



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC NO. 146 OF 2012

CHRISTABEL ACHIENG ODERA.....1ST PLAINTIFF
WILSON OGOLA ODENY.....2ND PLAINTIFF
CARRILUS OLANDO ODARI.....3RD PLAINTIFF
JOSEPH OMOLLO.....4TH PLAINTIFF
FLORENCE ATIENO ADERA.....5TH PLAINTIFF
JOHN OKONGO OGENDO.....6TH PLAINTIFF
MICHAEL JUMA ADEDE.....7TH PALINTIFF

(Suing as their own and on behalf of all other members of the Kogony Community
claiming registerable interests in the land known as C/18 Scheme)

-VERSUS-

CHRISTOPHER JUMA AKINYI.....1ST DEFENDANT
AUGUSTINE GENGA ONDINGO.....2ND DEFENDANT
VITALIS OURU AKINYI.....3RD DEFENDANT
JANE KAMBAGA.....4TH DEFENDANT
COUNTY LANDS REGISTRAR.....5TH DEFENDANT
HON.ATTORNEY GENERAL.....6TH DEFENDANT

AND

DAVID ODERA OIM &18 OTHERS.....INTERESTED PARTIES

JUDGMENT

BRIEF FACTS

The Plaintiffs herein by way of an Amended Plaint dated 28th June 2017 and filed on 29th June 2017 and stated that they are members of Kogony Community who belong to seven sub-clans of Kokwe, Koyola, Konyango, Kodongo, Kosina, Katuk and Kanyamedha all within Kogony Sub-Location. That they have been residing in and around and are entitled to all that block of land lying between Kogony and Kanyakwar adjudication sections and which is now registered and comprised in map or diagram No.18 and which is now referred to in some

official records as Kisumu /Kogony/5000 upto land parcel No. Kisumu/Kogony/6012.

It is the Plaintiffs' case that in 1978, the suit property was inadvertently included in a Kenya Gazette Notice by which Kanyakwar had been acquired by the government and when the mistake was sorted out, this block of land was not immediately adjudicated and it remained as a gap between Kogony and Kanyakwar Adjudication sections and was undemarcated and unsurveyed. The Plaintiffs aver that the said block is community land and was inherited by the Plaintiffs from their ancestors and in 2011, a decision was made by the District Land Adjudication and Settlement Officer that the area concerned should be adjudicated and revert back to the original families. The Plaintiffs elected officials to carry out this exercise on their behalf and among the persons elected were the 1st and 2nd Defendants.

The 1st, 2nd and 3rd Defendants assured the Plaintiffs that the block of land will be adjudicated and registered. The 1st, 2nd and 3rd Defendants in breach of their duty colluded with the 4th Defendant and the District Land Registrar, Kisumu and caused all parcels created from the survey to be registered in the names of few individuals including the 1st, 2nd and 3rd Defendants. It is the Plaintiffs' case that the 1st, 2nd and 3rd Defendants caused the surveyed land to be registered to persons who are not members of the Kogony community. The Plaintiffs further aver that the titles forming part of Kogony C-18 section be declared ancestral land and revert to the Plaintiffs and other families.

The Plaintiffs prayed for Judgment to be entered against the 1st, 2nd, 3rd and 4th Defendants for:

a. General Damages.

b. A declaration that all that block of land now registered and comprised in Map Sheet or Diagram Bo. 18 and which is referred to as Kogony C-18 Scheme and comprising but not limited to land parcel No. Kisumu/Kogony/5000 upto land parcel No. Kisumu/Kogony/6012, be declared the Plaintiffs' ancestral land and that the same should revert back to the Plaintiffs.

c. An order that all the titles deeds forming part of the said Kogony C-18 Scheme and which were issued to the 1st, 2nd, 3rd and 4th Defendants and /or any other third parties be nullified and cancelled.

d. An order that all the remaining parcels of land forming part of the said Kogony C-18 Scheme which have not been transferred or alienated now be equitably and justly shared between (and distributed to) all the beneficiaries entitled to the same including the Plaintiffs.

e. An order that the 1st, 2nd, 3rd and 4th Defendants do render true and accurate accounts of their dealings with all the parcels of land forming part of Kogony C-18 and further that they do jointly and severally account to all the Plaintiffs for all the proceeds of the sale of any of the parcels which they have sold out of the said Kogony C-18 Scheme.

f. Costs of this suit plus interest thereon.

The 1st, 2nd and 3rd Defendants filed their Amended Defence where they denied each and every allegation of the Plaintiffs. They denied that they did not collude with the 4th Defendant and the District Land Registrar, Kisumu to register the suit properties in the name of few individuals including them. They denied the existence of a fiduciary relationship between them and the Plaintiff and denied the breach of such duty as alleged. They also denied the particulars of fraud enumerated in the Amended Plaint by the Plaintiffs.

Plaintiff's Case

The Plaintiff PW1 upon being sworn in stated that she substituted Odera Siranda who passed on. She adopted her statement as evidence in chief and the list of documents. That their land is in Kogony and had not been registered. Other people came and grabbed their land and registered it as theirs. The four people who grabbed the land were led by the 1st Defendant and other three Defendants who registered the land in their names as No. 4617 and subdivided it.

She stated that the 1st, 2nd and 3rd Defendants belonged to their community but the 4th Defendant was not from their community but was working with the Ministry of Land. That land parcel number Kisumu/Kogony/4617 was not part of the land they are claiming but was used to grab their land and subdivide their ancestral land into several parcels which were registered with some members of the community and others sold to strangers. Land parcel number Kisumu/Kogony/4617 was first registered with the 1st Defendant.

She went on to state that the Community has written letters to the National Land Commission and the Land Office on the matter before coming to court. That the 1st, 2nd and 3rd Defendants had not obtained the community's authority to get the land. Land parcel number 5142 was registered in the name of Jane Kambaga who was working with the Lands Ministry, Pakal Ougi and Millicent are not members of their community but they got land. Maureen Awuor Odero and George Otieno who are not members of their community also got land.

That the Defendants misused the Ministries letter allowing the Plaintiffs to register their land by grabbing it and registering it and have been threatening the Plaintiffs and have also been using the land without their consent. The 1st to 3rd Defendants had with people claiming to be from EACC written letters claiming that EACC had authorized the land to be distributed as recommended by 1st Defendant which EACC disowned in writing saying the letter had been forged.

She stated that the Defendants are the ones using the land as the plaintiffs had been forced to vacate. The Defendants have averred that the Plaintiffs were given their land and that they sold it and this is not true. Her late father had not been given his land nor did he sell it. The Defendants are not telling the truth to say there was an agreement to give the strangers part of the land.

That her prayers are for the registration of the land to be nullified to enable the Kogony Community to register and distribute the land. The defendants should be made to meet the costs of the suit and damages for the time they have been denied the use for the land. The Defendant should give details of the land they claim the Plaintiffs were given and then sold. The 1st and 2nd Defendant have the documents for the land and parcels subdivided therefrom and list of the community members.

On Cross Examination by Mr. Oriero for Defendants, she stated that she has the original Title Deed No. 1303908. That she comes from Kogony though her I/D indicates that she is from Winam. That the problems over the land started in 1978 when the extension of the Kisumu Town to Kanyakwar was done and some of the Kogony Community members were evicted from their ancestral land and are the ones who have filed this land case after engaging the Land Ministry and finally getting the authority to register their land in 2010.

That Kisumu/Kogony/4617 was registered in the name of 1st Defendant and was the one used to subdivide the land we claim. The 1st Defendant made his land overlap to the land they are claiming. The acreage of parcel 4617 was smaller from the acreage of the parcels subdivided from it.

The survey report and map for the land are with the Defendants and the letter dated 25.2.2014 was done by their surveyor after the Lands Office said they could not trace the survey plan and mutation. There are more than 200 people staying on the suit land but the titles are in the names of 1st and 2nd defendants. The National Land Commission memo dated 30th April 2014 recommended that the matter awaits the establishment of the County Land Management Board.

That as a community, they had written to the County Commission, Lands Office and National Land Commission about their complaint.

On Cross Examination by Mr. Amondi for the Interested parties, PW1 stated that she is the daughter of the initial 1st Plaintiff and hails from Kogony Community. In 1978, she was about six years old and that is when the issue of the land started. The community members have been following on the land including Peter Onyango who is still alive. The 2nd Defendant was part of the Kogony Community Committee but not in the initial stages.

That in 1985 she went through the documents of her father and that is when she understood the dispute. She remembers the eviction carried out in 1978 was done at night. The Ministry of Lands agreed that the land they were claiming be registered and shared between the members of the community.

They came to court so that they could get her late father's portion of the land and the people entitled to the land are more than 300 and are likely to increase as numbers are added through birth.

That the Land has been subdivided into more than one hundred plots and the Plaintiffs herein are representatives of the families that have not been given a share of the land.

She confirmed that she is not aware that her late father was given plot numbers 5843, 5847, 5679 and 5680 at the said land and her father sold parcel 5680. Sarah Odhiambo and David Owino Odera are the other children of her late father.

She also confirmed that she is not aware of the Government Part Development Plan over the suit land. She confirmed that Otiato Siranda is her uncle and also a beneficiary of the suit land and he signed the document withdrawing the suit. The said Otiato did not disclose why he signed the withdrawal of the suit documents. That the 1st to 3rd Defendants as their clansmen had been sent by the Community to pursue the issue of the land and communicate back to the community.

Counsels on record agreed that the Statements of the other colleagues be admitted as evidence and the prosecution case be closed.

Defendants Case

DW1- Adopted his statement as evidence in chief.

On cross examination by Mr. Nyakiangana, he stated he had all the documents in relation to Kisumu/Kogony C18 and the documents were in the custody of the secretary John Owuor who is not a party in the case. He stated that before the land was surveyed it had no reference number.

The land was later surveyed and registered as parcel 4617/Kisumu/Kogony and his land was 0.48 hectares and the unsurveyed land was about 8.0 hectares which was not in one parcel but about 200 parcels. The first phase was 59 plots and were all in his names. The second phase was of 30 plots were in the name of Jane Kambaga the 4th Defendant. The last phase was for 170 plots registered in the name of 2nd and 3rd defendants.

The owner of the unsurveyed land that was after surveying registered with me, the 2nd to 4th Defendants was the members of Kisumu Kogony Kamoo and Kamyawetha clan which includes the Plaintiffs, Defendants and others not before this court.

DW2 testified and stated that he and others were appointed by the beneficiaries as leaders of the Kogony Community and were to act as trustees in the process of issuance of title deeds. That the title deeds in phase 2 were in the names of the 2nd Defendant and the same were issued to members of the community.

He further stated that all the Plaintiffs were allocated parcels of land and all other community members who proceeded to sell to 3rd parties

their parcels of land upon the parcels being transferred in their names.

DW2 produced Agreements for sale which indicated that titles were issued to members. He produced a list of members of Kogony together with the parcel numbers that were allocated to them. He further stated that no fraud was committed.

Plaintiffs' Submissions

The Plaintiffs filed their submissions on 18th October 2021 and submitted that the Defendants had no capacity to dish out land without due process of adjudication as provided in law. That the documents submitted but the Defendants demonstrate that no parcel was allocated to the Plaintiffs and from the records, the entire property was registered in the names of the 1st, 2nd and 4th Defendants.

It was the Plaintiffs' submission that they have proved the undisputed existence of the trust in land and the certificates of title issued to the Defendants was fraudulently and the titles were acquired illegally and unprocedurally through a corrupt scheme.

The Plaintiffs prayed that judgment be entered in their favour.

The Plaintiffs relied in the case of **Isaack M'Inanga Kabia vs Isaaya Theuri Mlintani & Another Petition No. 10 of 2015 and ELC 334 of 2014 Kisumu Yunita Oucho Owino vs Jectone Ongoro Girumba.**

Defendants' Submissions

The Defendants filed their submissions on 1st February 2022 where the following issues were raised for determination:

- i. Whether the suit property is a community land and if so, is this the right forum with the title already issued to various parties.
- ii. Has fraud been proved to the right standard in law to warrant interference with the title already issued to various parties.
- iii. Can the court issue orders cancelling titles owned by third parties who are not party to this suit.
- iv. Had the Plaintiffs proved their case to warrant issuing orders as prayed for in the Amended Plaintiff.
- v. Who bears the costs of this case.

On the issue of whether the suit property of whether the suit property is a community land and if so, is this the right forum for arbitrating the dispute; the Defendants submitted that the Plaintiffs have pleaded that the suit property was community land that was acquired by the government for purposes of expansion of Kisumu town. That the government failed to acquire the suit property and a District Adjudication and Settlement Officer made a decision in 2011 to have the land surveyed and given to members of the community.

That the Plaintiffs were required to prove that the land was compulsorily acquired for expansion of Kisumu town. The Plaintiffs failed to prove this in court. The Defendants relied in the case of **Isaiah Otiato & 6 Others v County Government of Vihiga (2018) eKLR** where the court observed as follows:

“Section 8 of the Land Acquisition Act observes that ‘where land is acquired compulsorily under this Part, full compensation shall be paid promptly to all persons interested in the land. The Petitioners are yet to be compensated for their land parcels. Compulsory acquisition is provided by the law and also compensation for the compulsory acquisition is provided by the law, the Respondent ought to respect the law... If land is so acquired the just compensation is to be paid promptly in full to persons whose interests in land have been determined.

The Defendants also relied in the case of **Town Council of Awendo vs Nelson O Onyango 713 Others; Abdul Malik Mohamed & 178 Others (Interested Parties) (2019) eKLR.**

On the issue of whether fraud has been proved to the right standard in law to warrant interference with the title already issued to various parties; the Defendants submitted that the Plaintiffs have failed to prove fraud on their part as the law requires fraud to be proved on a scale that is above a balance of probabilities but beyond reasonable doubt. That the Defendants have proved that the community members were issued with titles and had parcels transferred to them but sold the same later on. It was submitted that the Plaintiffs were unable to raise funds for the survey and the whole community agreed to get help from the 1st - 4th Defendant to provide the said funds in exchange with equivalent of land that will arise out of the survey and sub-division.

The Defendants further submitted that the Plaintiffs had failed to prove fraud as 3rd parties who purchased the suit parcels from community members who had been issued with title deeds based on the role granted to the Defendants as trustees and the Plaintiffs were in agreement.

On the issue of whether the court can issue orders cancelling titles owned by 3rd parties who are not parties to this suit; the Defendant stated that the Plaintiffs have sought orders for cancellation of titles issued to 3rd parties without naming the said persons in the suit to enable them present their case. That the Plaintiffs are not aware of how many titles they are seeking to have cancelled nor the numbers. Reliance was placed in the case of **Republic vs Land Registrar, Transzoia & Another Exparte Mary Odhiambo & Another (2019) eKLR.**

On whether the Plaintiffs proved their case to warrant issuing orders as prayed for in the amended plaintiff; It was submitted that it is not

possible to order cancellation of titles where people have carried out serious developments without granting such persons an opportunity of being heard. That the order to have the remaining parcels of land to be shared equitably without specifying the specific parcels would be an order difficult to enforce and the prayer for accounts of parcels allegedly sold by the 1st, 2nd and 3rd Defendants without proof of such sale of the said parcels of land, the Defendants have produced copies of the sale agreements and cheques.

The Defendants therefore prayed that this suit should be dismissed with costs.

Analysis and Determination

This court has carefully looked into the pleadings, the evidence on record and the submissions filed by the parties and the following issues need to be determined:

1. Whether the suit property is community land.
2. Whether there was fraud on the part of the Defendants.
3. Whether the Plaintiffs are entitled to the orders sought.

It is the Plaintiffs case that they have been residing in the block of land between Kogony and Kanyakwar Adjudication Sections and in the year 1978, the land which is within Kogony sub-location was inadvertently included in a Kenya Gazette Notice but the mistake was sorted out and this block of land was immediately adjudicated and it remained as gap between Kogony and Kanyakwar Adjudication Sections and was undemarcated and unsurveyed for many years.

That the Plaintiffs aver that in 2011, a decision was made by the District Land Adjudication & Settlement Officer that the suit property should be adjudicated and revert to the original families who owned it. The Plaintiffs elected officials to carry out this process for them and the 1st 2nd and 3rd Defendants were the officials elected who would act as trustees in ensuring the suit property is adjudicated and registered. The 1st, 2nd and 3rd, Defendants in breach of their duty, colluded with the 4th Defendant and the District Land Registrar Kisumu to have the parcels of land registered in the names of individuals who are not members of Kogony community. It is the Plaintiffs allegation that the Defendants committed fraud by allowing the parcels of land to be transferred to members who are not from the Kogony community.

The Defendants on the other hand have denied each and every allegation of the Plaintiff as they did not collude with the land Registrar to have the suit parcels transferred to members who are not from Kogony Community. They also denied the existence of a fiduciary relationship between them and the Plaintiffs and there was no breach of this duty.

Article 63 of the Constitution makes provisions on Community land and provides thus:

(1) Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest. (2) Community land consists of—(a) land lawfully registered in the name of group representatives under the provisions of any law; (b) land lawfully transferred to a specific community by any process of law; (c) any other land declared to be community land by an Act of Parliament; and (d) land that is—(i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines; (ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities; or (iii) lawfully held as trust land by the county governments, but not including any public land held in trust by the county government under Article 62(2).(3) Any unregistered community land shall be held in trust by county governments on behalf of the communities for which it is held. (4) Community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively.'

The community Land Act No 27 of 2016 defines Community land as;

"Community" means a consciously distinct and organized group of users of community land who are citizens of Kenya and share any of the following attributes-

- (a) Common ancestry;
- (b) Similar culture or unique mode of livelihood;
- (c) Socio-economic or other similar common
Interest;
- (d) Geographical space;
- (e) Ecological space; or
- (f) Ethnicity.

In the case of **Gitson Energy Limited v Francis Chachu Ganya & 6 others [2017] eKLR** the Court of Appeal held that: **' Article 63(4)**

provides that community land shall not be disposed of or otherwise used except in terms of legislation and Article 63(5) empowers Parliament to enact legislation to give effect to the Article.....A comparison of Article 62 and Article 63 shows as follows. Like Public land, unregistered Community land and Trust Land is held by county government. But unlike Public land which vests in and is held by county government in trust for the people, registered community land is vested in and is held by the particular community. Further, unlike Public land which is administered on behalf of the people by the National Land Commission, registered community land is administered by the particular community through a “Registered Community” as provided in section 15 of the Community Land Act.’

It is not in dispute that the suit property was community land and pursuant to the letter dated 15th March 2011 from the District Land Adjudication & Settlement Officer, it was recommended that the gap between Kogony and Kanyakwar should be surveyed to persons residing on the ground who are residents of Kogony. As per the letter from the Kenya Anti-Corruption Commission, they filed a report which indicated that phase one of Kogony C-18 Section had a total of 53 plots and only 17 plots were allocated to members and 36 other plots were allocated to individuals who are not members of the community. On 6th July 2011, the District Land Registrar wrote to the District Surveyor asking him to visit the site with a view of resurveying the affected areas as per the position of the ground.

On 29th July 2011, the District Surveyor responded to the District Land Registrar where he stated that the Kogony C-18 Scheme does not exist in the records under his custody and that the land is not a subdivision but an allocation of land which is legally on the domain of the Commissioner of Lands and therefore the community should follow the procedure of allocation of Government land.

Pursuant to the letter dated 30th April 2014, the Assistant Land Adjudication Director acknowledged the Plaintiffs complaint and recommended that the matter was awaiting appointment of the County Land Management Board and on 15th January 2015, the National Land Commission wrote to the Secretary of the County Land Management Board forwarding the Plaintiffs complaint in order for them to get assistance. The Plaintiffs confirmed that they have never received assistance from the Board. Despite the several complaints raised by the Plaintiffs, the Defendants transferred the subdivided parcels illegally to individuals who are not members of the community.

The Plaintiffs in paragraph 12 of the Plaint have enumerated the particulars of fraud on the part of the Defendants

Section 25 and 26 of the Land Registration Act provides that:’

(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject— (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register. (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee. 26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except— (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.’

In the case of *Mutsonga –VS- Nyati [1984] KLR at page 426*, it was held as;

“Allegations of fraud must strictly be proved and although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, a high degree of probability is required, which is something more than a mere balance of probabilities and it is a question of the Judge to answer”.

From the evidence on record, the 1st, 2nd, 3rd and 4th Defendants were appointed as leaders to act on behalf of members of the Kogony Community and ensure that the suit property is registered and titles issued in the names of the members of the community. The Defendants proceeded to register the suit parcels and the same were transferred to persons who are not members of the community and have sold the parcels to 3rd parties. This court confirms that the titles issued by the Land Registrar were issued to individuals who are not members of the community and there is also evidence of the sale Agreements produced that indicate that some parcels were sold to 3rd parties. I do find that those particulars of fraud have been proved on a balance of probability.

This court therefore enters Judgment against the Defendants and orders as follows:

a. General damages of Kshs.10,000,000/=.

b. A declaration that all that block of land now registered and comprised in Map Sheet or Diagram Bo. 18 and which is referred to as Kogony C-18 Scheme and comprising but not limited to land parcel No. Kisumu/Kogony/5000 upto land parcel No. Kisumu/Kogony/6012, be declared the Plaintiffs’ ancestral land and that the same should revert back to the Plaintiffs.

c. An order that all the titles deeds forming part of the said Kogony C-18 Scheme and which were issued to the 1st, 2nd, 3rd and 4th Defendants and /or any other third parties be nullified and cancelled.

d. An order that all the remaining parcels of land forming part of the said Kogony C-18 Scheme which have not been transferred or alienated now be equitably and justly shared between (and distributed to) all the beneficiaries entitled to the same including the

Plaintiffs.

e. An order that the 1st, 2nd, 3rd and 4th Defendants do render true and accurate accounts of their dealings with all the parcels of land forming part of Kogony C-18 and further that they do jointly and severally account to all the Plaintiffs for all the proceeds of the sale of any of the parcels which they have sold out of the said Kogony C-18 Scheme.

f. Costs of this suit plus interest thereon.

DATED AT KISUMU THIS 18TH DAY OF MARCH, 2022

ANTONY OMBWAYO

JUDGE

This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE