



**Manyala v Obura & 2 others (Environment & Land Case 56 of 2020)  
[2023] KEELC 21264 (KLR) (2 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21264 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND CASE 56 OF 2020  
E ASATI, J  
NOVEMBER 2, 2023  
IN THE MATTER OF THE REGISTERED LAND ACT CAP 300 (REPEALED)  
AND  
IN THE MATTER OF LAND REGISTRATION ACT, 2012  
AND  
IN THE MATTER OF SECTIONS 7, 17 & 38 OF  
THE LIMITATION OF ACTIONS ACT CAP 22  
AND  
IN THE MATTER OF LAND PARCEL NUMBER: KISUMU/DAGO/1024  
NOW SUBDIVIDED INTO KISUMU/DAGO/4424 AND 4425 RESPECTIVELY  
AND IN THE MATTER OF ADVERSE POSSESSION OF LAND  
PARCEL NUMBER KUSUMU/DAGO/1024 NOW SUBDIVIDED  
INTO KISUMU/DAGO/4424 AND 4425 RESPECTIVELY  
AND  
IN THE MATTER OF GRACE AUMA MANYALA  
IN THE MATTER OF ORDER 37 OF THE CIVIL PROCEDURE RULES**

**BETWEEN**

**GRACE AUMA MANYALA ..... APPLICANT**

**AND**

**ALEX OMONDI OBURA ..... 1<sup>ST</sup> RESPONDENT**

**EDZINZI MBONE ..... 2<sup>ND</sup> RESPONDENT**

**ERICK JOSEPH OCHOLA ..... 3<sup>RD</sup> RESPONDENT**



## JUDGMENT

### Introduction

1. Vide the Originating Summons dated 7<sup>th</sup> August 2020, Grace Auma Manyala the applicant herein who claims land parcel numbers Kisumu/Dago/4424 measuring 0.0.90 Ha. and Kisumu/Dago/4425 measuring 0.56Ha being the resultant sub-divisions of Kisumu/Dago/1024 by adverse possession and trust presented the following questions for the court's determination: -
  - a. Whether the applicant herein is entitled to land parcel number Kisumu/Dago/4424 measuring approximately 0.0.90 Ha. and Kisumu/Dago/4425 measuring approximately 0.56 Ha. being the resultant division of Kisumu/Dago/1024 measuring approximately 0.48 Ha or thereabout, by virtue of adverse possession and trust.
  - b. Whether the applicant should be registered as the proprietor of land parcel numbers Kisumu/Dago/4424 measuring 0.0.90 Ha. and Kisumu/Dago/4424 measuring approximately 0.56Ha being the resultant sub-division of Kisumu/Dago/1024 measuring approximately 0.48 Ha or thereabout.
  - c. Whether the registration of the Respondents as the sole proprietor of land parcel numbers Kisumu/Dago/4424 measuring approximately 0.0.90Ha and Kisumu/Dago/4425 measuring 0.56 Ha being the resultant sub-divisions of Kisumu/Dago/1024 measuring approximately 0.48 Ha or thereabout should be cancelled and the Respondent transfer the said land(s) to the applicant.
  - d. Whether the transfer and sub- division of the said land parcel number Kisumu/Dago/1024 measuring 0.48Ha. now sub-divided into Kisumu/Dago/4424 measuring approximately 0.0.90Ha and Kisumu/Dago/4435 measuring approximately 0.56 Ha by the Respondents is null and void for reasons set out in the Supporting Affidavit and other reasons to be adduced at the hearing.
2. The applicant sought for orders of: -
  - a. A declaration that the applicant is entitled to land parcel numbers Kisumu/Dago/4424 measuring approximately 0.0.90 Ha and Kisumu/Dago/4425 measuring approximately 0.56 Ha being the resultant sub-divisions of Kisumu/Dago/1024 measuring approximately 0.48 Ha or thereabout by virtue of adverse possession.
  - b. A declaration that upon expiry of 12 years the Respondents hold the said land Kisumu/Dago/4424 measuring approximately 0.0.90 Ha. and Kisumu/Dago/4425 measuring 0.56 Ha in trust for the Applicant
  - c. A declaration that upon expiry of 12 years the Respondent interest in land parcel number Kisumu/Dago/1024 measuring 0.48 Ha now sub-divided into Kisumu/Dago/4425 measuring approximately 0.0.90Ha and Kisumu/Dago/4425 measuring 0.56 Ha got extinct.
  - d. A declaration that the Respondent do transfer the land parcel numbers Kisumu/Dago/4424 measuring approximately 0.0.90 Ha. and Kisumu/Dago/4425 measuring approximately 0.56 Ha being resultant sub-division of Kisumu/Dago/1024 measuring 0.48 Ha or thereabout and/ or in default the Executive Officer of this court to execute all the necessary documents to effect the transfer.



- e. A declaration that the registration of the Respondents as the proprietors of land parcel number Kisumu/Dago/1024 measuring approximately 0.48 Ha now sub-divided into Kisumu/Dago/4424 measuring approximately 0.0.90 Ha and Kisumu/Dago/4425 measuring approximately 0.56 Ha be cancelled.
  - f. An order under section 38 of the *Limitation of Actions Act* Cap 22 Laws of Kenya, that the applicant be registered as the proprietor of Land Parcel Numbers Kisumu/Dago/4424 measuring approximately 0.0.90Ha and Kisumu/Dago/4425 measuring approximately 0.56 Ha. being resultant sub-divisions of Kisumu/Dago/1024 measuring approximately 0.48 Ha. or thereabout instead of the Respondents.
  - g. An order for costs.
3. The Originating Summons was supported by the contents of the Supporting Affidavit sworn by the Applicant on 7<sup>th</sup> August 2020 and the annexures thereto and the supplementary Affidavit sworn by the applicant on 24<sup>th</sup> April, 2021 and the annexures thereto.
  4. In reply to the Originating Summons, the Respondents filed Replying Affidavit sworn on 18<sup>th</sup> February 2021 by Edzinzi Mbore, the Respondent and annexures thereto, Replying Affidavit by Naftal Mbala Manyala sworn on 18<sup>th</sup> February 2021 and the annexure thereto.
  5. Directions were taken under O. 37 CPR on the Originating Summons on 23<sup>rd</sup> March 2023 inter alia that the suit be disposed of by way of viva voce evidence.

#### **The Plaintiff/Applicant's case**

6. The Plaintiff testified as PW1. She adopted the contents of her earlier filed witness statement dated 7<sup>th</sup> August 2020 as her evidence in chief. She had recorded in her witness statement that she is the widow to Manyala Obura deceased who is a brother to one John Obua Obura the husband to the 2<sup>nd</sup> Respondent and father to the 1<sup>st</sup> Respondent. That her husband Manyala Obura deceased died on 9<sup>th</sup> March 2018 leaving her and their 2 sons on land parcel Number Kisumu/AGO/1024 measuring approximately 0.48 Ha sub-divided into Kisumu/Dago/4424 measuring 0.09h Ha and 4425 measuring approximately 0.56 Ha respectively (herein collectively called the suit lands) That ever since she got married to her deceased husband in 1969, she has always lived on the suit land on which she cultivates and plants various types of crops including maize, beans , vegetables and trees.
7. That the suit lands were originally owned by her late husband but registered in the name of his eldest brother by the name of Dixon Obuta also now deceased; including other parcels in trust for the beneficiaries after adjudication process was conducted. That later land parcel Number Kisumu/Dago/1024 where the plaintiff lived with her husband was after the death of Nixon Obura transferred to the plaintiff's youngest brother known as John Obura Obura secretly and illegally. That the dependents of John Obura Obura did succession to his estate with the assistance of the 3<sup>rd</sup> Respondent and sub-divided parcel No. Kisumu/Dago/1024 and transferred resultant parcel No. Kisumu/Dago/4425 to the 3<sup>rd</sup> Respondent while the plaintiff was still staying on it.
8. That her husband who was a bona fide beneficiary of the estate of Ibrahim Obuta Okongo died on 9/3/2018 and was buried on the suit lands.
9. That John Obur Aobura failed to disclose relevant material facts to the Plaintiff including the fraudulent transfer of land parcel Kisumu/Dago/1024 and the sub-division thereof.



10. That she has lived on the suit lands since the year 1969 built her homestead thereon, cultivates, vegetables, planted trees and lived peacefully. continuously and uninterrupted and paid rent to none for living on the suit lands. That by virtue of this, the Respondents' titles to and right to inherit the suit lands has been extinguished by operation of law and that they are now holding title in trust for her and that the said parcels should now be registered in her name by virtue of her continued, peaceful exclusive and uninterrupted occupation thereof for a period totaling more than 12 years and cumulatively more than 53 years since 1969 to date.
11. In addition, the plaintiff produced exhibits. These were the documents attached to her witness statement namely copy of her national Identity Card No. 31850455, permit for burial for Manyala Obura, Green Card for Kisumu/Dago/1024 and certificate of death for Dickson Okong'o Obura.
12. On Cross examination she stated that she was claiming land parcel No. Kisumu/Dago/1024 and that she was not aware that the suit land had been sub-divided. She denied participating in the sale of part of the suit land or receiving proceeds of the sale.

### **The Defence Case**

13. The Evidence adduced by the defence comprised of the testimonies of the 2<sup>nd</sup> Defendant, the 3<sup>rd</sup> Defendant and one Naftal Mbala Obura and the exhibits that they produced.
14. DW1 was the 2<sup>nd</sup> defendant. She adopted the averments contained in her Replying Affidavit Sworn on 18/2/2021 as her evidence in chief. She had deposed in the said Affidavit that she is the widow of John Obura deceased who died on 13/10/2012 and left her behind with two children namely Evaline Adhiambo Obura and Alex Omondi Obura. That the original owner of land parcel No. Kisumu/Dago/1024 was Ibrahim Obura Okong'o that Dickson Okong'o held the land in trust for all his five (5) brothers including the plaintiff's husband. That before Dickson Okong'o Obura died, by consent of all the brothers, the said land was transferred to John Obura to hold in trust for them. That until his death, John Obura was the custodian of all the documents. That all the 4 brothers bought land elsewhere and settled there except Manyala Obura the plaintiff's husband and Naftal Mbala Obura who established their homes on the suit land.
15. That the suit land No. Kisumu/Dago/1024 was an ancestral land and could not be enough to be sub-divided and shared out to all the beneficiaries and so they agreed to sell part of it that was not occupied and share the proceeds. That together with the plaintiff's husband and Naftal Obura, they looked for a buyer and found the 3<sup>rd</sup> Defendant who bought the portions and the proceeds were shared out. That the plaintiff received her share of the proceeds of the sale. That they all agreed to do succession and transfer the land to the 1<sup>st</sup> and 2<sup>nd</sup> defendants and later transfer the sold portion to the 3<sup>rd</sup> Defendant and the remaining portion to Naftal Mbala and Manyala Obura. That after succession, they sub-divided the land to Kisumu/Dago/ 4424 and 4425 and transferred No. 4425 to the buyer the 3<sup>rd</sup> Defendant. That the plaintiff lives on parcel No. 4424 while the 3<sup>rd</sup> Respondent lives on parcel No. 4425.
16. That the orders sought are incapable of being granted as No.1024 no longer exists. That she has no problem transferring No, 4424 to the plaintiff and Naftal Mbala Obura.
17. On cross –examination she testified that her father in law only had one piece of land which is the suit land parcel No. Kisumu/Dago/1024 and that when she got married in 1981, they all lived on the suit land until later when she moved to settle elsewhere on land bought by her husband. That the transfer of land to the 3<sup>rd</sup> Defendant took place when the plaintiff's husband was still alive. That they have no interest in No. Kisumu/Dago/4424 which should be sub-divided between the plaintiff and Naftal. She



produced title deed for Kisumu/Dago/1024 and, certificates of official search for Kisumu/Dago/1024 and 4424, sale agreement, photograph and green card for Kisumu/Dago/1014 as exhibits.

18. PW2 was the 3<sup>rd</sup> defendant. He adopted the contents of his Replying Affidavit as his evidence and stated that he only bought a portion of the suit land. That although there was a homestead on the land when he was buying it he was buying the portion that was vacant. That he went to the plaintiff's house and talked to her before buying the land. That the agreement was reached in the plaintiff's house and later recorded in the Advocate's office.
19. DW3 was Naftal Mbala Obura. He testified that he got Ksh 250,000/= from the land sale proceeds and that is what each of his brothers got including the plaintiff's family.

### **Submissions**

20. It was submitted on behalf of the plaintiff that the suit land was transferred from the name of Dickson Okongo Obura to the name of John Obura 3 years after the death of Dickson Obura. That succession had not been done. That the green card indicates that it was a transfer that hence John Obura did not legally obtain title to the suit land. That John Obura did not comply with Section 2 and 82 (b) (ii) of the Law of Succession Act. That the land sale agreement dated 4<sup>th</sup> May 2016 is an incomplete document with no signature on it. That this was contrary to the provisions of Section 3(3) of the Law of Contract Act and Section 44 of the Land Registration Act.
21. That there were inconsistencies in the documents produced by the Respondents as exhibits and lack of proof of ownership by the Respondents. Counsel relied on the case of Diani Management Limited Vs County Government of Mombasa to submit that title obtained fraudulently should be cancelled.

### **Issues for Determination**

22. The issues for determination herein are the questions set out in the Originating Summons.

### **Analysis and determination**

23. The first question is whether the applicant is entitled to the suit land by virtue of adverse possession and trust.

I have taken into account the pleadings and the evidence adduced, Firstly, entry of the plaintiff onto the suit land was on the basis of being a family member. She testified that when she got married, she was brought to the suit land which originally belonged to her father in law on Ibrahim Obura. There is no evidence that she occupied the entire of the suit land. She did not deny that DW3 Naftal Obura also has his home on the suit land. DW1 (the 2<sup>nd</sup> defendant) testified that the suit land was all the land that their father in law owned and that all of the family members made up of six brothers lived on the suit land until later when some of them moved out to land they had bought elsewhere leaving the plaintiff's husband and Naftal Obura (DW3) on the land. This evidence was not controverted by the plaintiff. From this evidence I do not find that the ingredients of adverse possession were proved.

Moreover, the plaintiff pleaded, testified and submitted that the suit land was registered in the name of John Obura fraudulently hence the Defendants could not have gotten a good title. It is trite law that one cannot claim adverse possession on a title that she/he claims was obtained by fraud.

24. On trust, it was agreed that the suit land was registered in the name of Dickson Okongo Obura, the eldest of the brothers in trust. The point of departure was that while the defendant's case was that the land was so registered in trust for all the brothers, the plaintiff claimed that it so registered was in trust for her only. However, she did not challenge the presence evidence that DW.3 has his home on



the land and is entitled to a share thereof. I find that indeed the 1<sup>st</sup> and 2<sup>nd</sup> Defendant hold land parcel NO.Kisumu/Dago/4424 in trust for the plaintiff and Naftal Obura (DW.3).

25. The second question is whether the plaintiff should be registered as owner of the suit land. Though the plaintiff denied in her testimony in court that she did not know that the suit land parcel No, Kisumu/Dago/ 1024 had been sub-divided to create the resultant parcels, it is clear from her pleadings and Affidavit that she was aware. And being so aware, then she was also aware that land parcel No., Kisumu/Dago/1024 no longer existed. Secondly having found that adverse possession of the original parcel No. Kisumu/Dago/1024 has not been proved, I will have no basis to order the same parcel of land to be registered in her name. However, on the basis of the trust and the evidence of the defence that they are ready to transfer the resultant parcel No. Kisumu/Dago/4424 to the plaintiff and Naftal, this court finds that the plaintiff is entitled to be registered as owner of her portion of L.R No. Kisumu/Dago/4424 as occupied on the ground while the other portion goes to Nafatl Obura DW3.

26. The next question is whether the registration of the Respondents as proprietors of the suit land should be cancelled and the suit land be transferred to the plaintiff.

On the basis of the findings already arrived at herein, land parcel No. 4424 should be transferred to the plaintiff and Naftal Obura as occupied on the ground. I note that the original parcel number Kisumu/Dago/1024 measured 0.48 hectares. However, the resultant parcel numbers Kisumu/Dago/4424 and 4425 measure 0.9 Ha. and 0.56 Ha respectively totaling to 1.46Ha. There no doubt is an error on the sizes indicated. The parties may wish to ascertain the current acreage of each of the lands and particularly parcel No. Kisumu/Dago/4424 which the 1<sup>st</sup> and 2<sup>nd</sup> Defendants concede the Plaintiff is entitled to.

27. On costs, although costs ought to follow the event, for the reasons that the parties herein are close family members, it is in the best interest of justice that each party bear own costs.

28. I therefore find that the plaintiff has partly proved her case on a balance of probabilities and enter Judgment in her favour for: -

- a. A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> defendants hold that portion occupied by the plaintiff of land parcel No. Kisumu/Dago/4424 in trust for the plaintiff.
- b. An order for transfer by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants of the portion occupied by the Plaintiff of LR NO.Kisumu/Dago/4424 to the plaintiff. In default the Deputy Registrar of the court to sign the requisite documents so as to effect the transfer.
- c. Each party to bear own costs.

Orders accordingly.

**JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 2<sup>ND</sup> DAY OF NOVEMBER, 2023 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

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**E. ASATI,**

**JUDGE.**

**In the presence of:**

Maureen: Court Assistant.

Achung'a for the Plaintiff.



Sala for the Defendants.

