



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT OF KENYA**

**AT MIGORI**

**ELC CASE NO. 434 OF 2017**

**(Formerly Kisii ELC case No. 258 of 2013)**

**RISPA ALUDO OCHIENG.....PLAINTIFF**

**VERSUS**

**JOSHUA OMONDI MAGERE.....1<sup>ST</sup> DEFENDANT**

**ELISHA OMONDI.....2<sup>ND</sup> DEFENDANT**

**ENOS OTIENO OMONDI ALIAS MAGERE.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. By a plaint dated 17<sup>th</sup> May 2013 the plaintiff namely RISPA ALUDO OCHIENG has sued the three (3) defendants jointly and severally for two (2) substantive orders;-

**i. An order evicting the defendants jointly and severally from land parcel No. Suma West/Wasweta II/715. (Hereinafter referred to as the suit land)**

**ii. Cost of the suit.**

2. The plaintiff is represented by learned counsel, Mr. J.O. Soire of J.O. Soire and company Advocates. The defendants are represented by M/s Oguttu, Ochwangi, Ochwal and company Advocates.

3. The gist of the plaintiff's case as per the plaint is that the plaintiff is the registered owner of the suit land unto which the defendants have trespassed and constructed structures thereon. That the defendants have also cultivated and subdivided the suit land among themselves without the consent of the plaintiff thus provoking the instant suit.

4. In their statement of defence and counter claim dated 8<sup>th</sup> July 2013 the defendant denied the plaintiff's claim. The defendants stated, inter alia, that the suit land was acquired by the 1<sup>st</sup> defendant who then caused the same to be registered in the name of his eldest son Ochieng Omondi (deceased 1), the husband of the plaintiff, to hold the suit land on trust for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, together with their mother, Margaret Mita Omondi (deceased 2). That the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants have established a homestead on the suit land where the 2<sup>nd</sup> and 3<sup>rd</sup> defendants have resided since birth.

5. The defendants also stated that the registration of the suit land in the name of the deceased 1, Ochieng Omondi and subsequent registration of the same in the name of the plaintiff through transmission was founded and or based on trust. They pleaded particulars of trust thereof. The defendants have sought the dismissal of this suit with costs and that Judgment be entered in favour of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants/counter claimers for:-

**i. Declaration that the plaintiff holds LR No. Suna West/Wasweta II/715, on trust for herself (plaintiff), the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, together with their mother, one Margaret Mita Omondi, respectively.**

**ii. Cancellation of the transfer and registration of LR No. Suna West/Wasweta II/715 in the names of the plaintiff and rectification of the register to reflect the joint names of plaintiff, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and their mother, one Margaret Mita Omondi respectively.**

iii. **An order directing the plaintiff to sub-divide LR No. Suna West/Wasweta II/715, into four (4) equal portions in favour of the plaintiff, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, together with their mother, one Margaret Mita Omondi, respectively and in default the Deputy Registrar of this Honourable Court do sign the relevant documents to facilitate the sub-division of LR No. Suna West/Wasweta II/715, into four (4) equal portion and subsequent transfer in favour of the respective beneficiaries.**

iv. **Permanent injunction restraining the plaintiff either by herself, agents, servants and/or anyone claiming under the plaintiff, from alienating, selling, transferring, interfering with the defendant's occupation and /or otherwise encumbering the title in respect of LR No. Suna West/ Wasweta II/715, whatsoever and/or howsoever.**

v. **Costs of the cross suit be borne by the plaintiff.**

vi. **Such further and/or other relief as the Honourable court may deem fit and expedient.**

6. A reply to defence and defence to counterclaim is dated 20<sup>th</sup> October 2013. The plaintiff denied the defendants' counterclaim therein.

7. On 21<sup>st</sup> November 2013, counsel for the respective parties entered a consent inter alia, that:-

a. LR NOs. Suna West/ Wasweta II/3172, 3173 and 3174 be and are hereby revoked and the land comprised in the titles do revert to the original title namely; LR No. Suna West/Wasweta 11/715.

b. An order of inhibition be and is hereby issued with respect to LR NO. Suna West/Wasweta II/ 2715 inhibiting any dealings with the same pending the hearing and determination of this suit and the counter claim.

8. Initially this suit was partly heard by John Mutungi J, at Kisii Environment and Land Court where the plaintiff (PW1) testified and made reference to a certificate of official search dated 3<sup>rd</sup> February 2014 (PExhibit 1). The suit was then transferred to this court on 16<sup>th</sup> March 2017.

9. On 24<sup>th</sup> July, 2017 this court directed that hearing of the suit proceed from where it had reached. Thereafter, Richard Omoi Magere (PW2) a step brother of the 1<sup>st</sup> defendant and Joseph Kawidhi Oreje (PW3) testified in favour of the plaintiff's case.

10. On his part, the 2<sup>nd</sup> defendant (DW1) testified that he has lived on the suit land since his birth in the year 1956. He relied on the following documents;-

a. **A copy of the suit land register/green card (DExhibit 1).**

b. **A copy of official search dated 28/9/2012 (DExhibit 2).**

c. **Map of the suit land (DExhibit 3).**

d. **Photographs of defendants' houses on suit land (DExhibit 4).**

11. The 1<sup>st</sup> defendant (DW2) relied on his statement dated 8<sup>th</sup> July 2013 as his evidence in Chief. He also relied on a copy of minutes of the elders meeting held on 12<sup>th</sup> November 2015 to resolve the dispute as shown on the defendants' list of documents dated 9<sup>th</sup> March 2016 (DExhibit 5).

12. Learned counsel for the plaintiff filed submissions dated 15<sup>th</sup> March 2019 wherein he referred to the orders sought in the plaint and in the counterclaim and summarized the evidence of the plaintiff and the defendants. He framed and analysed the following issues for determination:-

**1. Whether or not the plaintiff is the registered owner o the suit land.**

**2. Whether or not the plaintiff holds the suit land in trust for the defendants.**

13. Counsel submitted that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants' counterclaim cannot stand. He relied on two (2) authorities **namely Obiero –vs- Opiyo and others (1973) EA 227 and Esivoyo –v- Esiroyo (1973) EA 388** to the effect that customary law land rights are extinguished upon registration of land under **Section 28 of the Repealed Registered Land Act (Cap 300).**

14. Learned counsel for the defendants filed submissions dated 15<sup>th</sup> March 2019, wherein counsel gave background of the case, framed and analysed three (3) issues for determination namely:-

**1. Whether the plaintiff has proved his case on balance of probabilities.**

**2. Whether the defendants have proved their case on balance of probabilities.**

**3. Whether the plaintiff is entitled to relief prayed for in the suit?**

15. Counsel further submitted, inter alia, that the claim of trust over the suit land by the first registered owner and subsequently by the 2<sup>nd</sup> registered owner has been proved. Counsel relied upon authorities which include;

**Patrick S. K. Kimiti –v- John Ngugi Gachau and another (2015) eKLR and Samson Ngugi Philip Kangori –v- Peter Njuguna Samson (2018) eKLR.**

16. I have anxiously considered the plaint, the counterclaim, the testimonies of PW1, PW2, PW3, DW1 and DW2. I also note a statement of agreed issues (defendants) dated 4<sup>th</sup> February 2014 and the written submissions of counsel for the respective parties and fully embrace the issues framed therein; see **Great Lakes Transport Company (U) Ltd –vs- Kenya Revenue Authority (2009) KLR 720** generally on issues for determination in a suit.

17. On the issue of registration of the suit land, I take into account paragraph 5 of the plaint and paragraph 3 of the defence and counter claim that the plaintiff is the registered owner and or proprietor of the suit land. PE Exhibits 1 and 2 confirm that PW1 was registered owner of the suit land on 22<sup>nd</sup> August 2012 and title issued to her on 28/8/2012 under section 30 (1) of the Registration of Land Act 2016 (2012); see also the case of **Wainaina –v- Murai and others (1976-80) 1 KLR 283 at 289 and 290.**

18. It was the testimony of PW1 that following her husband's death, she did succession and she is the registered owner of the land. PW3, a neighbour to PW1 told the court that PW1 owns the suit land. DW1 and DW 2 stated that the suit land was initially registered in the name of deceased 1. Thus, it is not in dispute that PW1 is the registered owner of the suit land.

19. Regarding the issue of trust, it was the evidence of PW1 that she acquired the suit land from deceased 1 through transmission. I am aware of **Section 26 (1) of the Land Registration Act, 2016 (2012)** thereof.

20. PW2 testified that the deceased husband of PW1 obtained the suit land from his late grandfather, Magere. That the 2<sup>nd</sup> and 3<sup>rd</sup> defendants live on the land.

21. According to PW3, deceased 1 was given the suit land by his late grandfather. That PW1, the 2<sup>nd</sup> defendant and 3<sup>rd</sup> defendant live on the suit land.

22. In the words of DW1, the suit land was registered in the name of the deceased 1 in trust for him (DW1) and other family members. It was so confirmed by DW2 who produced DExhibit 5 and stated that:-

**“PW1 owns the suit land on her behalf and others.”**

23. As already noted, PW1 is the proprietor of the suit land. The registration of title to land is a creation of the law and one must look into the considerations surrounding the registration in order to determine whether it was envisaged that a trust should be created as observed in the case of **Mwangi and another –vs- Mwangi (1986) KLR 328.**

24. The rights of a proprietor under **Section 25 of the Land Registration Act, 2016 (2012)** are subject to rights and interest, inter alia, trusts including customary trusts under Section 28 of the said Act. The defendants pleaded the particulars of trust at paragraph 5 of their statement of defence and counterclaim.

25. The defendants have claimed that PW1 holds the suit land in trust for herself, DW 1, DW2 as well as the estate of deceased 2. It is important to note that trust is an equitable remedy which is recognized at **Article 10 2 (b) of the Constitution of Kenya, 2010.** This court is bound by the national values and principles of governance under the said Article.

26. In the case of **Chasei International Investment Corporation and another –vs- Laxman Keshra and others (1978) KLR 143 (1976-80) 1KLR 891**, Madan JA (as he then was) made observation about equity thus:-

**“If the circumstances are such as to raise equity in favour of the plaintiff and extent of the equity is known, and in what way it should be satisfied, the plaintiff is entitled to succeed.....”**

27. In the case of **Macharia Mwangi Maina and 87 others –v- Davidson Mwangi Kagiri (2014) eKLR**, the court of Appeal being reminded and guided by the dicta in **Chase International case (supra)**, held that:-

**“ This Court is a Court of law and a Court of equity; Equity shall suffer no wrong without a remedy; no man shall benefit from his own wrongdoing; and equity detest unjust enrichment. This Court is bound to deliver substantive rather than technical and procedural justice. The relief, orders and directions given in this judgment are aimed at delivery of substantive justice to all parties having legal and equitable interest in the suit property.” (Emphasis added)**

28. It is trite law that the rights and interests previously vested in a group, family or individual under African Customary law are not extinguished upon registration of trust land; see the Supreme Court of Kenya decision in **Isack M'inanga Kiebia –v- Isaya Theuri M'lintari and another (2018) eKLR.**

29. In the present suit, the defendants have established by DExhibit 4 that they live on the suit land. That PW1 holds the land in trust for herself, the 1<sup>st</sup> and 2<sup>nd</sup> defendants and the estate of deceased 2 as revealed in evidence including DExhibit 5.

30. It is the finding of this court that whereas the plaintiff (PW1) is the registered proprietor of the suit land, the same is subject to the rights and interests of the 1<sup>st</sup> and 2<sup>nd</sup> defendants and the estate of deceased 1, under sections **25 and 28 of the Land Registration Act, 2016 (2012)**. Some of the elements that would qualify the 2<sup>nd</sup> and 3<sup>rd</sup> defendants as trustees in respect of the suit land have been satisfied as recognized in **Kiebia case (supra)**. The plaintiff's case fails as it has not been proved the same on a balance of probabilities against the defendants.

31. On the hand, the 1<sup>st</sup> and 2<sup>nd</sup> defendants' counter claim has been proved against the plaintiff on a balance of probability.

32. A fortiori, the entire suit is hereby determined thus:-

**a. The plaintiff's suit by way of a plaint dated 17<sup>th</sup> May 2013 be and is hereby dismissed.**

**b. Judgment be and is hereby entered for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants against the plaintiff in terms of orders (a), (b), (c) and (d) sought in their counterclaim dated 8<sup>th</sup> July 2013.**

**c. By dint of the proviso to Section 27 (1) of the Civil Procedure Act (Cap 21) and the circumstances of this case, each party shall bear his /her own costs.**

**DELIVERED, DATED and SIGNED at MIGORI this 2<sup>nd</sup> day of July 2019.**

**G.M.A. ONGONDO**

**JUDGE**

**In the presence of:**

M/s. W. Ochwal learned counsel for the defendants.

Tom Maurice – Court Assistant.