



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC NO. 641 OF 2015

HENRY OUKO OTIENO.....PLAINTIFF

VERSUS

PETER AYUYO OMONDO.....1ST DEFENDANT

TORAS ODONGO OMONDO.....2ND DEFENDANT

HENRY OMONDO OGUTA.....3RD DEFENDANT

JUDGMENT

The Plaintiff has come to court praying for judgment against the Defendants for:

- a) A declaration that the he has an ancestral legal right over land parcel No. UYOMA/KATWENGA/427 which the Defendants registered in trust to the heirs of Nange.
- b) An order compelling the Defendants jointly and severally to execute the necessary documents to enable the Plaintiff to be registered as a lawful owner in trust of the suit parcel.
- c) And in the alternative this Honourable Court does order the District Land Registrar Siaya to effect the registration of the Plaintiff's name on the abovementioned title deed to that effect.
- d) A permanent injunction restraining the Defendants jointly and severally by themselves, servants, agents, representatives and/or other persons howsoever acting on their behalf from transferring and/or dealing in any other way the suit parcel of land UYOMA/KATWENGA/427.
- e) Cost of this suit.

The Plaintiff states that the suit parcel was ancestral land of Odhil Nange, Omondo Nange and Ochieng Odhil Nange, and that the Defendants are the registered title holders. That the Plaintiff is the first son of Jorim Otieno Ochieng who was the son of Odhil Nange. That the Defendants are the sons of Omondo Nange and the uncles of the late Jorim Otieno Ochieng.

The Plaintiff alleges that on or about the time of adjudication at East Uyoma, the Plaintiff's late father who had a legal ancestral trust claim to the land assumed that his name had been included by the Defendants when registering the suit parcel which they were to hold in trust for the heirs of Nange, their great grandfather. That upon realising that the Defendants omitted his name in the title, the Plaintiff approached the District Officer Rarieda Division who subsequently found that Jorim Otieno Ochieng's name was inadvertently omitted and advised the District Land Adjudication Officer to include Jorim's name in the register but the Defendants have repeatedly thwarted the inclusion.

The Plaintiff states that he took his dispute before the Siaya District Land Dispute Tribunal which made its award but the Defendants appealed, which appeal was dismissed.

The Plaintiff states that he is apprehensive that the Defendants may subdivide, sell and/or transfer to their heirs, assigns and agents or otherwise encumber the title without the Plaintiff's knowledge.

The Defendants, on the other hand, deny that the Plaintiff is the first son of Jorim Otieno Ochieng. They stated that the District Officer Rarieda did not have the powers to direct the Adjudication Officer to include the name of a stranger in the adjudication record and that the

Siaya Land Dispute Tribunal did not have the jurisdiction to handle the dispute herein. They deny that the Plaintiff has a right to the suit parcel and contend that they are the rightful owners of the land and that the Plaintiff is a stranger to the same.

Plaintiff's Case

At the hearing, the Plaintiff testified as PW1 and adopted his written statement filed on 30th March 2016 which reiterated the contents of his plaint. The Plaintiff had also stated that his father inherited a portion of land measuring 7.5 acres in parcel No. 407 and 8.5 acres in parcel No. 427 since 1938 to 1988 when he realised that his name was not included in the registry. The Plaintiff requested the court to include the names of his late father in the parcels 407 and 427 and allow subdivision of the plots and to allow him to be administrator of his late father's estate.

On cross-examination, the Plaintiff stated that the 1st and 2nd Defendants are brother and their father was called Omodo, while the 3rd Defendant is a nephew to the 1st and 2nd Defendants. That they were formerly living together.

The Plaintiff admitted that the Land Disputes Tribunal decision was quashed by the High Court in Kisumu Civil Application No. 9 of 2011. That he had no document in court to show that Jorim Ochieng was his father.

James Walala Mbok testified as PW2 and adopted his written statement. In the statement, PW2 stated that the Defendants were known to him as family members of Nyabonga who reside within East Uyoma Location Katwenga Sub-location. That the land in dispute is the ancestral land of Ochieng Odhil Nange and Omondo Nange of Uyoma Location.

PW2 had stated that the late Jorim Otieno Ochieng inherited a portion of land in the suit parcel from his father since 1938. That he worked in the said portion with Jorim Otieno as a young boy until 1967 when he moved to South Uyoma where he now resides.

PW2 had stated that the registration was because the neighbouring families had wanted to register the land unlawfully leading to wrangles. That they had agreed that after successful registration the land would be subdivided among themselves. That the registered parties never used the land since they were born. That Abisai Akulu and Jorim Ochieng were caretakers of the land.

On cross-examination, PW2 confirmed that he knew the Plaintiff and that he lived with the Plaintiff's father in East Uyoma from 1958 to 1967. He admitted that he was born in 1946 and therefore did not have first-hand knowledge of what happened in 1938. That it was the Plaintiff's father who had told him that the suit parcel was registered in a block in the names of the Plaintiff's father and the Defendants but he went to check the register and found that his name was not on the register. That he was a witness in the Land Disputes Tribunal case. PW2 denied being paid by the Plaintiff to give evidence in his favour.

The matter was for defence hearing on 23rd July 2019, but one of the Defendants was deceased and the matter subsequently slated for mention to fix a fresh date. Neither the Defendants nor their Advocates were present at the mention on 7th November 2019. The defence case was therefore closed and the matter opened to submissions. Neither party filed submissions.

Issues for Determination

1. Whether the Plaintiff has proved his ancestral legal right to the suit parcel

Section 107 – 109 of the Evidence Act provides that a claimant bears the burden to prove or disprove a matter of fact:

107 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either said.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall be on any particular person."

The basis of the Plaintiff's claim to an ancestral legal right on the suit parcel is twofold. First is his averment that the suit parcel is the decisions of the Siaya District Land Tribunal and the appeal decision of the Nyanza Provincial Appeal Committee. Second, is the testimony of PW2 to the effect that the Plaintiff's father inherited a portion of the suit parcel, was a caretaker of the suit parcel, and was supposed to have had his name included in the register as one of the proprietors of the suit parcel.

However, the Plaintiff admitted that the decisions of the Land Tribunal and Appeal Committee were quashed as per the order of the High Court in Misc. Civil Application No. 9 of 2011 contained in the Defendants' list of documents. The evidence of PW2 is not persuasive as he was not privy to the events of 1938 when he alleges that the Plaintiff's father inherited a portion of the suit parcel and also amounts to hearsay when PW2 testified that the Plaintiff's father had told him that the suit parcel was to be registered as a block in the names of the Plaintiff's father and the Defendants.

Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts

must prove that those facts exist.

This is called the legal burden of proof. There is however evidential burden of proof which is captured in sections 109 and 112 of the same Act as follows:

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

48. The two provisions were dealt with in **Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another [2005] 1 EA 334**, in which the Court of Appeal held that:

“As a general proposition under section 107(1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act.”

It follows that the initial burden of proof lies on the plaintiff, who is supposed to prove the existence of a trust. No evidence of a trust has been given before this court.

The Plaintiff has therefore failed to discharge the burden of proof to the required standard. The suit ought to be, and is hereby dismissed.

DATED AT KISUMU THIS 28th DAY OF MAY 2020

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

This judgment is hereby delivered to the parties by electronic mail due to the measures restricting court operations due to COVID -19 pandemic and in light of directions issued by the Honourable Chief Justice on 15TH March 2019 and with the consent of the parties.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE