



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**ELC. NO. 50 OF 2013**

**FREDRICK OUMA OPILE.....PLAINTIFF**

**(Suing as the Personal Representative of the Estate of OMOLO DELEWA – Deceased)**

**VERSUS**

**ISAAC OPILE OMOLO.....1<sup>ST</sup> DEFENDANT**

**CHARLES NATHAN ORANGA.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

1. Fredrick Ouma Opile, suing as a personal representative of the estate of Omollo Delewa, deceased, the plaintiff, sued Isaac Opile Omolo and Charles Nathan Oranga, the defendants, vide the plaint dated 8<sup>th</sup> January, 2013 and filed on the 28<sup>th</sup> February, 2013 seeking for the following:-

- a. *Permanent injunction against 2<sup>nd</sup> defendant in respect of Uholo/Tingare/21.*
- b. *Declaration that the removal of the caution registered by Stephen Otieno Onyango on the 6<sup>th</sup> November, 2007 was irregular, un-procedural, illegal and unlawful.*
- c. *Declaration that transfer of Uholo/Tingare/21 from Omollo Delewa, deceased, to Isaac Opile Omolo, the 1<sup>st</sup> defendant was irregular, un-procedural, illegal, unlawful, null and void abinitio.*
- d. *Declaration that the sale by the 1<sup>st</sup> defendant and subsequent transfer of Uholo/Tingare/21 into the name of the 2<sup>nd</sup> defendant was irregular, un-procedural, illegal, unlawful, null and void abinitio.*
- e. *An order for cancellation of the title now registered with 2<sup>nd</sup> defendant and reverting the title to the name of Omollo Delewa, deceased.*
- f. *Order of eviction of 2<sup>nd</sup> defendant from Uholo/Tingare/21.*
- g. *Costs of the suit.*
- h. *Interest on costs at court's rates.*

2. *The plaintiff avers as follows among others:-*

- a. *That the plaintiff was a dependent and beneficiary of the estate of the deceased Omollo Delewa, who was the father to the 1<sup>st</sup> defendant and grandfather to the plaintiff.*
- b. *That Omollo Delewa, deceased, was the first registered proprietor of Uholo/Tingare/21 having been so registered on the 17<sup>th</sup> February, 1970.*
- c. *That the 1<sup>st</sup> defendant irregularly, fraudulently, unlawfully, illegally and or irregularly, un-procedurally and or without obtaining a grant of letters of administration in the estate of Omollo Delewa, deceased caused Uholo/Tingare/21 to be transferred to his name.*

*d. That on the 6<sup>th</sup> November, 2007, Stephen Otieno Onyango a grandson to Omollo Delewa, deceased, registered a caution claiming beneficial interest on Uholo/Tingare/21.*

*e. That the 1<sup>st</sup> defendant through a Miscellaneous Application No. 8 of 2007 that was not served upon the cautioner, Stephen Otieno Onyango, had the caution removed on the 8<sup>th</sup> March, 2008 un-procedurally, illegally, and unlawfully.*

*f. That on the 29<sup>th</sup> March, 2012 the 1<sup>st</sup> defendant unlawfully, illegally and un-procedurally and without the consent of his spouse and other beneficiaries transferred the land parcel Uholo/Tingare/21 to the 2<sup>nd</sup> defendant.*

*g. That the 1<sup>st</sup> defendant was holding title to the land in trust for the plaintiff and other beneficiaries of the estate of Omollo Delewa.*

*h. That Uholo/Tingare/21 was at all times ancestral land and could not have been disposed without the consent and knowledge of other beneficiaries with equal or lesser interest to the 1<sup>st</sup> defendant.*

3. The plaintiff's claim is opposed by the defendants through their joint statement of defence dated the 25<sup>th</sup> March, 2013 in which they among others avers as follows:-

*a. That the plaintiff has no locus standi to sue for the estate of Omollo Delewa, deceased, as he is neither a beneficiary nor a dependent.*

*b. The defendants admitted that the late Omollo Delewa, was the first registered proprietor of the suit property but denied irregularly, fraudulently, unlawfully, un-procedurally or otherwise obtaining letters of administration removing the caution or transacting on the land.*

*c. That the 1<sup>st</sup> defendant did not hold the title to the land in trust for the plaintiff.*

*d. That were it not for the transaction over the land, the entire parcel would have been auctioned by Agricultural Finance Corporation.*

4. The plaintiff testified as PW 1 and called Peter Akello Nyanja who was the Land Registrar Ugenya, Joyce Washiali who is mother to the plaintiff and wife to 1<sup>st</sup> defendant and Stephen Otieno Onyango who is a brother to the plaintiff as witnesses and they testified as PW 2 to PW 4 respectively. The plaintiff case is summarized as follows:-

*a. That the suit land, Uholo/Tingare/21, was on first registration registered in the name of Omollo Delewa, the father to the 1<sup>st</sup> defendant.*

*b. That Omollo Delewa passed on the 23<sup>rd</sup> July, 1985 leaving the 1<sup>st</sup> defendant family, which included his wife, PW 3 and her children PW 1 and PW 4 among others, living on the suit land.*

*c. That on the 24<sup>th</sup> September, 2007, the 1<sup>st</sup> defendant got registered as proprietor of the suit land without obtaining a grant of letters of administration in respect of the estate of the late Omollo Delewa. That PW 4 lodged a caution on the 6<sup>th</sup> November, 2007 which was removed on the 10<sup>th</sup> March, 2008 without giving him an opportunity to be heard.*

*d. That the 1<sup>st</sup> defendant then transferred the land to the 2<sup>nd</sup> defendant on the 19<sup>th</sup> March, 2012 without obtaining the spousal consent from PW 3 and without the knowledge of the family members.*

*e. That efforts to discuss the matter before the Land Registrar and Chief did not bear fruits. That the 2<sup>nd</sup> defendant then issued eviction notice against PW 3 and her family. That this suit was thereafter filed.*

5. The defendants testified as DW 1 and DW 3. They also called Rosemary Adhiambo Opile, wife to the 1<sup>st</sup> defendant, who testified as DW 2. The defendants case is as summarized herein below:-

*a. That the late Omollo Delewa, the first registered proprietor of the suit land, was survived by the 1<sup>st</sup> defendant and three sisters. That the 1<sup>st</sup> defendant had the suit land registered in his name on the 24<sup>th</sup> September, 2007 without filing a succession cause or obtaining letters of administration.*

*b. That the 1<sup>st</sup> defendant defaulted in servicing a loan from Agricultural Finance Corporation secured with the suit lands title. That the 1<sup>st</sup> defendant lease some sugarcane on the land to 2<sup>nd</sup> defendant in 2009 or 2010. That the 1<sup>st</sup> defendant obtained the consent of his family to sell the land to 2<sup>nd</sup> defendant and a sale agreement dated 8<sup>th</sup> August, 2011 was made with a purchase price of Kshs.900,000/=.*

*c. That the 1<sup>st</sup> defendant cleared the Kshs.130, 000/= outstanding loan and the title to the suit land was discharged. The 1<sup>st</sup> defendant then bought a three acre land at Busia where he moved with DW 2 and her children after PW 3 and her children*

*declined to move there.*

*d. That this suit was filed after the 2<sup>nd</sup> defendant issued eviction notices to PW 3 and her children who reside on the suit land.*

*e. That the 2<sup>nd</sup> defendant knew that PW 3 and her children were residing on the suit land when he bought it and became the registered proprietor.*

6. The learned counsel for the plaintiff and defendants filed their written submissions dated 19<sup>th</sup> January, 2018 and 8<sup>th</sup> March, 2018 respectively.

7. The following are the issues for the court's determination:-

*a. Whether the plaintiff as a son to the 1<sup>st</sup> defendant and grandson to the late Omollo Delewa, the first registered proprietor of the suit land, has an interest known in law over the suit land.*

*b. Whether the suit land was ancestral land.*

*c. Whether the 1<sup>st</sup> defendant, who admitted to have transferred the land to his name without obtaining a confirmed grant over the estate of the deceased registered proprietor, obtained a good title.*

*d. Whether the 1<sup>st</sup> defendant passed good title over the suit land to the 2<sup>nd</sup> defendant.*

*e. Who pays the costs of this suit.*

8. The court has carefully considered the pleadings, oral and documentary evidence tendered by both sides, the written submissions and the decided cases referred to therein by both counsel and come to the following determinations:-

*a) That from the evidence tendered by PW 3, she settled on the suit and upon marrying the 1<sup>st</sup> defendant. That the documentary evidence in the form of the green card produced by the Land Registrar (PW 2) shows clearly that the land was first registered on the 17<sup>th</sup> February, 1970 in the name of Omollo Delewa, the late father to the 1<sup>st</sup> defendant. That though the 1<sup>st</sup> defendant claimed that his late father had bought that land, the plaintiff's case is that it was ancestral land which appears not only reasonable but plausible by the fact that it was a first registration.*

*b) That the suit land having been ancestral land and being the land PW 3 was settled on upon marrying 1<sup>st</sup> defendant, and still resides on with her children, who include the plaintiff, then it is obvious that the plaintiff is expected to have some rights over the land. That such rights would include right to use, cultivate and settle by virtue of being a son to 1<sup>st</sup> defendant, who upon the death of the late Omollo Delewa, was reportedly the only surviving son of the deceased. That whether or not the three (3) surviving daughters of the late Omollo Delewa were interested with*

*a share of their father's estate is not an issue for determination by this court, and in any case such an issue would ordinarily be dealt with by the succession court.*

*c) That though the defendants claimed that the plaintiff, his mother (PW 3) and brothers had consented to the suit land being sold to 2<sup>nd</sup> defendant, the fact that none of them signed the sale agreement confirms the plaintiff's position that the sale and transfer was done without their knowledge and consent. That had they consented to the sale, they would most probably have vacated from the land when the 2<sup>nd</sup> defendant asked them to.*

*d) That the removal of the caution filed on the 6<sup>th</sup> November 2007 by PW 4 against the suit land's title was irregularly lifted on the 10<sup>th</sup> March, 2008 without the cautioner being given a hearing by the Land Registrar or being served with the suit papers in the alleged Miscellaneous Civil Suit No. 8 of 2007 in which the order vacating the caution was issued.*

*e) That Sections 2(1) and 45(1) of Law of Succession Act Chapter 160 of Laws of Kenya outlaws distributing of the estate of a deceased without a confirmed grant. That the Court finds that the 1<sup>st</sup> defendant illegally, irregularly and un-procedurally had the suit land registered from his own admission during cross-examination when he stated as follows;*

***"I never filed a succession cause in relation to my late father's estate before getting the land registered in my name. I was assisted by the clerks at the Siaya Lands office to transfer the land to my name after learning I was the only son of my father."***

*f) That on the 1<sup>st</sup> defendant's own admission that he did not comply with the provisions of the Law of Succession Act before transferring the suit land to his name, it is obvious he obtained title irregularly, illegally and without following the due process. That the title 1<sup>st</sup> defendant got did not confer upon him good title and is accordingly impugned.*

That the 1<sup>st</sup> defendant as the father to the plaintiff would ordinarily get preference under **Section 66 of the Law of Succession Act** to administer the estate of his late father. That it is only where the appropriate succession cause is filed and publicized that those claiming any interests, including dependents would get the opportunity to move the succession count for their provision. That the family of PW 3 appears

to have been apprehensive when they learnt that the suit land had been registered in the name of the 1<sup>st</sup> defendant as they filed a caution though PW 4 shortly thereafter. That now that it is clear the 1<sup>st</sup> defendant did not process the transmission of Uholo/Tingare/21 into his name through the succession court, his registration on the 24<sup>th</sup> September, 2007 and the subsequent transfer of the title to 2<sup>nd</sup> defendant on the 19<sup>th</sup> March, 2012 cannot be allowed to stand as he did not have a good title to pass. That the defendants' registration with the suit land has been successfully challenged in accordance with **Section 26 of Land Registration Act No. 3 of 2012**. The court of appeal in **Munyu Maina- Vs- Hiram Gathina Maina (2013) eKLR** said the following about the responsibility of a registered proprietor whose title is under challenge in legal proceedings;

**“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”**

The Defendants have failed to satisfy that legal requirement.

g) That the 2<sup>nd</sup> defendant knew that PW 3 and her children, including the plaintiff, were residing on the suit land when he bought it and got registered as proprietor. That he did not ensure that the land was vacant or that PW 3 and her children would readily give vacant possession to him. That it was therefore not surprising that this suit was filed soon after he served them with the notice to vacate.

9. That having come to the findings set above, the court finds that the plaintiff has proved his claim against both defendants on a balance of probabilities. That the court therefore enters judgment in his favour in the following terms:-

a) That the registration of the 1<sup>st</sup> defendant as proprietor of the land parcel Uholo/Tingare/21 on the 24<sup>th</sup> September, 2007 without obtaining a confirmed grant in accordance with the Law of Succession Act was irregular, illegal and unprocedural and the said registration is hereby cancelled.

b) That the 1<sup>st</sup> defendant not having obtained good title as shown in (a) above had no capacity to pass title of Uholo/Tingare/21 to the 2<sup>nd</sup> defendant. That the registration of the 2<sup>nd</sup> defendant as proprietor of the said land on the 18<sup>th</sup> March, 2012 is therefore cancelled.

c) That the Land Registrar is hereby ordered to rectify the register of Land parcel Uholo/Tingare/21 by cancelling entries number 2, 3, 6 and 7 and recall the title deed issued thereof for cancellation so as to revert the registration of the said land to Omollo Delewa, deceased, as in entry number 1 (one). That thereafter those interested with the estate of the late Omollo Delewa do move the succession court for letters of Administration and distribution thereof.

d) The defendants do pay the plaintiff costs of this suit.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 21<sup>ST</sup> DAY OF NOVEMBER 2018

**In the presence of:**

Plaintiff Absent

Defendants Present

Counsel Mr. Kivenga for the Plaintiff

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE