



**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA  
AT KISUMU**

**CIVIL APPEAL 73 OF 1996**

**NYATWANG'A ISRAEL .....APPELLANT**

**AND**

**ALLOYS OTACHI .....RESPONDENT**

**(An appeal from a Judgment of the High Court of Kenya at Kisii (Justice Mbaluto)**

**dated 19<sup>th</sup> August, 1994**

**IN**

**H. C. C. NO. 62 OF 1990)**

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**JUDGMENT OF THE COURT**

Alloys Otachi (the respondent) sued Nyatwanga Israel (the appellant) in the superior court seeking among other reliefs an order that Plot No. 3 Daraja Mbili (the suit premises) be subdivided into 2 equal halves and one half be registered in the name of the respondent and the other half in name of the appellant; and an injunction restraining the appellant from interfering with the respondent's quiet enjoyment of the part of the suit premises occupied.

According to the plaint filed on 20<sup>th</sup> March, 1990, the suit premises originally belonged to the appellant but in 1951 he sold half of it to the respondent at a consideration of Shs.500/=. The suit premises were then registered in the joint names of both parties. On 1<sup>st</sup> January, 1990, the appellant, with the assistance of his sons, forcibly evicted the respondent from the suit premises and took possession of the part previously occupied by the respondent. A defence was filed on behalf of the appellant on 28<sup>th</sup> June, 1990 in which sale to the respondent was denied although the appellant admitted that the suit premises were registered in the joint names of the appellant and the respondent. It was averred in the defence that such registration had been procured by fraud on the part of the respondent and the local authority of the area but no particulars of the alleged fraud were given.

The case was heard by Mbaluto, J. who after considering both oral and documentary evidence gave judgment for the respondent. He found evidence of joint registration in a Plot Card issued by African District Council of Kisii dated 24<sup>th</sup> November, 1964 according to which the proprietors of the suit premises were named as Nyatwanga Israel and Alois Otachi. The judge also found that the respondent

had over the years developed his part of the suit premises by adding 6 residential units which he rented out. The respondent received a monthly income of shs.1,350/= from these unlawful eviction in January, 1990.

In a desperate attempt to show that he was the exclusive owner of the suit premises, the appellant produced a document purportedly issued by Kisii Town Council to the effect that he was the sole owner of the plot. But the judge rejected that document, because it was a document of dubious authenticity being neither dated nor signed. There was also evidence by the Gusii County Council Surveyor of joint allocation of the suit premises to both the appellant and the respondent.

In the end, Mr. Mogikoyo, for the appellant, has failed to convince us that the Judge erred in any way and that being our view of the matter, the appeal must fail and is hereby ordered to be dismissed with costs. We also order the appellant to restore possession to the respondent and to pay to the respondent Shs.113,400/= being his loss of income up to and including 31<sup>st</sup> December, 1996. To bring this dispute to an end we hereby direct Gusii County Council to subdivide the suit premises into 2 equal halves and issue each party his own title. The respondent will also have the costs of this appeal.

Dated and delivered at Kisumu this 22<sup>nd</sup> day of November, 1996

**R. O.KWACH**

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**JUDGE OF APPEAL**

**P. K. TUNOI**

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**JUDGE OF APPEAL**

**G. S. PALL**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**



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