



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL CASE NO.26 OF 2003

SILVESTER ANDINGO MIGUNAPLAINTIFF

VERSUS

OPIYO AGIMBA AND OTHERS.....1ST DEFENDANT

**MARGARET OBONYO (suing as the administrator of the estate of
ABONGO AGUMBA.....2ND DEFENDANT
THE DISTRICT LANDS REGISTRAR KISUMU.....3RD DEFENDANT
HONOURABLE ATTORNEY-GENERAL.....4TH DEFENDANT**

J U D G E M E N T

The plaintiff **Silvester Muguna** moved the court by way of a plaint dated 5th of February, 2003. The same amended twice on the 28th of June, 2004 and the 6th of December, 2006. The plaintiff claims that Land Parcel No. **Kisumu/Nyalenda 'B'/229 and 230** was ancestral land belonging to the plaintiff's grandfather, **Anyango Otieno**. His father **Aloice Muguna** in turn inherited same and upon the plaintiff's father in 1914 the family agreed that the said land be registered in the name of the plaintiff's eldest brother **Martinus Mbeya Miguna** for the benefit of all the other beneficiaries.

The plaintiff claimed that the 1st defendant and his brother in collusion of the 3rd defendant fraudulently and unlawfully registered the said properties in the names of the 1st defendant and his brother without the knowledge of the plaintiff's family. The plaintiff sought for judgment against the defendants jointly and severally for:

(a) an order cancelling the names of Agumba Opiyo and Obongo Opiyo as the registered proprietor of Kisumu/Nyalenda 'B'/229 and 230 respectively and restituting it with the name of the plaintiff and an order that the defendants are holding the titles in trust for the deceased and plaintiff;

(b) that the title be cancelled for fraud and the defendants to pay damages for trespass and vacate the aforesaid

parcels of land;

(c) any other relief the court deems fit and just

(d) cost and interest.

The 1st and 2nd defendants filed a defence on the 20th of June 2003. After the plaint was amended the 1st and 2nd defendant amended their defence on the 26th July, 2004. In the same they generally denied the allegations contained in the plaint and contended that the parties as sued lacked capacity and are misjoined and that the plaintiff did not have capacity to file the case.

The 3rd and 4th defendant filed a defence on the 19th of April, 2005 they also denied contents of the plaint. They stated that they at all times acted within the purview of the law.

The plaintiff in his evidence produced evidence that he obtained grant of letters of administration of the estate of his brother **Maritinus Mbeya Miguna**. He also stated that the dispute had been referred to the adjudication board who awarded judgment in favour of his brother, however his brother did not participate in an appeal preferred. He said that he was not aware of the appeal.

The 1st and 2nd defendants did not adduce any evidence. The 3rd and 4th defendants called one witness **Monica Bor (DW1)**, a land registrar. She informed the court that land parcel number **Kisumu/Nyalenda 'B'/229 and 230** are registered in the names of **Agumba Opiyo** and **Obongo Opiyo** registered as absolute titles under The Registered Land Act Chapter 300 of the Laws of Kenya. The registration was done after an adjudication process. She indicated that property **229** was registered in the names of **Martinus Mbeya Miguna**. She also stated that an objection proceeding was filed by **Martinus Mbeya Miguna** an award was made in his favour however an appeal was preferred. Appeal **No.132 of 1985** which appeal was allowed and the 2 mentioned above consequently registered as registered owner. She indicated that there is no fraud in the registration as alleged.

Having considered the pleadings, evidence and submissions by counsel the issues for determination are:

1. Whether the plaintiff has locus standi to bring this suit?
2. Whether the 1st defendant and his brother were fraudulently and unlawfully registered as proprietors of Kisumu/Nyalenda 'B'/229 and 230?
3. Did the 3rd and 4th defendant collude with the 1st defendant and his brother to have the properties subject matter registered in their names?
4. Is the plaintiff entitled to damages for trespass?
5. Who pays costs?

Does the plaintiff have the locus standi to bring the suit against the defendant?

On his own evidence the plaintiff stated that he is the legal representative of his brother **Martinus Mbeya Miguna**. However, he claims the land is family land having been inherited from his grandfather to his father, brother and then him. He did not take out grant of administration on behalf of the estate of his grandfather or even his father. He is not therefore a legal

representative of any of the two who may have had an interest in the said land.

The plaintiff claims that the 1st defendant and his brother were unlawful and fraudulently registered as proprietors of **Kisumu/Nyalenda 'B'/229 and 230**. However apart from the allegation he did not adduce any evidence of fraud or illegality as alleged. Although his brother **Martinus Mbeya Miguna** raised an objection to the land dispute tribunal and won the first round. The case was overturned on appeal and his brother or indeed his sister did not appeal further. From the evidence on record his late brother was aware of the appeal, was present and participated in the same. Needless to say that Land dispute tribunal had no jurisdiction to entertain the question of ownership.

The evidence by **DW1** which is uncontraverted is that after the adjudication process the 1st defendant and the brother were registered as proprietors within the purview of the relevant Laws.

The plaintiff has therefore failed on a balance of probabilities to prove his claim against the defendants in the circumstances he cannot therefore be entitled to any damages for trespass or at all.

For the above reasons the suit is dismissed with costs.

Dated and delivered at Kisumu this 18th February, 2011.

ALI-ARONI

J U D G E

In the presence of:

Mr. Ogejo holding brief for Mr. Mwamu for plaintiff

N/A for 1st and 2nd defendants

N/a for 3rd and 4th defendants