



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT KISUMU
LAND CASE NO.232 OF 2013

JACOB NYAKWA OJWANG.....PLAINTIFF

VERSUS

NATHWALAL NARSHIDAS GHELANI.....1ST DEFENDANT

JOSHUA OMARI T/A SEDIME AGENCIES.....DEFENDANT

SAMWEL OGWENO OKETCH.....DEFENDANT

MATHEWS OWINYO ODERA.....DEFENDANT

JOSHUA ONGWEN WAGUDE.....DEFENDANT

THE DISTRICT LAND REGISTRAR KISUMU DEFENDANT

JUDGMENT

1A. **Jacob Nyakwa Ojwang**, the Plaintiff, filed this suit against **Nathwalal Narshidas Ghelani, Joshua Omari T/A Sedime Agencies, Samwel Ogweno Oketch, Mathews Owinyo Odera, Joshua Ongwen Wagude, The District Land Registrar Kisumu**, hereinafter referred to as the 1st to 6th defendants respectively for the following orders:

- a) A declaration that the Defendant is only entitled to eight acres out of land parcel **Kisumu/Kanyakwar 'B'/396**.
- b) That the said land be subdivided into two portions of eight and four acres and that the former be registered with the 1st Defendant names and the latter with the Plaintiff names.
- c) That the dealings, transaction entries and record made by and in the names of 2nd to 5th Defendants on the said land be declared fraudulent, void and be cancelled.
- d) Costs.

The 3rd and 4th Defendants were sued as trustees of Afya Co-operative, Kisumu Branch.

B. The Plaintiff averred that his late father, namely **Augustinus Ojwang Okut alias Ojwang Okut** had by agreement dated 13th January 1979 sold eight acres out of his land to the 1st Defendant at Ksh.52,000 and was paid in full. That the land was then not adjudicated. That after the adjudication process, it was

registered as **Kisumu/Kanyakwar 'B'/396** in the names of the 1st Defendant on 23rd February 1983. That it was after registration that the size of the land was determined as 12 acres. That on 26th November 2012, the 1st Defendant obtained the title deed for the whole 12 acres instead of the 8 acres that he had bought.

C. That the Plaintiff discovered that the 5th Defendant had fraudulently obtained registration with the said land before selling it to the 2nd Defendant who then sold it to 3rd and 4th Defendants, as trustees of Afya Co-operative Kisumu Branch, and hence this suit.

2. The 1st Defendant filed a statement of admission dated 25th October 2013 averring that when he bought the eight acres, the land had not been adjudicated and that he was shown the whole land. He further averred that he had no ill intention when he obtained title for the whole land. That he has no objection to the Plaintiff getting the four acres portion and he be left with eight acres.

3. The 5th Defendant also filed what he called a statement of admission dated 17th October 2013, averring that he had migrated to Tanzania in 1975 and came back in 1985. That in 1987 he migrated to Suba District and returned in 2007 and was therefore not aware that the land had been registered in his names at any time. That he was not involved in any transactions involving the 1st to 4th Defendants over the said suit land.

4. That the 2nd, 3rd, 4th and 6th Defendants did not enter appearance or file defence and the Plaintiff applied for interlocutory judgment against them vide letter dated 10th December 2013. The interlocutory judgment was entered on 30th January 2014. The matter was then fixed for formal proof which took place on 3rd March 2016 with Plaintiff testifying as PW1. The Plaintiff produced copies of the grant issued in **Kisumu H.C. Succession Cause No.320 of 2010** appointing him as the administrator of the estate of **Augustinus Ojwang Okut**, certificate of confirmation of grant dated 9th November 2010, sale agreement and title deed for the suit land showing the land was 4.8 hectares as exhibits 1(a), (b), 2 and 3 respectively.

He also produced a certificate of official search showing that the 2nd Defendant had been registered as proprietor of the suit land on 21st January 1999 and another showing that the 3rd and 4th Defendants, as trustees of Afya Co-operative Kisumu Branch Members, had been registered as the proprietor of the same suit land on 15th March 2011 as exhibits 5 and 6 respectively. The Plaintiff further testified that the 3rd and 4th Defendant had gone to take possession of the land in 2013 but he chased them away. That it was after conducting the searches that he discovered the land had been transferred from the 1st Defendant's name without their knowledge and thereafter filed this suit.

5. The issues for determination are as follows: Whether the 1st Defendant was entitled to be registered as proprietor of the whole suit land or only eight acres of the same.

b) Whether the Plaintiff, as the administrator of his father's estate, is entitled to be registered with four acres out of the suit land.

c) Whether the transactions registered on the suit land's register after the second entry should be cancelled.

d) Who pays the costs.

6. The court has considered the evidence adduced by the Plaintiff in support of the claim lodged through the plaint dated 28th August 2013, the so called statement of admission by 1st and 5th Defendant's and come to the following conclusions:

a) That indeed, the 1st Defendant bought eight acres of land from the Plaintiff's father and fully paid for it. That after adjudication the 1st Defendant was registered as the proprietor of the said land whose size had then been determined as 4.8 hectares (about 12 acres).

b) That the 1st Defendant has accepted that he was only entitled to eight (8) acres out of the twelve (12) acres and has conceded to the Plaintiff's claim for four (4) acres out of the suit land.

c) That the 1st Defendant had not transferred or acceded to the transfer of the suit land to the names of 2nd Defendant on 21st January 1999 or that in favour of 3rd and 4th Defendants of 15th March 2011 and those entries must therefore have been entered on the register unprocedurally, illegally, unlawfully and fraudulently and should be cancelled.

d) That though the Plaintiff claimed that the 5th Defendant had obtained the land registered into his names fraudulently before selling it to the 2nd Defendant who then sold it to the 3rd and 4th Defendants, the 5th Defendant has in his so called statement of admission denied that allegation. It was therefore the duty of the Plaintiff to avail evidence of the transaction that involved the 5th Defendant but no such documentary evidence was availed. The so called statement of admission filed by the 5th Defendant is actually a denial of the Plaintiff claim.

e) That the 2nd to 4th Defendants acts of having their names registered with the title to the suit land are what caused the Plaintiff to file this case and they should therefore meet the costs of this suit.

f) That the 1st Defendant has denied any involvement in the transactions that led to the title to the suit land being transferred to the 2nd Defendant, then to the 3rd and 4th Defendant in his statement of admission. The Plaintiff did not avail any evidence to the contrary to prove his allegation that 1st Defendant was involved in the fraudulent transactions that had effectively taken the eight acres from the 1st Defendant in addition to his four acres.

g) That the Plaintiff has also not proved in what respect the 6th Defendant was involved in the questioned transactions of effecting the title of the suit land to the names of 2nd to 4th Defendants and the claim against the 6th Defendant remains unsubstantiated.

7. That in view of the foregoing the court finds that the Plaintiff has proved his case against the 2nd to 4th Defendants and enters judgment in his favour in the following terms:

a) That all the entries in the register of **Kisumu/ Kanyakwar 'B'"/396**, except the first and second one dealing with registration of **Nathwalal Narshidas Ghelani** as the proprietor and issuing of title deed, are hereby declared to have been entered unprocedurally, unlawfully, illegally and fraudulently and are void, ab initial. The land Registrar is hereby ordered to cancel all the entries appearing after the entry No.2 from the register of **Kisumu/Kanyakwar 'B'/396**.

b) That a declaration is hereby issued that the 1st Defendant herein is entitled to eight (8) acres (3.2 hectares), while the Plaintiff as the administrator of **Augustinus Ojwang Okut**, is entitled to four (4) acres (1.6 hectares) of **Kisumu/Kanyakwar 'B'/396**.

c) That land parcel **Kisumu/Kanyakwar 'B'/396** be subdivided into two portions of eight (8) acres (3.2 hectares), and four (4) acres (1.6 hectares) and be registered in the names of 1st Defendant and the plaintiff, as administrator of the late **Augustinus Ojwang Okut alias Ojwang Okut** respectively.

d) That the Plaintiff's costs be met by the 2nd, 3rd and 4th Defendants.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 18TH DAY OF MAY 2016

In presence of;

Plaintiff Absent

Defendants Absent

Counsel M/s Nakyeyune for Kwango for Plaintiff

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

18/5/2016

18/5/2016

S.M. Kibunja J

Oyugi court Assistant

M/S Nakyeyune for Kwango for Plaintiff

Court: Judgment delivered in open court in presence of M/s Nakyeyune for Kwango or Plaintiff.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

18/5/2016