



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
LAND CASE NO.41 OF 2012
CHRISPINE ONYANGO OTIENO.....PLAINTIFF
VERSUS
THOMAS FRANCIS OUMA OTIENO.....1ST DEFENDANT
JOHN OWINO OTIENO (DECEASED).....2ND DEFENDANT

RULING

1. **Chrispine Onyango Otieno**, the Applicant filed the notice of motion dated 22nd October 2012 seeking for the following orders, among others;

- a) That Siaya Resident Magistrate order of 6th April 2011 in respect of the Respondents application dated 6th September 2011 in land case number **SYA/B/2011** be set aside.
- b) That the Siaya Resident Magistrate's order of 5th April 2011 be stayed pending hearing and determination of this application.

2. The notice of motion is based on five grounds as shown hereinbelow;

- a) That Respondent obtained the Siaya Resident Magistrate order dated 6th April 2011 through fraud and misrepresentation.
- b) That the land parcel **North Ugenya/Doho/659** was registered in the names of **Oyako Aloma, Ojulo Odongo** and **Ongek Oduor** who are all deceased.
- c) That **Gabriel Oyako** succeeded **Ongek Oduor** and **Ojulo Odongo**.
- d) That **Charles Otieno Ongek** is an heir of the late **Ongek Oduor** and hence entitled to a share of the land.
- e) That other evidence would be adduced during the hearing of the application.

The application is also supported by the affidavit of **Chrispine Onyango Otieno** sworn on 19th October 2015.

3. The 1st Respondent, **Thomas Francis Ouma Otieno**, opposed the application through the replying

affidavit sworn on 29th February 2016. the 2nd Respondent, **John Owino Otieno** who reported to have passed on while this suit was pending.

4. The application came up for hearing on 10th May 2016 when the Applicant and Mr Orengo for the 1st Respondent made their submissions summarized as follows;

a) **APPLICANT'S SUBMISSIONS:**

i) That Land parcel **North Ugenya/Doho/659** which belonged to several proprietors was the subject matter of the Siaya Land Disputes Tribunal Land Case **No.SYA/94/2010**.

ii) That Gabriel Ayoka had in 1993 replaced some of the proprietors of the said land and the Applicant prays for the earlier orders to be set aside to enable the beneficiaries to the said land get their shares.

b) **1ST RESPONDENT COUNSEL'S SUBMISSIONS:**

i) That the prayers sought by the Applicant are substantive and formal in nature and not being grounded on the plaint cannot be issued.

ii) That the order by the Siaya Resident Magistrate Court of 6th April 2011 was made in Siaya P.M.CC. Land case No.13 of 2011 adopting the award of the Siaya Land Disputes Tribunals case No.94 of 2010.

iii) That the Tribunal award annexed shows that the parties had by consent agreed to subdivide the land subject matter of the case and no grounds have been availed by the Applicant to set aside the consent order.

iv) That the Tribunal award and adoption proceedings took place about four years ago in 2011 and no judicial proceedings were initiated to challenge it in accordance with **Order 53 of the Civil Procedure Rules**.

v) That the Applicant's notice of motion should be dismissed with costs.

5. The issues for determination are as follows:

a) Whether the prayers of the notice of motion dated 22nd October 2015 are grounded on the plaint and if not what orders to issue.

b) Whether the Applicant has properly moved this court through the plaint and notice of motion.

c) Whether the Applicant's suit commenced vide the plaint dated 29th August 2012 and filed in court on 31st August 2012 is res judicata.

d) Who pays the costs.

6. The court has after considering the grounds on the notice of motion, affidavit evidence by both parties, submissions by Applicant and counsel for the 1st Respondent come to the following conclusions;

a) That the 1st Respondent, **Thomas Francis Ouma Otieno** had lodged Siaya Land Disputes Tribunal Case Number 94 of 2010 against the Applicant, **Chripine Onyango Otieno** claiming his share of land parcel **North Ugenya/Doho/659** which was registered in the names of their uncle **Gabriel Ayako Aloma** and the Applicant.

b) That the proceedings before the Siaya Land Dispute Tribunal in land case number 94 of 2010 shows that the parties entered a compromise that the land parcel **North Ugenya/Doho/1048**, which was a subdivision from **North Ugenya/Doho/659** and was in the names of the Applicant herein, be shared between the two parties namely **Thomas Francis Ouma Otieno, Chriphine Onyango**

Otieno and their brothers **Aloys Ouma and John Owino** in accordance with the portions each was tilling.

c) That the award was adopted on 1st March 2011 in **Siaya PMC Land Case No.13 of 2011** and an order extracted and issued on 6th April 2011. That is the order the Applicant seeks to be vacated.

d) That **Chrisphine Onyango Otieno**, the Applicant, not being satisfied with the decision of Siaya Land Dispute Tribunal filed **Kisumu H.C.C.A No.193 of 2011** which was dismissed on 13th June 2012 for filing the appeal out of time and in the wrong forum.

e) That in view of the finding in (b) to (d) above, the issues on sharing and entitlement to land parcel **North Ugenya/Doho/1048** appears to have been decided through the consent recorded before the Siaya Land Disputes Tribunal in number 94 of 2010 which has not been set aside or successfully appealed against.

f) That in spite of the finding in (e) above, the Land Dispute Tribunals were under Section 3(1) of the Land Disputes Tribunal Act without jurisdiction to issue an award that confers or takes away title to registered land and notwithstanding the attempt by Siaya Land Dispute Tribunal to make their award appear like a consent, their order was without jurisdiction. The order therefore having, been made by a tribunal without jurisdiction, is a nullity and do not make any subsequent claim over entitlement or ownership of land parcel **North Ugenya/Doho/1048** res judicata.

g) That the Siaya Land Disputed Tribunal award in land case **No.94 of 2011** and adopted in Siaya PMC Land case **No.13 of 2011** on 1st March 2011 and extracted on 6th April 2011 are null and void.

h) That the notice of motion dated 22nd October 2012 is not based or grounded on the prayers set out in the plaint dated 29th August 2012 and cannot be granted.

7. That having found as above, the notice of motion dated 22nd October 2012 is without merit and is dismissed with costs in the cause, so as to encourage good relations between the parties who are relatives.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 22ND DAY OF JUNE 2016

In presence of;

Plaintiff Present

Defendants Absent

Counsel Mr Orengo for 1st Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

22/6/2016

22/6/2016

S.M. Kibunja J

Oyugi court Assistant

Plaintiff present

Mr Orengo for 1st Defendant

The Plaintiff is present and in person.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

22/6/2016

Court: Ruling read over in open court in presence of the Plaintiff and Mr Orengo for the 1st Defendant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

22/6/2016