first registration. The point has no merit and is rejected.”

The learned trial judge then considered the appellant’s alleged entitlement to part of the suit land by adverse possession and said that from the evidence before him the appellants had been evicted therefrom at some period before 7<sup>th</sup> March, 1987 when they descended onto the land. He refused to accept that the appellants had been on this land from “time immemorial” or for some period before 7<sup>th</sup> March, 1987 as they had testified before him. To the learned trial judge, limitation period started to run from the date aforementioned. But the respondent did not allow it to take root as he immediately took steps to have the appellants removed from the suit land culminating in the filing of the suit now the subject-matter of this appeal which inter alia sought their eviction from the said land as they were trespassers. Accordingly, the learned trial judge rejected the appellant’s alleged claim to part of the suit land by adverse possession.

Arising from the foregoing observations, the learned trial judge rejected the appellants’ defence to the respondent’s suit and accordingly entered judgment for the respondent to the effect that the appellants were to give to the respondent vacant possession of the portions of the suit land that they were occupying and remove themselves and their families and/or those claim in under them the said land within a period of three months from the date of his judgement, that is to say, by 21<sup>st</sup> October, 1993. The learned trial judge awarded costs of the suit to the respondent against the appellants jointly and severally.

Dissatisfied with the judgment of the learned trial judge, the appellants now appeal to this Court and have put forward nine grounds of appeal. Their principal complaints in these grounds of appeal are the learned trial judge’s failure to hold that their prescriptive rights to part of the suit land could have accreted to them prior to 7<sup>th</sup> March, 1987; his failure to hold that the portion of 50 hectares occupied by them and comprised in the suit land and registered in the name of the respondent was held by the latter in trust for them and for their benefit; his error in law and in fact in holding that they were trespassers on the suit land; and his error in law and in fact in holding that the issue of ownership of the suit land had been determined in earlier court proceedings and was therefore res judicata.

At the hearing of this appeal on 30<sup>th</sup> November, 1994, counsel for the appellants, Mr. Hawala, argued all the nine grounds of appeal together and laid emphasis on the issue of trust. In this regard, he submitted that although this issue was raised in the superior court, it was left out of consideration by the learned trial judge with the result that an injustice was occasioned to the appellants for had the judge addressed himself thoroughly to it he probably would have arrived at a different conclusion. Counsel therefore invited us to review the evidence before the learned trial judge and hold that the respondent held the suit land in trust for the appellants.

In answer to this submission, counsel for the respondent, Mr. Okero, contended that although the appellants and the respondent had a common ancestry at the level of the third generation backwards, the evidence of trust was neither clear nor properly expressed. There was therefore little to go by in this regard in the superior court.

From the material available before the learned trial judge, it is evident that the appellant’s alleged entitlement to 50 hectares of the suit land by prescriptive rights and the allegation that the respondent had fraudulently obtained registration of the suit land in his name were baseless. Indeed, after the ownership of the suit land had been determined in previous court proceedings as is outlined in this judgment, there remained no outstanding issue in this regard as any such issue merged in the decision contained in those court proceedings. Raising the issue of ownership to the suit land in the subsequent

proceedings in the superior court amounted to vexing the respondent twice for the same matter. It is for this reason, we think, that the learned trial judge said in his judgment that that issue must come to some finality and should not be allowed to raised its head again. Public policy demands that there should be an end of litigation and the question of the final decision being correct or not has no bearing towards this end; otherwise, every final decision would be impugned as erroneous with no finality to a litigation. It was with this in mind that the learned trial judge could not accept the appellants alleged entitlement to part of the suit land on the nebulous basis that the same was held by the respondent in trust for them particularly when one of the appellants in the present appeal was a party to the previous court proceedings where, like all the appellants in the instant appeal, his alleged entitled to part of the suit land was through his grandfather – Agumbi Odhiambo – which entitlement vis-à-vis that of the respondent was adjudicated upon in the earlier court proceedings and rejected. There was therefore no basis upon which the appellants could in the circumstances legitimately say that the respondent held part of the suit land in trust for them and for their benefit. Accordingly, we think that the learned trial judge rightly rejected the appellants’ allegation in his regard . Having done so, it followed naturally that they were trespassers on the respondent’s land. The learned trial judge quite correctly therefore entered judgement for the respondent in this respect. In the result, we can find no merit in the appellant’s appeal to this Court which appeal we dismiss with costs to the respondent.

**Dated and delivered at Kisumu this 22<sup>nd</sup> day of March, 1995**

**J. E. GICHERU**

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**JUDGE OF APPEAL**

**A.M. AKIWUMI**

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**JUDGE OF APPEAL**

**P. K. TUNOI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

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