



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**ELC CASE NO. 476 OF 2015**

**FORMERLY CIVIL CASE NO. 69 FO 2008**

**WILLY MBADI OJULU.....1<sup>ST</sup> PLAINTIFF**

**JANE MARTHA ODONGO.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**MESHACK OGADA OPENJI.....DEFENDANT**

**JUDGEMENT**

1. The Plaintiffs commenced this suit through the plaint dated 2008, seeking for the Defendant to be evicted and permanently enjoined from Land Parcel West Asembo/Nyagoko/2559, the suit land, costs and interests. The Plaintiffs aver that they are the legal and registered owners of the suit land. That the Defendant unlawfully entered onto the said land on or about February 2007, and constructed three houses thereon without their consent or authority.

2. The Plaintiffs' claim is denied by the Defendant through the defence dated the 16<sup>th</sup> September 2008, and filed on the 18<sup>th</sup> September 2008. The Defendant among others denied the plaintiffs' claim and averred that his entry onto the suit land was lawful, as he is the registered and absolute owner of the same. That the Plaintiffs' suit should be dismissed with costs.

3. That the hearing commenced on the 23<sup>rd</sup> January 2013 when Willy Mbadi Ojulu, the 1<sup>st</sup> Plaintiff, testified as PW1. He told the court that the suit land that belonged to his late grandmother was bequeathed to him and the 2<sup>nd</sup> Plaintiff. That they engaged a private surveyor whom they paid Kshs. 50,000/= in 2006 to confirm the boundaries, and have the land transferred to them. That they became the registered proprietors in 2007, but could not remember who signed the transfer forms. That they used to cultivate on the land but stopped after the Defendant encroached onto it and constructed structures thereon. That they did not obtain a grant of letters of administration for the estate of their late grandmother Louise. The 2<sup>nd</sup> Plaintiff testified as PW2 on the 25<sup>th</sup> March 2013. She confirmed that the land belonged to the late Loise Ogolla Opwenji who died in 1996, before being registered in the names of the 1<sup>st</sup> Plaintiff and herself. That they did not obtain a grant of letters of administration before transferring the land to their names. That she knew the late Loise had litigated with the father to the Defendant over the land, and that the matter was decided in favour of the Defendant. That the Defendant had planted trees on the land in 2007. That she is a widow of one of the two late sons of the late Loise. That she lives on a land registered in the name of her late husband, and father to 1<sup>st</sup> Plaintiff. The Plaintiffs called Amalake Nguru Auko who testified as PW3. She told the court that she cultivated on that land from 1972, with the consent of the late Loise, and after her death in 1996, continued farming on it with the Plaintiffs' authority until 2006, when they stopped her after somebody else came and constructed on it. The last witness for the Plaintiffs was Patrick Opiyo, a surveyor, who told the court that in January 2018 he conducted a survey exercise over Siaya/Nyagoko/2559 and prepared a report that was filed with the court on the 18<sup>th</sup> April 2018. That on the land he found five houses that did not belong to the owner of the land.

4. The Defendant testified on the 30<sup>th</sup> January 2019 as DW1. He told the court that West Asembo/Nyagoko/2559 was subdivided from their land West Asembo/Nyagoko/222 without their knowledge. That parcel West Asembo/Nyagoko/222 belonged to his father James Openji and has lived on it since childhood and constructed a house on that portion in 2006. That thereafter the Plaintiffs filed this suit against him. That his father had won a case filed by the late Loise over the land before the Land Committee in 1973. He agreed that the green card he produced as exhibit for parcel 222 did not indicate that the parcel had been subdivided to create parcel 2559.

5. The learned Counsel for the Plaintiffs and the Defendant filed the written submissions dated the 8<sup>th</sup> April 2019 and 11<sup>th</sup> June 2019 respectively. The learned counsel for the Plaintiffs submits that the Plaintiffs have proved their case against the Defendant and their rights and privileges under **Sections 24 and 25 of the Land Registration Act** should be upheld by granting their prayers. The learned Counsel for the Defendant on the other side submitted that the Defendant has been in possession of the suit land since 1996. That he erected a house thereon in December 2006 and by the time this suit was filed in 2008, over twelve (12) years had lapsed. That the Plaintiffs' title to the suit

land had therefore been extinguished by virtue of **Sections 7, 9, 13, 37 and 38 of the Limitation of Actions Act**. That the Plaintiffs' suit being time barred, should be dismissed with costs.

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

- a) **Whether the Plaintiffs registration with the suit land was regularly, lawfully and procedurally acquired.**
- b) **Whether the Defendant occupation of the land was lawful or adverse to the title of the registered proprietor.**
- c) **Whether any of the orders sought should be allowed.**
- d) **Who pays the costs.**

7. The Court has after considering the pleadings by both sides; oral and documentary evidence tendered by PW1, PW2, PW3, PW4 and DW1; the written submissions by both Counsel and the decided cases cited therein, come to the following conclusions;

a) That whereas the Defendant claimed that West Asembo/Nyagoko/2559, the suit land, was unlawfully created from West Asembo/Nyagoko/222 that belonged to his father, the copy of the green card he availed to the court for West Asembo/Nyagoko/222 does not contain any evidence that it has ever been subdivided to create West Asembo/Nyagoko/2559 or any other portion. That the green card shows the land was registered first on the 23<sup>rd</sup> June 1983 in the name of James Openji and there has been no further transaction since then.

b) That the copy of the title deed and certificate of official search of West Asembo/Nyagoko/2559 availed by the Plaintiffs confirms that the land was first registered on the 25<sup>th</sup> April 1983. That on the 13<sup>th</sup> April 2007 it was registered in the names of Willy Mbadi Ojulu and Jane Martha Odongo, the Plaintiffs, under entry No. 6, and title deed issued under entry No. 7. That as the parties did not avail a copy of the said land's register (green card), the court is unable to confirm the persons previously registered with the title before the Plaintiffs.

c) That admissions by the Plaintiffs, when they testified as PW1 and PW2, that they never obtained grant of letters of administration in respect to the estate of Loise Ogolla Opwenji, who had been registered with the land before causing it to be registered in their names, shows clearly that they did not obey the dictates of **Sections 2 (1) and 45 (1) of the Law of Succession Act, Chapter 160 of the Laws of Kenya**. That accordingly, the title to the suit land held by the Plaintiffs was obtained without adherence to the law, and therefore not protected by **Article 40 (6) of the Constitution 2010, and Section 26 (1) of the Land Registration Act No. 3 of 2012**.

d) That in view of the evidence tendered that the late Loise Ogolla Opwenji, who was registered with the suit land before the Plaintiffs, passed on in 1996 and that the Defendant started using the land in the same year of her death, and considering the provisions of **Section 45 (1) of the Law of Succession Act** that **"no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person"** unless as therein expressly allowed, the Defendant's possession and occupation of that land never became adverse to the title of the deceased as she had passed on by the time he took possession. That actually, the Defendant's occupation could be said to amount to intermeddling with the property of a deceased person and punishable under **Section 45 (2) (a) of the said Act** and he may be sanctioned through criminal proceedings. The same applies to the Plaintiffs' act of having the suit land transferred to their names without complying with the provisions of **the Law of Succession Act**.

e) That the foregoing leads the court to find and hold that the Plaintiffs never obtained good title to the suit land, despite being registered as proprietors on the 13<sup>th</sup> April 2007, in view of the provisions of **Section 2 (1) and 45 (1) of the Law of Succession Act**. That a court of law cannot therefore sanctify or uphold their irregularly, illegally and un-procedurally obtained registration with the suit land. That even without being moved by any of the parties, this court is bound by the law, and its obligations to the Constitution, to order for the cancellation of their title, and rectification of the register to restore the land ownership to the status it was before entry No. 6 of 13<sup>th</sup> April 2007. That further the court cannot equally approve the Defendant's occupation of the land by declaring him an adverse possessor as he prays, which occupation as shown above contravenes the provision of **Section 45 (1) of the Laws of Succession Act**.

f) That those of the parties herein or out there, who may be interested to administer the estate of the deceased registered proprietor, or to a share of it, should move the Succession Court for appropriate orders in accordance with the **Law of Succession Act Chapter 160 of Laws of Kenya**.

g) That as the court has found that both the Plaintiffs and Defendant have failed to comply with the law guiding how the land of a deceased person should be dealt with, each side will bear their own costs.

8. That flowing from the foregoing, the court finds that the Plaintiffs have failed to establish their case against the Defendant to the standard required. That the court therefore orders as follows;

- a) **That the suit is dismissed with each party bearing their own costs.**
- b) **That the Land Registrar is hereby directed to rectify the register of West Asembo/Nyagoko/2559 by cancelling entry No. 6 and restoring the ownership or title thereof, to the person(s) registered before the Plaintiffs.**

**c) That the administration and distribution of suit land be pursued before the Succession Court in accordance with the Law of Succession Act.**

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**

**DATED AND DELIVERED THIS 10<sup>TH</sup> DAY OF JULY 2019**

**In the presence of:**

Plaintiffs Absent

Defendant Absent

Counsel Absent

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**