



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
CIVIL CASE 76'B' OF 2007

**ROMANUS ODHIAMBO OTIENO)
PAMELA AWUOR OCHIENG) PLAINTIFFS/APPLICANTS**

VERSUS

GEORGE OCHIENG OGONY DEFENDANT/RESPONDENT

JUDGMENT

The genesis of this dispute between the plaintiffs and the defendant is a parcel of land that was known as **SUNA WEST/WASIMBETE/855** measuring 15.6 hectares. The land was registered in the names of Gucha wife of Kathikiro, Ajwang wife of Kathikiro and Akede wife of Kathikiro as joint proprietors. They were so registered on 24th April, 1985 and it was a first registration. Pursuant to the provisions of **section 143 (I)** of the **Registered Land Act**, a court cannot order rectification of the register to affect such a title deed, that is, a first registration, even if it is shown that the registration was obtained or made by fraud or mistake.

On 7th July, 2006, two of the joint registered proprietors of the said parcel of land, Ajwang Kathikiro and Akede Kathikiro, decided to sell to the plaintiffs a portion of the land measuring 6.48 hectares. As at that date, the other joint proprietor, Gucha Kathikiro, had already died. **Section 102 (I) (b)** of the **Registered Land Act** provides that on the death of a joint proprietor, his interest shall vest in the surviving proprietors jointly. That notwithstanding, the transfer document had the name of Gucha Kathikiro on it and the two joint proprietors caused someone to thumb print the transfer for and on behalf of Gucha Kathikiro. Though that was not proper in law, it was of no legal consequence as the two joint proprietors had legal capacity to sell and transfer even the entire parcel of land, **Suna West/Wasimbete/855**, though they sold just a portion of the same. The land was subdivided and the area Land Control Board gave its consent. The plaintiffs herein were registered as the proprietors of one of the subdivisions thereof, **SUNA WEST/WASIMBETE/1305**, hereinafter referred to as **"the suit land"**, measuring 6.48 hectares. The plaintiffs were issued with a Title Deed to the suit land on 18th September, 2006.

In their plaint, the plaintiffs claimed that on 4th April, 2007 the defendant unlawfully trespassed on the suit land, purporting to have acquired the same vide a court decree dated 23rd January, 2007. They prayed for an eviction order against him and a permanent injunction to restrain him, his agents and/or servants from trespassing, interfering and/or in any manner dealing with the suit land.

The defendant filed a statement of defence and stated that the plaintiffs' purchase of the suit land and subsequent issue of a Title Deed in their favour was illegal and fraudulent and an attempt to defeat a lawful decree issued in Principal Magistrate's Miscellaneous Application No. 67 of 2006 at Migori. The said decree was issued on 23rd January, 2007. The said court adopted a decision of the Migori District Land Disputes Tribunal in Case Nos. 36/05 and 06/06 between George Ochieng Ogony (the defendant herein) and Ajwang Kathikiro and Akede Kathikiro. The Tribunal, in its decision made on 19th December, 2006, awarded the defendant herein 30 acres of the land known as **Suna West/Wasimbete/855**. The defendant further stated that he had registered a caution against the parent title (parcel No. 855) and the same had not been removed prior to the registration of the suit land in favour of the plaintiffs. He further alleged that parcel No. 855 was registered in the joint names of Gucha Kathikiro, Akede Kathikiro and Ajwang Kathikiro and at the time of the sale of the suit land Gucha Kathikiro had long died and no succession proceedings had been instituted. The defendant further contended that he had been in occupation of the suit land for more than 30 years as the same was family land.

During the hearing, the first plaintiff testified as to how they acquired the suit land. He produced copies of the Title Deed, for the suit land (**P. Exhibit 1**), the Sale Agreement, (**P. Exhibit 2**) and the Certificate of Official search in respect of **Suna West/Wasimbete/855; (P. Exhibit 3)**. The latter was obtained on 4th June, 2006 and as at that date there was no restriction or caution registered against the title.

He further testified that the defendant trespassed on the suit land on 4th April, 2007 and when attempt was made to evict him, he became violent and as a result this suit was filed.

In cross examination, the first plaintiff stated that the share of the original parcel of land that belonged to Gucha Kathikiro was not sold. The first plaintiff was shown a copy of the Register (Green card) in respect of Suna West/Wasimbete/855 which was later produced by the defendant as **D. Exhibit 1**. The Green Card shows that:

- (a) On 24/4/85 Gucha w/o Kathikiro
Ajwang w/o Kathikiro
Akede w/o Kathikiro
were registered as joint proprietors.**
- (b) On 28/3/94 a caution was registered in
favour of George Ochieng Ogony claiming
beneficial interest.**
- (c) On 24/4/85 a Restriction was registered. It
restricted all dealings on the title until pending
appeals before the Minister had been finalized.**
- (d) On 15/2/99 the Restriction was removed vide
Chief Land Registrar's letter Ref.
No.CLR/R/69/VOL. X/146 of 11/2/99.**
- (e) On 12/9/06 the above caution was removed
under section 133 of the Registered Land Act.**
- (f) On 12/9/06 the Title was closed following
subdivision of the land to create parcels Nos.
1302 to 1305.**

The first plaintiff said that prior to their acquisition of the suit land, he did not know that the defendant and the vendors had been having any cases over the land. He only knew that when he received a letter dated 30th May, 2007

from the Land Registrar, Migori District, asking him to return the title Deed that they had been issued with. The letter was referring to the decree of 23rd January, 2007 which was issued long after they had been issued with the Title deed.

Marcella Achieng Kathikiro, PW2 and **Monica Ajuang Kathikiro, PW3**, testified regarding sale of the suit land to the plaintiffs. PW2 said that she was not aware of the decree issued by the Principal Magistrate's Court at Migori awarding the defendant 30 acres of parcel No. 855. She said that one of the grand children of Gucha Kathikiro had executed the transfer document in place of Gucha. PW3 corroborated the evidence of PW2 in all material aspects.

Michael Ochola Ochieng, PW4, is a grand child of Gucha Kathikiro. He said that he was aware that the plaintiffs had purchased the suit land. He witnessed the sale agreement. The witness said that he was aware that the defendant's father, Austin Manyala, had a claim over land parcel No. Suna West/Wasimbete/855 and the dispute was decided in favour of Gucha, Ajuang and Akede Kathikiro. Following dismissal of the appeal by the Minister, a restriction that had been entered against the title was removed.

The plaintiffs also called **Joel Ogise Atuti, PW5**, the District Land Registrar, Migori/Rongo. At the time of testifying, PW5 had worked at the said land registry for just about four months. He said that the plaintiffs' Title Deed had been cancelled vide Gazette Notice No. 3265 published on 25th April, 2008. The Gazette Notice was later produced by the defendant as **D. Exhibit 3**. However, that cancellation was not entered in the Register. He said that he did not know why the cancellation had been done.

The defendant testified that he was not living on the suit land. He however claimed that the suit land was a subdivision of Suna West/Wasimbete/855 which was owned by his late father and two other people. He said that he had a case with Gucha Kathikiro, Akede Kathikiro and Ajuang Kathikiro over the said parcel of land. The case was before the Migori District Land Disputes Tribunal. It was decided in his favour and a decree issued by the Principal Magistrate's Court at Migori. He was entitled to 30 acres of the land. He produced the decree as an exhibit. When he went to the District Lands Registry to process his title, he found that the land (parcel No. 855) had been subdivided and three new titles issued. As a result, the District Land Registrar caused a Gazette Notice to be published vide which he cancelled the three resultant Title Deeds, that is, Suna West/Wasimbete/1303, 1304 and 1305. That notwithstanding, he had not been issued with any Title Deed. The defendant urged the court to dismiss the plaintiff's suit and order that he be given a Title Deed in terms of the aforesaid decree.

In cross examination, the defendant said that his late father had a case against Gucha, Ajuang and Akede Kathikiro over land parcel No. 855. After its first determination his father lost but preferred an appeal to the Minister. He alleged that the appeal was determined in his father's favour but his father had since passed away. Following that determination, he (the defendant) filed the case that went before the Migori District Land Disputes Tribunal.

The defendant could not explain why he had to institute the case afresh if indeed his father had won the appeal. It appears to me that the appeal had been decided in favour of Gucha, Ajuang and Akede Kathikiro and that explains why the Chief Land Registrar ordered removal of the Restriction in 1999. The Restriction had been ordered by the Chief Registrar in 1985, pending finalization of the appeal before the Minister.

The defendant conceded that at the time when the plaintiffs acquired the suit land there was no restriction registered against the title in respect of parcel No. 855. He further conceded that the decree by the Principal Magistrate's court at Migori was issued after the plaintiffs had been issued with a Title Deed for the suit land.

From the foregoing, it is clear that the plaintiffs lawfully purchased the suit land, then a portion of Suna West/Wasimbete/855, from Ajuang and Akede Kathikiro. The two vendors were joint proprietors together with Gucha

Kathikiro who had died at the time when they purchased the land. I have already stated that pursuant to the provisions of **section 102** of the **Registered Land Act**, Gucha's interest in the land had vested in the two surviving joint proprietors. The preparation of the transfer document and its registration was not done by a lawyer. The transfer shows that it was drawn by the plaintiffs. That may explain why the parties thought that it was necessary for someone to thumb print the same on behalf of Gucha. In the circumstances, the plaintiffs' interest in the suit land is absolute and indefeasible in terms of the provisions of **sections 27 and 28** of the **Registered Land Act**. The defendant did not prove that there was any fraud on the part of the plaintiffs in their acquisition of the suit land.

Although the defendant pleaded that he had been in occupation of the suit land for over 30 years, he told the court that he was not living on the land. But even if he had been living on the land, that *per se* cannot entitle him to any right over the same, the plaintiffs having lawfully purchased the land from its former rightful owners.

Whatever claim the defendant's father may have had over the suit land was rejected after his appeal to the Minister was dismissed. The defendant's act of filing a fresh dispute before the Migori District Land Disputes Tribunal in 2006, long after determination of the appeal by the Minister was a wrong legal move. In any event, the Tribunal had no power to make orders which relate to proprietary interest of registered owners of the land. The powers of such Tribunals are specifically set out in **section 3 (1)** of the **Land Disputes Tribunals Act, 1990**. See **WAMWEA V. CATHOLIC DIOCESE OF MURANG'A REGISTERED TRUSTEES** [2003] KLR 389. A decision made by a body that lacks jurisdiction is null and void and of no legal consequence. The decree that was issued by the Principal Magistrate's court at Migori cannot therefore assist the defendant at all.

Gazette Notice No. 3265 of 25th April, 2008 that purported to cancel the plaintiffs' Title Deed and two others is also of no legal consequence. The Gazette Notice was based on the aforesaid decree which was issued pursuant to the decision of Migori District Lands Tribunal. I have already stated that the Tribunal acted *ultra vires* its jurisdiction. Further more, at the time of issue of the said decree, there was no parcel of land known as Suna West/Wasimbete/855. The title had been closed on 12th September, 2006. In any event, the subordinate court does not have any power to order cancellation of a Title Deed. The then District Land Registrar, Migori, was clearly in error to purport to cancel the plaintiffs' Title Deed. The said Gazette Notice is declared null and void.

I find and hold that the plaintiffs are the lawful registered proprietors of the suit property, Suna West/Wasimbete/1305. The defendant has no right over the same and if he is in occupation of the suit land or any portion thereof he is hereby ordered to vacate forthwith. If he fails to do so within seven (7) days from the date hereof an eviction order shall issue. The defendant, his servants and/or agents are further restrained from trespassing onto the suit land and/or interfering with the plaintiffs' occupation and enjoyment of the same.

The defendant shall bear the costs of this suit.

DATED, SIGNED AND DELIVERED AT KISII THIS 12TH DAY OF OCTOBER, 2009.

**D. MUSINGA
JUDGE.**

12/10/2009

Before D. Musinga, J.

Mobisa - cc

Mr. Mboya for the Plaintiffs.

N/A for the Defendant

Defendant - present

Court: Judgment delivered in open court.

**D. MUSINGA
JUDGE.**