



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT HOMA BAY

ELCC NO. 13 OF 2021

(FORMERLY MIGORI ELCC NO. 40 OF 2020)

DORCAS ADHIAMBO OGWEL.....PLAINTIFF

VERSUS

SIPROSA APIYO OYATA, Sued as the Legal Administrator/Representative of the Estate of

JOHN OYATA OMOLO (Deceased).....1ST DEFENDANT

OCHIENG MBOYA PAUL.....2ND DEFENDANT

JUDGMENT

1. The instant suit was originated by a plaint dated 6th July 2020 and filed herein on 17th August 2020 by the plaintiff, Dorcas Adhiambo Ogwel through M/S Oguttu, Ochwangi, Ochwal and Co. Advocates. She is seeking the Orders infra;

- a) Declaration that the Defendants' rights and/or interests over the suit property, namely LR NO. CENTRAL KASIPUL/KAMUMA/5882, stands extinguished pursuant to and by dint of **Sections 7, 37 and 38 of the Limitations of Actions Act, Chapter 22 Laws of Kenya.**
- b) Declaration that the plaintiff has since acquired ownership and/or title over and in respect of the entire suit property, namely, LR NO. CENTRAL KASIPUL/KAMUMA/5882, by way of adverse possession and/or prescription.
- c) An order revoking and/or nullifying the registration of the 2nd defendant as the owner of LR NO. CENTRAL KASIPUL/KAMUMA/5882 and that same, that is, LR NO. CENTRAL KASIPUL/KAMUMA/5882, be transferred and registered in favour of the plaintiff, who is the lawful and legitimate owner thereof on account of the open, continuous and uninterrupted possession thereof for a period in excess of 32 years.
- d) In the alternative and without prejudice to the foregoing, the Honourable Court be pleased to declare that the 2nd defendant holds the title in respect of LR NO. CENTRAL KASIPUL/KAMUMA/5882, on trust for the plaintiff and that the title thereof be revoked and same be registered in favour of the plaintiff.
- e) Permanent injunction restraining the defendants either by themselves, agents, servants and/or anyone claiming under the defendants from selling, alienating, wasting, interfering with and/or in any other manner, whatsoever, dealing with the title in respect of LR NO. CENTRAL KASIPUL/KAMUMA/5882 or any portion thereof.
- f) Costs of this suit be borne by the defendants.
- g) Such further and/or other relief as the Honourable Court may deem fit and expedient.

2. In a nutshell, the plaintiff contends that though the 2nd defendant is currently registered as the proprietor of the suit land, LR NO. CENTRAL KASIPUL/KAMUMA/5882 measuring approximately zero decimal zero five (0.05 Ha) in area located within Homa bay county, the registration was carried out in circumstances in favour of the plaintiff. Therefore, the plaintiff has relied on the doctrine of implied/constructive trust and pleaded particulars of trust thereof at paragraph 23 of the plaint.

3. The defendants failed to file a statement of defence in this suit.

4. On 5th August 2020, Learned Counsel for the plaintiff and the defendants in person, presented before this court a consent dated 1st August 2020. The same reads;

“

a) The 2nd defendant hereby covenants and/or otherwise confirms that the plaintiff herein is entitled to a portion measuring 65 feet by 40 feet out of LR NO. CENTRAL KASIPUL/KAMUMA/5882, *hereinafter referred to as the suit property*.

b) The 2nd defendant undertakes to sub-divide and/or cause to be sub-divided LR NO. CENTRAL KASIPUL/KAMUMA/5882, into two (2) portions, including *inter alia* the portion measuring 65 feet by 40 feet, which shall be transferred to and registered in the name of the plaintiff.

c) To facilitate the intended sub-division over and in respect of the suit property, the 2nd defendant herein undertakes to procure and/or obtain the requisite Land Control Board consent, which shall be applied for and obtained within 30 days from the date of adoption of the Consent Order.

d) The Caution/Restriction registered on the title in respect of LR NO. CENTRAL KASIPUL/KAMUMA/5882 by and/or at the instance of the plaintiff herein on the basis of the Letter by the Chief, Oyugis Town Location, be and is hereby withdrawn and/or otherwise discharged.

e) The 2nd defendant and the plaintiff hereby covenant to engage the services of a surveyor, to facilitate the sub-division of LR NO. CENTRAL KASIPUL/KAMUMA/5882 into two (2) portions, in line with clause (b) hereof.

f) Subject to clause (e) hereof, the Survey and/or otherwise sub-division of the suit property, shall be carried out in such a manner to ensure that the resultant portion measuring 65 feet by 40 feet, has an access road thereto.

g) The plaintiff herein shall pay the expenses and/or charges of the nominated surveyor, towards the sub-division of the suit property.

h) Upon the sub-division of LR NO. CENTRAL KASIPUL/KAMUMA/5882 into two (2) portions, the 2nd defendant herein undertakes to procure and obtain the statutory Land Control Board consent, to facilitate the transfer and registration of the resultant portion, measuring 65 feet by 40 feet, to and in favour of the plaintiff, which consent shall be procured and/or obtained within 30 days from the date of registration of the mutation.

i) In default of execution of any of the transfer instruments and/or documents, *inter-alia* Application for Land Control Board Consent, Mutation, Transfer Form and any other incidental documents within the stipulated timelines, the Deputy Registrar of this honourable court be and is hereby authorized to execute and/or sign same *in lieu* of the 2nd defendant.

j) Upon the transfer and registration of the resultant portion measuring 65 feet by 40 feet in favour of the plaintiff. The 2nd defendant undertakes to respect the plaintiff's title and/or ownership over the resultant title.

k) In any event, the 2nd defendant shall be and is hereby restrained by an order of permanent injunction either by himself, agents and/or servants from interfering with the plaintiff's rights, title and/or interests over the resultant portion of land.

l) The 2nd defendant herein shall pay to and in favour of the plaintiff the sum of Kshs.50,000 only, being the agreed costs of the suit and the same shall be paid to the plaintiff within 30 days from the date of adoption of Consent.

m) The plaintiff's claim against the 1st defendant be and is hereby marked as withdrawn with no order as to costs.

n) Upon compliance with the terms of the consent herein, the matter herein be marked as fully settled. ”

5. It is trite law that the issues for determination in a suit flow from either the pleadings or as framed by the parties for the court's determination; see **Great Lakes Transport Co. Ltd –vs- Kenya Revenue Authority (2009) KLR 720**.

6. So, I have duly considered the plaint and the parties' consent in their entirety. The issues for determination in this suit are as captured in the said consent and are resolved thereby.

7. It is important to note and applaud the parties for their action to have their dispute resolved in an amicable way in consonant with **Article 159 (2) (c) of the Constitution of Kenya 2010**; see also **Article 159 (2) (b)** of the same Constitution which provides;

“Justice shall not be delayed.”

8. In the foregoing and for the avoidance of doubt, the Consent as set out in paragraph 4 hereinabove, be and is hereby adopted as the

judgment of this court.

9. It is so ordered.

DELIVERED, SIGNED AND DATED at Homa Bay this 28th Day of October 2021

G M A ONGONDO

JUDGE