



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC CASE NO. 743 OF 2015

(FORMERLY HCCC NO. 199 OF 2011)

PRISKA ANYANGO OJUANG'1ST PLAINTIFF

JANE MILDRED OJUANG'2ND PLAINTIFF

VERSUS

HENRY OJWANG' NYABENDE.....DEFENDANT

JUDGEMENT

1. The Plaintiffs sued the Defendant vide the plaint dated 8th November 2011 seeking for the following prayers;

a. "A declaration that the decision by the District Land Disputes Tribunal Case No. SYA/521/98 which was later adopted in Siaya SRM Civil Suit No. 160 of 1999 (HENRY OJWANG' NYABENDE – vs- JASON OJWANG AUDI) was made without jurisdiction and was therefore unlawful and null and void, and the order issued in Siaya SRMCC No. 160 of 1999 is therefore similarly null and void.

b. General damages for trespass to land.

c. A permanent order of injunction restraining the Defendant by himself or his family or servants, or agents, or proxies or any of them from carrying out or effecting any survey or sub-division of land parcel No. SIAYA/SOUTH GEM/GOMBE/375, and further from entering, occupying, remaining on, cultivating, developing or any other way using or interfering with the title to the said land parcel No. SIAYA/SOUTH GEM/GOMBE/375 or any portion thereof or doing anything else which may restrict, curtail, diminish or interfere with the Plaintiffs' quiet possession, use and enjoyment of the said parcel of land.

d. Costs of this suit and interest thereon at court rates."

The Plaintiffs aver that they are personal representatives and joint administrators of the estate of the late Jashon Ojuang' Audi who was the registered proprietor of Siaya/South Gem/Gombe/375, the suit land, measuring about 19.5 hectares. That in the year 1998, the Defendant unlawfully claimed ownership of a portion of the suit land and without colour of right or authority encroached upon the said portion and has been cultivating crops therein despite the Plaintiffs' protest. That he Defendant, in furtherance of his unlawful claim over the suit land, filed a dispute being Siaya Land Disputes Tribunal Case No. 521 of 1998 whose award was adopted in Siaya S.R.M C.C. No. 160 of 1999, to the effect that the suit land be subdivided into two and the portion of 8 hectares be registered with Defendant. That the decision was in excess of the Tribunal's jurisdiction and therefore unlawful, null and void and hence this suit.

2. The Defendant opposed the Plaintiffs' claim through his statement of defence dated the 16th November 2011. That the Defendant averred that the suit land was ancestral land that was under the joint occupation and possession of the families of Jashon Ojuang' Audi and his, each being entitled to 11 hectares. That the families lived peacefully and during Land Adjudication, Jashon Ojuang Audi persuaded the Defendant's father to allow the land to be registered in his name and they would subdivide it later for each to get his portion. That the said Jashon Ojuang Audi, who was a Land Adjudication Committee Member later declined to have the land apportioned as earlier agreed and was registered as the sole proprietor of the suit land fraudulently. The Defendant set out the particulars of fraud attributed to Jashon Ojuang Audi at paragraph 8 of the defence as follows;

a. "Deceiving the defendants' father that he would sub-divide the suit property so that the defendant would not obtain a title deed for his portion.

b. Having the suit property registered in his sole name when he was well aware of the defendants' interest in the same.

c. Misusing his position as a member of the Land Adjudication Committee.”

He reiterated that his claim of 8 hectares of the suit land was lawful as it rightfully belongs to his family and admitted filing the Land Dispute claim. That he alleged in the alternative that Jashon Ojuang Audi had breached the trust and a constructive trust should be inferred against him and in favour of the Defendant.

3. That the Defendant had added a counterclaim against the Plaintiffs in his statement of defence. That the counterclaim was however struck out vide the ruling of 21st February 2018, and his subsequent motion for stay dated 8th September 2018 was rejected through the ruling of 3rd April 2019, after which the court fixed the suit for Judgment as parties had already filed and exchanged written submissions following their consent of 17th September 2014.

4. That following the consent dated 17th September 2014 that the suit be dealt with through written submissions, the learned Counsel for the Plaintiffs and Defendant filed their written submissions dated 23rd January 2015 and 27th May 2015 respectively, which are summarized as follows;

A: PLAINTIFFS' SUBMISSIONS:

a. That the Land Disputes Tribunal award adopted by the lower court, and the surveyor's report were made without jurisdiction and therefore unlawful, null and void. The learned Counsel cited the Court of Appeal decision in Asman Maloba Wepukhulu & Wycliffe Barasa vs Francis Wakwabubi Biketi, Kisumu C.A, C.A. NO. 157 of 2001, where it was held that the tribunal has no jurisdiction to cancel the title and order that the land be subdivided among the sons of the deceased. The Counsel also cited the decision in Jotham Amunavi vs The Chairman Sabatia Division Land Disputes Tribunal & Amos Kenyani Amunavi Kisumu C.A. C.A No. 256 of 2002, where the Court held that *“the proceedings before the tribunal related to both title to land and to beneficial interest in the suit land. Such a dispute is not in our view, within the provisions of Sections 3 (1) of the Land Disputes Tribunal Act. By Section 159 of the RLA, such a dispute can only be tried by the High Court or by the Resident Magistrate's Court in cases where such latter court has jurisdiction.”* The Counsel also cited the case of Stephen Otieno Oyor vs The Hon. Attorney General & Another C.A. C.A No. 175 of 2012, where the court held that the effect of the tribunal's decision was to interfere with the title by excising a portion of the title holders land and giving it to another. The court held that the tribunal lacked jurisdiction to make such an order which was plainly illegal.

b. That the evidence on record did not support the inference of a constructive trust that has been pleaded. That even customary trust that has not been pleaded has not been established as there was no relationship between the two families. That the Plaintiff deposition at paragraph 5 of their Replying affidavit filed on the 21st November 2011 that the Defendant's original home is Alego where his father came from, and that he and his family are only settlers in Gem, has not been rebutted by the Defendant. That the late Jashon Ojuang Audi became the sole registered proprietor of the suit land on the 7th June 1973 after completion of the adjudication process without the Defendant and his father lodging any objections under Section 29 of the Land Adjudication Act.

c. That the Surveyor's report established that the Defendant was occupying only 2.05 hectares yet he was claiming 8 hectares. That the fact that the Defendant was confirmed to be occupying 2.05 hectares of the suit land confirms that he has trespassed thereon and should be declared a trespasser and eviction order issued.

B: DEFENDANT'S SUBMISSIONS:

a. That the Plaintiffs' suit is statutory time barred as it was filed after 38 years which is outside the twelve (12) years window.

b. That the Plaintiffs are not the personal representatives and joint administrators of the estate of Jashon Ojuang Audi for reasons that their Grant had not been confirmed. That the suit property had not been included as one of the properties of the estate in Kisumu Succ. Cause No. 681 of 2007, and therefore the Plaintiffs are without locus standi.

c. That as the two families had been in occupation of the suit land for decades, then it was ancestral land.

d. That the suit land was held in common and the tribunal had jurisdiction to order its subdivision, and thereafter the resultant parcels be registered with the various parties.

e. That the Defendant was entitled to be registered as proprietor under adverse possession having been in occupation continuously for decades.

5. The following are the issues for the Court's determinations;

a. Whether the Plaintiffs are with capacity in this suit.

b. Whether the award/decision of Siaya Land Disputes Tribunal was made without Jurisdiction.

c. Whether the Plaintiffs' suit is time barred.

d. Whether the Defendant has acquired title to the suit land or a defined portion thereof through adverse possession, or is a trespasser.

e. Who pays the costs of the suit.

6. The Court has carefully considered the pleadings filed by both sides, and the submissions by the two learned Counsel and come to the following conclusions;

a. That the Plaintiffs had filed their list of documents dated 8th November 2011 with the plaintiff. That document number 3 is the Grant of Letters of Administration in Kisumu H.C. SUC Cause No. 681 of 2007 issued on the 3rd March 2008, that confirms that they were appointed administrators of the estate of the late Jason Ojuang Audi on the 24th September 2007, by virtue of being the deceased personal representatives. That there is no evidence availed to confirm whether the deceased estate has since been identified and distributed as no certificate of confirmation of the grant, to which the schedule of distribution would ordinarily be attached, has been availed. That notwithstanding, the grant clothes the Plaintiffs with power **“to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative”**, under **Section 82 of Law of Succession Act Chapter 10 of Laws of Kenya**. The Defendant’s averment at paragraph 3 of the defence that the Plaintiffs are not the personal representatives and joint administrators of estate of the late Jason Ojuang Audi, and his learned Counsel’s submissions on that same issue, is not in agreement with the documentary evidence in the form of the grant availed by the Plaintiff. That as no evidence was tendered to support the said claim, the court takes them as mere unsubstantiated allegation. That the Defendant’s claim that the Plaintiffs are without locus standi therefore fails.

b. That both the Plaintiffs and the Defendant are in agreement on the content of the award made by the Siaya Land Disputes Tribunal in Case No. 521 of 1998. That the court has confirmed from the proceedings availed that the award was to the effect that 8 hectares be carved out of suit land and be registered with the claimant, who is the Defendant, and the whole family of Martin Nyabende. That further the remaining portion was to be retained in the name of the objector, who was Jason Ojuang Audi, deceased. That award was adopted by the lower Court in Siaya S.R.M C.C. No. 160 of 1999 as it was obligated under **Section 7 (2) of the Land Disputes Tribunal Act (Repealed)** to do. That as correctly submitted by the Counsel for the Plaintiffs, that decision or award of the tribunal was in view of the three cited decision above, beyond the tribunal’s jurisdiction as its execution meant taking away 8 hectares from the objector, now represented by the Plaintiffs, and conferring the interest thereof upon the Defendant and his family. That the tribunal decision having been made without Jurisdiction, was unlawful, illegal, null and void **ab initio**. That the lower court order adopting the null and void award of the tribunal was itself a nullity.

c. That the Plaintiffs’ plaint at paragraph 5 gives the year the Defendant started claiming a portion of the suit land by cultivating and growing crops on it to be 1998. That by the time this suit was filed in 2011 only about four (4) years had lapsed and in the absence of other evidence to the contrary, the Plaintiffs’ suit was filed years before the twelve (12) years window for recovery of land provided by **Section 7 of the Limitation of Actions Act, Chapter 22 of Laws of Kenya**.

d. That the Defendant did not raise or plead adverse possession in his pleadings and the same cannot be commenced from the bar through the written submissions filed by his learned Counsel. That as the Defendant, and his father before him, had not raised any objection in terms of **Section 29 of the Land Adjudication Act Chapter 295 of Laws of Kenya**, during the adjudication process, and further that the Defendant has not availed any evidence to challenge the Plaintiffs position that the two families are not related, then the court finds no evidence has been presented upon which constructive trust in favour of the defendant could be inferred. That the court is obligated by **Section 26 (1) of the Land Registration Act No. 3 of 2012**, to take the person named in the certificate of title issued by the Land Registrar as proprietor to be the absolute and indefeasible owner subject to the listed encumbrances thereon, until such a title is successfully impugned as provided for under **Subsection (2)**. That further and noting that among the documents in the list of Plaintiffs’ documents is the certificate of official search dated 7th December 2011, that confirms that the South Gem/Gombe/375, which the court takes to be the suit land is registered with Jason Ojuang Audi since 7th June 1973, who is represented in these proceedings by the Plaintiffs, then the court finds that the Defendant’s entry onto the portion of the suit land that is under his occupation, measuring about 2.05 hectares, amounts to trespass as he had no authority or consent of the Plaintiffs or the late Jason Ojuang Audi. The Plaintiffs have therefore made a case against the Defendant to be permanently restrained.

e. That the Plaintiffs did not present any evidence that would have guided the court in determining what loss or damages they may have suffered due to the Defendant’s trespassing onto the land. That in view of the length of the time taken since the filing of the dispute before the tribunal to today, and hoping that the parties will get a way of having a better relationships in the future, the court will not award any general damages.

f. That as the Plaintiffs are generally successful in their claim, they are entitled to costs of the suit pursuant to **Section 27 of the Civil Procedure Act, Chapter 21 of Laws of Kenya**.

7. That in view of the findings above, the court finds that the Plaintiffs have proved their case on a balance of probability against the Defendant. That the court therefore enters judgment in their favour, and against the Defendant, in terms of prayer (a), (c) and (d) of their plaint dated 8th November 2011.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 3RD DAY OF JULY 2019

In the presence of:

Plaintiff Absent

Defendants Absent

Counsel Mr. Sala for Ragot for Defendants

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE