



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**ELC CASE NO. 315 OF 2014**

**GEORGE OMOLLO ADIKA & 12 OTHERS.....PLAINTIFFS**

**VERSUS**

**PAUL MAINA.....1<sup>ST</sup> DEFENDANT**

**DISTRICT LAND REGISTRAR, KISUMU.....2<sup>ND</sup> DEFENDANT**

**CHAIRMAN, THE NATIONAL LAND COMMISSION.....3<sup>RD</sup> DEFENDANT**

**THE NATIONAL LAND COMMISSION.....4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

The Plaintiffs, 11 in number have sued the District Land Registrar Kisumu, Chairman National Land Commission and the National Land Commission claiming that the 1<sup>st</sup> Plaintiff was registered as proprietor and holder of the Registration of Titles Act (now repealed) title to all that property known as and referred to as L.R. NO. 15238 situate in the Kisumu Municipality in the Kisumu District containing by measurement approximately 3.037 Hectares with the said title duly registered as No. L. R 73665.

The 1<sup>st</sup> Plaintiff did cause the said parcel of land to be subdivided and sold certain parcels to the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> plaintiffs who were all issued with certificates of titles to their parcels of land from the subdivision as particularized hereunder:

<b>NO.</b>	<b>PROPRIETOR</b>	<b>L.R. NO.</b>	<b>L.R.NO</b>
1	GEORGE OMOLLO ADIKA		
2	ROSEBELLA ACHIENG WAGA	15328119	56866/06
3	CHARLES AWITI AGWANDA	15328/51 & 15328/52	56866/35 & 56866/16
4	JARED WAGARA	15328/48	56866/15
5	EDWINA ADHIAMBO OTIENO	15328/59	56866/18
6	LUCIA AKELLO ODONGO	15328/10	56866/5
7	WYCLIFE OTIENO MIDEGA	15328/69 & 15328/70	56866/26 & 56866/20
8	GEORGE STEPHEN AYANGA	15328/39 & 15328/35	56866/11 & 56866/33
9	JUDITH A. MUGUDA ATTYANG	15328/45	56866/13
10	BEATRICE ANYANGO OWITI	15328/53	56866/17
11	NAAMAN ADUDA ABIRA	14328/18 & 15328/78	56866/39 & 56866/22
12	SIMPROMSA ACHIENG ONGANGA	15328/84	56966/45

That The 1<sup>st</sup> Defendant in collusion with officials in the offices of the 2<sup>nd</sup> and 4<sup>th</sup> Defendants has fraudulently and unlawfully purported to make a parallel grant also as L.R. No. 15238 situate in the Kisumu Municipality in the Kisumu District containing by measurement approximately 3.037 Hectares with the said title also purportedly registered as No. L.R. 73665. He has also consequently purported to subdivide and sell the parcels to unknown individuals.

The plaintiffs have now noticed that purporting a proprietary interest over the subject property, the 1<sup>st</sup> Defendant and/or his assignees, servants and/or agents are constructing permanent and pervasive buildings and structures on the said plaintiffs' properties and there is a grave, probable and imminent danger that the 1<sup>st</sup> Defendant and/or his assignees, servants or agents will continue to interfere with, waste, alienate and affect the plaintiffs' properties irreparably.

The Plaintiffs discovered that the Defendants spuriously and unlawfully issued or caused to be issued, with reference to the land parcel upon which the Plaintiffs proprietary interests lay, a Certificate of title registered in the name of the 1<sup>st</sup> Defendant. It is possible and likely that he thereafter transferred and/or subdivided and sold a purported interest in gross violation of the Plaintiff's constitutional, proprietary and contractual rights and which violations are fraudulent and in any case the Plaintiffs believe are unlawful.

The plaintiff believes that as the body tasked to manage public land on behalf of County and National Governments as well as advise the state on a comprehensive programme for the Registration of Titles throughout Kenya, the 3<sup>rd</sup> and 4<sup>th</sup> Defendants are either complicit in the said actions or have failed in their principal duty to manage and deal with such un-procedural actions.

Thereafter there has begun significant construction and erection of buildings and structures on plaintiffs parcels in direct violation of their right to the quiet enjoyment and possession of their property.

The Plaintiffs are the lawful title holders and proprietors of the subject property and the Defendants, particularly the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants have never cited, communicated or purported any cancellation, breach or lapse of that proprietary interest over the subject property.

The purported registration of the 1<sup>st</sup> Defendant as proprietor of the subject property and all transfers arising therefrom is fraudulent and/or irregular, unlawful and void ab initio and this Court should, in the name of justice, issue a declaration to that effect.

The particulars of fraud are:

- i) The issuance of a title and the registration of individuals as proprietors to a property which is already registered and which is subject to titles validly issued and in the hands of the Plaintiffs.**
- ii) Failing to notify the Plaintiffs of any revocation of their valid leasehold over the subject property before issuing a subsequent title and registering other individuals as proprietors with interests inconsistent with the Plaintiffs'.**
- iii) Causing a situation in which two or more individuals each purport proprietary rights over the same property which implication is that the subsequent title can only be fraudulent and/or irregular.**

The Plaintiffs pray for:

- a) A declaration that the registration of the 1<sup>st</sup> Defendant as the proprietor of all that property referred to and known as L.R. No. 15238 situate in the Kisumu municipality in the Kisumu District as well as all and any subsequent transfer arising therefrom are void ab initio and unlawful.**
- b) An injunction restraining the Defendants jointly and severally whether acting by themselves, their assignees, servants and/or agents howsoever from occupying and/or continuing with any construction work on the properties known as L.R. No. 15238 situate in the Kisumu Municipality in the Kisumu District and registered in the name of the 1<sup>st</sup> Plaintiff and the subdivisions therefrom belonging to the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> plaintiffs and/or interfering in any manner with the Plaintiffs' quiet enjoyment and possession of the properties.**
- c) An injunction restraining the Defendants jointly and severally whether acting by themselves, their servants and/or agents howsoever from interfering with, selling, disposing of and/or transferring or causing to be transferred any interest in the properties known as L. R. No. 15238 situate in the Kisumu Municipality in the Kisumu District and registered in the name of the 1<sup>st</sup> Plaintiff and the subdivisions therefrom belonging to the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> plaintiffs.**
- d) General damages for trespass and loss of user.**
- e) The costs of this suit.**
- f) Any other or further relief deemed fit and just to grant by this Honourable Court.**

The first defendant was served through substituted service but did not file defence. The 2<sup>nd</sup> Defendant did not file defence.

The 3<sup>rd</sup> and 4<sup>th</sup> Defendant filed defence, denying the Plaintiffs claim:

When the matter came up from hearing the Plaintiffs called **PWI George Omollo Adija Onyiro** a civil servant who worked in the Physical Planning department who stated that the parcel number of the suit property is Kisumu/Municipality/LR 15328. He produced the grant number 56866 for L.R. No. 15328. The land measures 3.037 Ha. The land is delineated on the plan number 166125. He subdivided the land and sold it to the 2<sup>nd</sup> to 12<sup>th</sup> Plaintiffs.

He states that the 1<sup>st</sup> Defendant in collusion with officials in the offices of the 2<sup>nd</sup> and 4<sup>th</sup> Defendants has fraudulently and unlawfully purported to make a parallel grant also as L.R. NO. 15238 situate in the Kisumu municipality in Kisumu District containing by measurement approximately 3.039 Hectares with the said title also purportedly registered as No. IR 73665. He has also consequently purported to subdivide and sell the parcels unknown individuals.

with, waste, alienate and affect these properties irreparably.

He discovered that the Defendants spuriously and unlawfully issued or caused to be issued, with reference to the land parcel upon which his proprietary interest lay, a certificate of Title registered in the name of the 1<sup>st</sup> Defendant who very soon after transferred subdivided and sold his purported interest in gross violation of its constitution, proprietary and contractual rights and which violations are fraudulent and in any case unlawful.

He believes that as the body tasked to manage public land on behalf of County and National Governments as well as advise the state on a comprehensive programme for the Registration of Titles throughout Kenya, the 3<sup>rd</sup> and 4<sup>th</sup> Defendants are either complicit in the said actions or have failed in their principal duty to manage and deal with such un-procedural actions.

Thereafter there has begun significant construction and erection of buildings and structures on plaintiffs parcels in direct violation of their right to the quiet enjoyment and possession of their property.

He is the lawful title-holder and proprietor of the subject property and the Defendants, particularly the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants have never cited, communicated or purported any cancellation, breach or lapse of that proprietary interest over the subject property.

The purported registration of the 1<sup>st</sup> Defendant as proprietor of the subject property and all transfers arising therefrom are fraudulent and/or irregular, unlawful and void ***ab initio*** and this Court should, in the name of justice, issue a declaration to that effect. The plaintiff prays for Judgment against the Defendants in terms of the plaint. PW2 adopted his statement. The defence did not call any evidence.

I have considered the evidence on record and do find that the plaintiff is the registered proprietor of the suit property.

The defence did not give any evidence as to the impropriety of the 1<sup>st</sup> Plaintiff's title and the subsequent subdivision and transfers.

Article 40 (1) of the Constitution provides:

**“40.(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—(a) of any description; and(b) in any part of Kenya.”**

Section 24 of the Land Registration Act provides:

**“24.Subject to this Act—**

**(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.”**

Section 25 of the Act provides:

**“25.(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.”**

Section 26 provides:

**“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.**

**(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”**

I do find that the Plaintiffs have satisfied the court that they hold genuine titles of the suit property. I do grant the following orders namely: -

**a) A declaration that the registration of the 1<sup>st</sup> Defendant as the proprietor of all that property referred to and known as L.R. No. 15238 situate in the Kisumu municipality in the Kisumu District as well as all and any subsequent transfer arising therefrom are void ab initio and unlawful.**

**b) An injunction restraining the Defendants jointly and severally whether acting by themselves, their assignees, servants and/or agents howsoever from occupying and/or continuing with any construction work on the properties known as L.R. No. 15238 situate in the Kisumu Municipality in the Kisumu District and registered in the name of the 1<sup>st</sup> Plaintiff and the subdivisions therefrom belonging to the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> plaintiffs and/or interfering in any manner with the Plaintiffs’ quiet enjoyment and possession of the properties.**

**c) An injunction restraining the Defendants jointly and severally whether acting by themselves, their servants and/or agents howsoever from interfering with, selling, disposing of and/or transferring or causing to be transferred any interest in the properties known as L. R. No. 15238 situate in the Kisumu Municipality in the Kisumu District and registered in the name of the 1<sup>st</sup> Plaintiff and the subdivisions therefrom belonging to the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> plaintiffs.**

**d) Costs of the suit to the Plaintiffs.**

**DATED AT KISUMU THIS 18<sup>th</sup> DAY OF MARCH., 2021**

**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 15<sup>th</sup> March 2020.**

**ANTONY OMBWAYO**

**JUDGE**