



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 353 OF 2017

[FORMERLY NAIROBI HCCC NO. 196 OF 2007]

RODGERS KATAMI WAMBIA.....1ST PLAINTIFF

ALEX KIMIYA.....2ND PLAINTIFF

JONATHAN OMBEMBA OMBIMA.....3RD PLAINTIFF

[As officials of Lugari Yearly Meeting of Friends (Quakers)]

VERSUS

RACHEL ODERA.....1ST DEFENDANT

FELIX ODERA.....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

AND

BOARD OF MANAGEMENT –

MARULA PRIMARY SCHOOL.....INTERESTED PARTY

JUDGMENT

1. This suit was commenced by **Rodgers Katami Wambia, Alex Kimiya and Jonathan Ombemba Ombima**, as *officials of Lugari Yearly Meeting of Friends Church – Quakers*, against **Rachel Odera, Felix Odera and The Attorney General**, hereinafter referred to as 1st to 3rd Defendants respectively, through the Amended Plaint dated the 14th March, 2011. The Plaintiff avers that in 1964, the government of Kenya through the Ministry of Lands, Adjudication and Settlement allocated East African Yearly Meeting of Friends Church (Quakers), the Plaintiffs’ parent church, Plot Numbers 695, 301 and 304 through its training centre called Lugari Farmers Training centre. That the Plaintiffs took possession of the said plot Number 695 now known as Kakamega/Lugari/183, *“the suit land”*, after making the necessary payments. That in 2003, the Plaintiffs discovered that one **Salome Muhonja Odera** had been issued with title documents for suit land and upon making enquiries with the Ministry concerned, the Ministry acknowledge the mistake and wrote to the said Salome to surrender the title and in its place be issued with one for Kakamega/Lugari/182. That the said Salome subsequently passed on and in 2007, the 1st and 2nd Defendants stopped persons who had leased portion of the suit land from the Plaintiff from ploughing them and further wrote to the Plaintiff threatening to evict them. That the Ministry of Lands, Adjudication and Settlement had renumbered Plot No. 695 to 183 allocated to its Ministry, Lugari Farmers Training Centre while Plots numbers 182 and 183 had been renumbered Plot 182. That however, the Ministry did not reflect those changes at the Department of Land Adjudication. That upon taking possession of the suit land in 1964, the Plaintiff has established Marula Primary School in 1982, and has about 866 pupils. That the Land Registrar had issued the title deed of the suit land by mistake and relying on incorrect records in that the discharge of charge from the Director of Land Adjudication and Settlement was not obtained at the behest of the 1st and 2nd Defendants. That the 1st and 2nd Defendants fraudulently took possession of the suit land while knowing it belonged to the Plaintiff and processed title to it in their names without disclosing that it had been registered with the late Salome by mistake. The Plaintiff therefore, prays for the following:

(a) Declaration that the suit land belonged to the Plaintiff.

(b) Cancellation of title and rectification of the register to the suit land.

(c) *Permanent order of injunction restraining the 1st and 2nd Defendants from interfering and meddling with the Plaintiff's use of the suit land.*

(d) *Costs.*

2. The 3rd Defendant filed Further Amended Defence and Cross-claim dated the 19th July, 2018 averring as follows; That the Settlement Fund Trustees allocated the 1st and 2nd Defendants' late father Plot Numbers 182 and 183 with a total acreage of 48.5 acres on the 12th December, 1964 which he took possession, and use of, while Lugari Yearly Meeting Quakers through Lugari Farmers Training Centre was allocated Plot Number 695. That Plot Numbers 182 and 183 were adjacent to each other while Plot Number 695 was about 3 kilometres away at the time of allotment. That sometimes in 1965, the Department of Settlement did the mapping of the Plots and discovered some plot numbers were non-existent. That as the Survey of Kenya could not leave gaps in the final area lists, some plots were amalgamated, and other numbers brought forward. That during that exercise, Plot numbers 182 and 183 were amalgamated and renamed 182 while Plot Number 695 measuring 133.4 acres was renamed Plot 183. That on 3rd September 1990, Salome Muhonja Odera was erroneously issued with title deed for Plot 183 after it was discharged instead of Plot 182. That when the anomaly was discovered, the Department of Land filed restriction against both plots. That on the suit land are Lugari Yearly Meeting – Quakers Church, and Marula Primary School which have existed since 1982 and the Plot should be registered to them as proprietors in common and Plot Number 182 be transferred by Settlement Fund Trustees to the 1st and 2nd Defendants. The 3rd Defendant further, avers that the estate of the late Salome Muhonja Odera holds the title of Plot No. 183 by mistake and error and the title is a nullity *ab initio*. The 3rd Defendant therefore, prays for the following against 1st and 2nd Defendants;

(a) A declaration that the registration and issuance of title of Plot No. 183 to the late Salome Muhonja Odera was erroneous, and contrary to existing laws and should be cancelled.

(b) A declaration that the register for Plot No. 183 be rectified by deleting Salome Muhonja Odera as proprietor and substituting with Lugari Yearly Meeting – Quakers Church, and Marula Primary School as proprietors in common.

(c) Plot No. 182 be transferred to the 1st and 2nd Defendant as personal representatives of the estate of the late Salome Muhonja Odera.

(d) *Costs.*

3. The 1st and 2nd Defendants opposed the Plaintiff's claim through their Amended Defence and Amended Counterclaim dated the 31st March, 2011. They also opposed the 3rd Defendant's cross-claim through their reply to the 3rd Defendant's and Interested Party's statement of Further Amended Defence and Defence to the Cross-claim dated the 13th August, 2018. They aver that Plot Numbers 182 and 183 are far from each other, and could not have been merged as alleged. That the suit land was allocated to their late father who paid all the fees required and upon his death, their mother, Salome Muhonja Odera obtained letters of administration and was registered with it on the 23rd September, 1990. That sometime in 1982, their late mother was approached by local leaders to allow the setting up of a school on the suit land and following her consent, Marula Primary School was established. That the 1st and 2nd Defendants are the legal owners of the suit land as administrators of the estate of their late mother. That the title of the suit land in the name of their late mother, being a first registration was indefeasible, and the attempt by the Director of Land Adjudication and Settlement to allocate it to the Plaintiff was illegal and a nullity. That the Plaintiff has never owned or occupied the suit land but had purported to lease out part of the land to third parties for cultivation. The 1st and 2nd Defendants therefore, claim for the following in their counterclaims against the Plaintiff;

(a) A declaration that the 1st and 2nd Defendants are the lawful owners of the suit land.

(b) In the alternative, a declaration that the letter dated 30th November, 2006 purporting to allocate the suit land to the Plaintiff is an illegality, nullity and void *ab initio*.

(c) Damages for trespass.

(d) Mesne profits.

(e) *Costs.*

That in their defence to the 3rd Defendant's cross-claim, the 1st and 2nd Defendants denied the claim and aver that the suit land was regularly and legally registered in the name of their late mother and the title is therefore, not a nullity *ab initio*. They therefore, pray the 3rd Defendant's defence and cross-claim be dismissed with costs and judgment be entered for them as prayed in their counterclaim with costs.

4. The Plaintiff filed their Reply to the 1st and 2nd Defendants' Amended Defence and Defence to the Amended Counterclaim dated the 7th April, 2011. They aver that they are the beneficial owners of the suit land and have been in occupation since 1964. That the issuance of the title to the 1st and 2nd Defendants over the suit land was erroneous and by mistake. That the 1st and 2nd Defendants' Amended Counterclaim should be dismissed with costs.

5. The hearing of the suit commenced on the 3rd June, 2015 with the Rodgers Katami Wambia, the 1st Plaintiff, testifying as PW1. The Plaintiffs then called **Jacob Munialo Sichangi**, a village elder, who testified as PW2. The Plaintiff's case is that the Plaintiff was allocated Plot Numbers 695, 301 and 304 at Lugari Settlement Scheme by the Government in 1964. That at the same time, one Nehemiah Odera, the father to the 1st and 2nd Defendants, was allocated Plot No. 183 while one Musoma was allocated Plot No. 182. That later, during the

mapping exercise, some plots were amalgamated and others given new numbers. That Plot numbers 182 and 183, which were neighbouring, were amalgamated and given to Nehemiah Odera, and Musoma who had been given the original Plot number 182 given Plot Number 208 at Songor Settlement Scheme. That Plot 695 was renamed Plot Number 183, and is the suit land. That the distance from the current Plot Number 182 to Plot Number 183 is about 3 kilometres unlike before when the parcels bearing those numbers were adjacent to each other. That the Plaintiff have been in possession of the suit land from 1964 and has constructed a church on it, and has been using the suit land for training its members in farming and had fish ponds thereon among other activities. That about 1982, the church and the community established Marula Primary School on a portion of the suit land, and the school became a public institution in 1986. That between 1986 to 2006, the church had leased a portion of the suit land to Lake Basin Authority for farming. That come the 2007, the 2nd Defendant who had earlier been utilizing his late father's land, parcel 182, invaded the suit land claiming it was his. That earlier in 2003, the church had discovered that the title to the suit land had erroneously been issued to one Salome Muhonja, the mother to the 1st and 2nd Defendants, and one of the widows of the late Nehemiah Odera. That the church had lodged a complaint with the relevant Government officers, and correspondence aimed at recalling the title had started but the said Salome Muhonja passed on. The 1st and 2nd Defendants have since been appointed the administrators of the estate of the late Salome Muhonja, and hence their being enjoined as Defendants in this suit.

6. The Court through the order of 15th May 2018 directed that Marula Primary School be enjoined as an Interested Party in these proceedings. That the learned Counsel for the Plaintiff and Defendants entered a consent on the 23rd July, 2018 that the pleadings filed by the 3rd Defendant be amended to include the Interested Party. That accordingly, when the 1st and 2nd Defendants filed the Reply and Defence dated 13th August 2018, their reference and heading correctly reflected the inclusion of the Interested Party in the pleadings.

7. The 1st and 2nd Defendants testified as **PW1** and **DW2**. That it is their case that Plot Number 183, the suit land, was allocated to their late father, Nehemiah Odera in 1964. That their father died in 1973 and had been using about 8 (eight) acres of the suit land which is about 133 acres. That after their father died, he was buried at his Bunyore land and their mother Salome Muhonja, the second widow, continued living on the suit land with her children. That after completing paying for the land to the Settlement Fund Trustees in 1990, the land was registered in their mother's name after a Succession Cause. That in 2007, the Plaintiff started claiming ownership of the suit land on the basis of a letter of allotment issued in 2006. That this suit was then filed. That the Plaintiff had leased out portions of the suit land to Lake Basin Authority and in 2011, erected a church house which they have been using since. That the church house was erected when there was an order of injunction against the Plaintiff. That the late Salome and her two children named Joyce and Nabate were buried on Plot Number 182 on orders of the elders, even though they do not know the owner of the parcel. That in 1982, the late Salome Muhonja who was a teacher allowed the community and church elders to establish Marula Primary School on the suit land and that they are ready to transfer five (5) acres to the suit land to the school. That they have never resided on parcel 182 as they have always lived on 183 since birth. The 1st Defendant conceded that she has been farming on a portion of parcel 182 which she said was about 1 to 3 kilometres from 183.

8. In support of the 3rd Defendant and Interested Party's case, Thomas Morara Nyangau, a Land Registration Officer, and Richard Malala, head teacher Marula Primary School, testified as **DW3** and **DW4** respectively. That the evidence of DW3 more or less supports that of PW1 and PW2 that the initial plot numbered 182 and 183 were consolidated during the 1965 surveying exercise that produced the Final Registry Index Map. That after consolidated, the parcel was renumbered parcel 182 and allocated to Nehemiah Odera, the late father to the 1st and 2nd Defendants. That Nehemiah was the initial allottee of parcel 183 while one Musoma was initially allocated parcel 182. That upon the two parcels being consolidated, and renamed 182, and allocated to Nehemiah, the initial allottee of parcel 182 (Musoma) was allocated parcel 208 at Songhor Settlement Scheme. That as the consolidation left number 183 without a ground plot, the initial plot 695 allotted to the Plaintiff was renamed 183. That the Plaintiff paid for their Plot in 1968 under the initial reference of Plot 695, while Nehemiah and later his widow, Salome Muhonja continued paying for their plot using the initial number 183. That in 1990, the title to parcel 183 was issued to Salome Muhonja. That later when the Plaintiffs were pursuing their title, it was discovered it had already been issued erroneously to the said Salome Muhonja. That a restriction was filed on both parcels 182 and 183 and then this suit was filed. The evidence of DW4 is that the school had been established on the suit land on which there is also a church house. That the 1st Defendant also resides on the suit land and has leased out portions of the land to other persons.

9. The learned Counsel for the Plaintiffs, 1st and 2nd Defendants, the 3rd Defendant and Interested Party filed their written submissions dated 7th February, 2020, 2nd March 2020 and 2nd March, 2020 respectively.

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

- (a) Whether land parcel now registered as Kakamega/Lugari/183 was allocated to the Plaintiff or the late Nehemiah Odera.
- (b) Whether the transfer of Kakamega/Lugari/183 to Salome Muhonja, widow to Nehemiah Odera and mother to the 1st and 2nd Defendants, on 3rd September, 1990 was erroneously and or mistakenly done.
- (c) Which parties have proved their respective claims to the standard required, and what orders to issue?
- (d) Who pays the costs of the Plaintiff's case, 1st and 2nd Defendants' counterclaim and the 3rd Defendant and Interested Party's cross-claim?

11. The Court has carefully considered the pleadings filed by all the parties, the oral and documentary evidence by PW1, PW2, DW1 to DW4, the written submissions by the learned Counsel and superior court's decisions cited thereof, and come to the following findings;

- (a) That rights to property are protected by the Constitution of Kenya, 2010 at Article 40. That sub-article 6 is however clear that the rights to property **"under this Article do not extend to any property that has been found to have been unlawfully acquired."** That the dispute in this matter concerns ownership of land parcel Kakamega/Lugari/183 that was registered in the name of Salome Muhonja Odera on the 28th August, 1990 and title deed issued on the 3rd September, 1990, according to the copies of green card

available by the parties. That the said copies of the green card further show that the register for the said land was first opened on the 8th February, 1983 in the name of the Settlement Fund Trustees who then transferred it to the said Salome Muhonja Odera on the 28th August, 1990. That the statute applicable in the registration of the land at that time was the **Registered Land Act Chapter 300 of Laws of Kenya** that was repealed by **Section 109 of the Land Registration Act No. 3 of 2012**. That the title having been issued pursuant to **Sections 27 and 28** of the said repealed Act could be impugned under **Section 143 of the Act** on the Court being satisfied that the registration had been obtained, made or omitted by fraud or mistake. The exemption was only in a first registration. That the first registration in Kakamega/Lugari/183 was in the name of Settlement Funds Trustees and that registration has not been challenged by the Plaintiff, 1st and 2nd Defendants, the 3rd Defendant and Interested Party in their respective suit. The challenged title is that of Salome Muhonja Odera who was the second registered proprietor of the said land after the Settlement Funds Trustees.

(b) That from the oral and documentary evidence tendered herein by all the parties, it is apparent the position taken by the Plaintiff, 3rd Defendant and Interested Party is different from that taken by the 1st and 2nd Defendants on the history or origin of land parcel Kakamega/Lugari/183. That according to the Plaintiff, 3rd Defendant and the Interested Party, the said land was initially Plot No. 695 and was allocated to the Plaintiff in 1964. That during the mapping of the plots in 1965, Plot No. 695 was renumbered Plot No. 183, which number initially belonged to a Plot allocated to Nehemiah Odera, the father to the 1st and 2nd Defendants. That Nehemiah Odera's Plot No. 183 had during the exercise of 1965 been consolidated with Plot 182 and allocated to him hence leaving number 183 uncommitted. That one Musoma who had been allocated Plot 182 was moved to Songhor Settlement Scheme and allocated Plot No. 208. That on the other hand the 1st and 2nd Defendants have maintained that their late father's Plot No. 183 allocated in 1964 remained and retained that number up to the 3rd September, 1990 when a title was issued in the name of their late mother, Salome Muhonja Odera. That it was conceded by DW3 that the renumbering of the plot No. 695 to 183 appear not to have been captured by the Land Registrar's Office and this resulted to the transfer of Kakamega/Lugari/183 to Salome Muhonja Odera in 1990. That this is an indictment on the said office and the source of many disputes on land ownership. That as submitted by Counsel for the 1st and 2nd Defendants, it is a reflection **"of poverty of trust, conscience, honesty and professionalism of the officials in our Land registries and in this particular case, Kakamega Land Registry, the 3rd Defendant herein. The Court of Appeal in Moses Lutomia Washiali Vs Zephaniah Ngaira Angweye & Another [2018] eKLR, had an opportunity to express its disgust in the manner in which Land registries have been operated in this County and to demonstrate their level of disgust and disclaim, we hereby reproduce their opening words while delivering their judgment in that appeal;**

"We are yet again confronted by an appeal where the integrity of our land registration system is seriously called into question. As we recently stated in Denis Noel Mukhulo Ochwada & Another Vs Elizabeth Murungari Njoroge & Another CA No. 293 of 2013.

"At the Centre of Torren Land registration system on which ours is based is the basic assumption that meticulous professionals of conscience, absolute honesty and integrity, will superintend over it"

...One again, dishonesty, abuse of trust, complicity, and lack of professionalism and integrity are readily apparent in the dealings with land leading to this appeal...."

That had the 3rd Defendant kept and maintained the records relating to Plot Numbers 182 and 183 properly, the errors and mistakes that they now plead to have led to Salome Muhonja Odera being registered with land other than the one allocated to her late husband, Nehemiah Odera, would not have occurred. That the suffering and expenses incurred already, and likely to be incurred by the parties whichever way, the Court will determine the issues herein would not have arisen.

(c) That DW3 testifying on behalf of the 3rd Defendant, produced the Final Area Map list that covers the suit land and neighbouring plots. The map shows the old and new numbers of the plots and their respective acreages. That Plot Number 183 is shown to have been Plot Number 695, which is not disputed had been allocated to the Plaintiff. That the parcel is mostly in survey map sheet number 10 and partly in sheet number 5, while Plot Number 182 is wholly on sheet number 5. That as the 1st and 2nd Defendants did not avail documentary evidence capable of challenging those availed by DW3 who actually represented the Government, which has the responsibility of maintaining such documents, the Court finds and holds that land parcel Kakamega/Lugari/183 is the same as Plot Number 695 that was allocated to the Plaintiff in 1964, and wholly paid for. That further, the Court finds and holds that the land that was allocated to the late Nehemiah Odera is Plot Number 182 that is a consolidation or amalgamation of the original Plot Numbers 182 and 183.

(d) That the evidence adduced by PW1, PW2 and DW3 shows clearly that the 1st and 2nd Defendants started laying claim over land parcel Kakamega/Lugari/183 only in 2006 and subsequently, thereafter, the 2nd Defendant erected his homestead there. That he also started leasing out portions of the land to other persons. That before 2006, the said land was mostly under the Plaintiff and the Interested Party as can be confirmed by the fact that the Plaintiff had leased it to Lake Basin Authority reportedly from 1986 to 2006. That the lease dated 11th July 1997, and produced as exhibit 6 goes to confirm that. That further until 2006, the 1st and 2nd Defendants' activities on land use were confined on Plot Number 182 on which their late mother, Salome Muhonja Odera and their late siblings named Nabate and Joyce, were buried after their death. That when the 1st and 2nd Defendants, as beneficial owners to the estate of the late Salome Muhonja Odera, laid claim to the suit land in 2006, the Plaintiff filed this case through their Plaintiff dated 12th February, 2007 that was subsequently amended on the 14th March, 2011. That the fact that Salome Muhonja Odera and her late children named above were buried upon death on Plot Number 182, and not the suit land which had been registered in her name in 1990 can only lead the Court to conclude that all her children and elders knew her land was Plot Number 182. That in the case of **Benja Properties Ltd Vs Syedna Mohammed Burhanuddin Sahad & 4 Others (2015) eKLR**, cited by the learned Counsel for the 3rd Defendant and Interested Party, the Court of Appeal held as follows;

“It is trite law that all titles to land are ultimately based upon possession in the sense that the title of the man seized prevails against all who can show no better right to seisin. Seisin is a root of title. The 1st, 2nd, and 3rd Respondents being in possession of the suit land have a better right to the same as against the appellant. The maxim is that possession is nine-tenths ownership. As was stated by the Privy Council in Ghana of Winta Ofel Vs Danquah (1961) AII ER 596 at page 600, the slightest amount of possession would be sufficient.”

That the family of Nehemiah Odera and Salome Muhonja Odera now represented in this suit by the 1st and 2nd Defendants have since the allocation of the land in 1964 have been in possession of Plot No. 182 while the Plaintiff has been in possession of Kakamega/Lugari/183 [formerly Plot No. 695]. That the transfer of Kakamega/Lugari/183 by Settlement Fund Trustees on the 28th August 1990, and the subsequent issuance of the title on the 3rd September, 1990 must have been in error, mistake and or fraud. That no evidence has been tendered to prove fraud attributed to any of the parties in this matter. That however, the fact that the transfer was registered without first ensuring that a discharge of charge had been obtained, and registered leads the Court to infer fraud. That in the case of ***Johnson Mkala Mirero & Another Vs Chve Kambi Tuva & 5 Others [2018] eKLR, Angote J***, found that the 2nd Defendant had been registered as proprietor of the suit land on the same day the Settlement Fund Trustees had been registered, but without a discharge of Charge by the Settlement Fund Trustees. That the Honourable Judge went on to find and hold that the registration of the 2nd defendant as proprietor of the land was fraudulent, null and void, and could not pass title to a third party. That decision is of a persuasive value to this Court. That the Court therefore, finds and holds that the transfer of Kakamega/Lugari/183 from Settlement Fund Trustees to Salome Muhonja Odera on 28th August, 1990, and the subsequent issuance of title deed to her favour without first obtaining, and registering a discharge of Charge issued by the Settlement Fund Trustees was obtained and process fraudulently, and or by mistake or error.

(e) That the registration of the late Salome Muhonja Odera and the title issued to her over the suit land has been challenged by the Plaintiffs in their suit. That it has also been challenged by the 3rd Defendant who before the filing of the suit had filed a restriction over the title, and commenced investigations as evinced by the correspondence and report produced as exhibits. The same has also been challenged by the Interested Party, a public school under the sponsorship of the Plaintiff that was established on a portion of the suit land in 1982. That the provision of ***Section 143 (1) and (2) of Registered Land Act (Repealed)*** allowed rectification of the register, and cancellation of the title where the Court is satisfied that such registration was obtained through fraud or mistake, and that the proprietor had ***“knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.”*** That PW1 had stated in his statement that was adopted as part of his evidence that before Salome Muhonja Odera passed on ***“...she had acknowledged that there was a mistake on the paper work at the Ministry of Lands and both parties awaited for rectification by the Ministry of Lands and Settlement, however, this could not have been pushed through as she passed on shortly thereafter.”*** That part of the statement and evidence of PW1 was not controverted, and shows or confirms at least that the late Salome Muhonja Odera knew that her registration with the suit land was through a mistake. That the provision of ***Section 143 of the Registered Land Act (repealed)*** on circumstances under which a registration and title can be impugned has similarities with ***Section 26 and 80 of the Land Registration Act No. 3 of 2012***. That ***Section 26 of Act No. 3 of 2012*** provides that a Certificate of Title issued by the Land Registrar is conclusive evidence of proprietorship ***“Subject to the encumbrances, easements, restriction and conditions contained or endorsed in the certificate and the title of that proprietor shall not be subject to challenge, except –***

(a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

That ***Section 80 of the Act No. 3 of 2012*** provides for rectification by order of the Court. That the Court can direct any registration to be cancelled or amended if it is satisfied that it was obtained, made or omitted by fraud or mistake. That the register shall not be rectified to affect the title of the proprietor unless the ***“proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”***

(f) That the findings above that the registration of the suit land in the name of Salome Muhonja Odera was through fraud and or mistake means the 1st and 2nd Defendants counterclaim has no merit and therefore fails. That their beneficial interests lie on Plot Number 182 which their family have exclusively been in possession of since allocation to the late Nehemiah Odera in 1964 as Plot No. 183, and later upon consolidation or amalgamation of Plot Number 182 and 183 in 1965, was renamed Plot 182. That it is on that land that their late mother and two siblings were buried after their passing on.

(g) That the 3rd Defendant and Interested Party’s cross-claim was against the 1st and 2nd Defendants as clearly evinced by the heading between paragraphs 9 and 10 of the 3rd Defendant’s and Interested Parties’ statement of Further Amended Defence, and cross-claim dated 19th July 2018, and filed on the 20th July, 2018. That as held above, the 1st and 2nd Defendants’ beneficial interest as administrators of the estate of the late Salome Muhonja Odera lies on Plot No. 182, and not 183. That the 1st and 2nd Defendants had no registration interests over Kakamega/Lugari/183, which belongs to the Plaintiff. That the Plaintiff was not enjoined in the cross-claim, and there is no counterclaim lodged against the Plaintiff by the Interested Party. That the prayers sought by the 3rd Defendant, and Interested Party in the cross-claim to include the Interested Party as a proprietor in common cannot therefore, issue without affording the Plaintiff an opportunity to be heard on that issue.

(h) That as the situation the Plaintiff, 1st and 2nd Defendants, and the Interested Party find themselves in relation to the registration, and titling of the suit land is greatly contributed by the lack of professionalism, and integrity in the suit land’s documents maintained by the Land Registrar’s Office, it would be unfair to condemn the 1st and 2nd Defendants with costs of the Plaintiff’s suit and cross-claim by the 3rd Defendant, and Interested Party. That accordingly, each party will bear their own costs in the main suit, counterclaim and cross-claim.

12. That flowing from the foregoing, the Court finds and orders as follows;

- (a) That the 1st and 2nd Defendants have failed to prove their counterclaim to the standard required, and the same is dismissed.
- (b) That the Plaintiff, 3rd Defendant and Interested Party have proved their claim and cross-claim respectively against the 1st and 2nd Defendants on a balance of probabilities. The Court therefore, enters judgment for the Plaintiff, 3rd Defendant and Interested Party against the 1st and 2nd Defendants in the following terms;
- (i) That a declaration is hereby issued that the registration, and issuance of title of Kakamega/Lugari/183 to Salome Muhonja Odera on the 28th August, 1990, and 3rd September, 1990 respectively was fraudulent and erroneous.*
- (ii) That a declaration is hereby issued that land parcel Kakamega/Lugari/183 that was formerly Plot No. 695 at initial allocation, and later renumbered Plot 183 belongs to the Plaintiff, Lugari Yearly Meeting of Friends (Quakers).*
- (iii) That the Land Registrar do upon presentation of this order rectify the register of Kakamega/Lugari/183 by deleting the name of Salome Muhonja Odera as proprietor at entry Number 2, and thereafter process the registration of the discharge of Charge by Settlement Fund Trustees, and transfer in favour of the Plaintiff, Lugari Yearly Meeting of Friends (Quakers) upon payment of the applicable fees, if any.*
- (iv) That the 1st and 2nd Defendants do give the Plaintiff, vacant possession of Kakamega/Lugari/183 in ninety (90) days and in default, eviction order to issue to be executed in accordance with the law.*
- (v) That upon the 1st and 2nd Defendants giving vacant possession or evicted as in (iv) above, they remain permanently, restrained from interfering with the Plaintiff's use, and possession of the suit land.*
- (vi) That the Land Registrar do transfer Plot Number 182 Lugari Settlement Scheme to the 1st and 2nd Defendants as personal representatives of the estate of the late Salome Muhonja Odera upon appropriate discharge of Charge by Settlement Fund Trustees, transfer and applicable fees, if any being presented.*
- (c) That each party bears their own costs in the Plaintiff's suit, the 1st and 2nd Defendants' counterclaim and the cross-claim by 3rd Defendant and Interested Party.

Orders accordingly.

Delivered and signed at Eldoret this 13th day of May, 2020

S. M. KIBUNJA

JUDGE

Judgment read in the absence of all Parties/Counsel and be transmitted by the Deputy Registrar digitally through the e-mail addresses provided by Counsel.

Court Assistant: Christine