



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC 268 OF 2015 (O.S)**

**SAMWEL ODONGO OMEDO..... PLAINTIFF**

**VERSUS**

**HARRISON OCHIENG KOJWANG.....1<sup>ST</sup>DEFENDANT**

**JUDGEMENT**

Samuel Odongo Omedo hereinafter referred to plaintiff has brought this amended originating summons against Harrison Ochieng Kojwang hereinafter referred to as the defendant for determination of the following issues namely:

- 1) Whether the Applicant/Plaintiff herein is entitled to the while of land parcel No. KISUMU/KOGONY/358 by reason of their his adverse possession of the same for a period exceeding 12 years.**
- 2) Whether the transfer of land parcel No. KISUMU/KOGONY/358 registered on 7<sup>th</sup> November, 1996, in favour of the Defendant was made after the death of the first registered proprietor, Guya Odongo on 15<sup>th</sup> August, 1986, and if so, whether the said transfer was made without a grant of letters of administration to the deceased's estate and was therefore irregular and null and void.**
- 3) Whether the Respondent/Defendant's proprietary interest in the said land parcel No. KISUMU/KOGONY/358 has been extinguished by virtue of the Applicant's/Plaintiff's adverse possession of the same and whether the Respondent/Defendant is now holding the title in trust for the Applicant/Plaintiff.**
- 4) Whether the Title Deed issued in the name of the Defendant HARRIOSN OCHIENG KOJWANT as the absolute proprietor of the whole of land parcel No. KISUMU/KOGONY/358 should now be annulled, revoked and cancelled and transferred to the Applicant/Plaintiff herein as sole proprietor.**
- 5) Whether the Applicant/Plaintiff should be registered as proprietor of land parcel No. KISUMU/KOGONY/358 in place of the Defendant who is presently registered as proprietor of the said parcel of land.**
- 6) Whether the costs of this summons should be provided for and be paid by whom.**

The summons is based on grounds that the plaintiff is the grandson of the late guya pius owiti (a.k.a Guya Odongo) and is now the administrator of the deceased's estate pursuant to a grant of letters of

administration issued to him in kisumu cmc succession cause no. 714 of 2016, and he is also interested in the deceased's estate as an heir.

The plaintiff claims that Under Order 37 Rule 1 of the civil Procedure Rules, the Plaintiff is entitled to take out as of course; an originating summons returnable before a judge for the determination of any relief affecting his right or interest as an heir to the deceased.

The said Guya Odongo (a.k.a Guya Pius Owiti) (deceased) was, until his death on 15<sup>th</sup> August, 1986, the sole registered absolute proprietor of land parcel No. KISUMU/KOGONY/358 measuring or estimated to measure 0.5ha or thereabouts.

On 7<sup>th</sup> November, 1996, long after the death of the said Guya Odongo, but before any grant of letters of administration was issued in respect of the deceased's estate, the whole of the said land parcel No. KISUMU/KOGONY/358 was irregularly transferred to the Defendant Harrison Ochieng' Kojwang'. The said Harrison Ochieng' Kojwang' is not and has never been the administrator of the estate of the said Guya Odongo.

It is now necessary to determine whether the transfer of the said land parcel No. KISUMU/KOGONGY/358 to HARRISON OCHIENG' KOJWANG' on 7<sup>th</sup> November, 1996, should be revoked or annulled. It is just equitable that the orders sought herein do issue.

In the supporting affidavit, he states that his father occupied the suit parcel before his death in 2001. He planted trees and built rental houses. The plaintiff moved in in 2002 and constructed his homestead on the land. He has constructed a rental block with 7 residential units. Moreover, he has inherited his father's units.

The plaintiff claims to have planted 30 blue gum trees, 4 gravalia trees, 5 pine trees and more than 30 other assorted species of trees. His homestead is fenced with barbed wire as well as chicken wire and has three pit latrines and a shallow well for the use of his family and tenants. He keeps 10 heads of cattle, 25 sheep, and many chicken from which I have been generating income for the last 15 years or more. He has constructed a kiosk in which he has been operating a grocery business, and has also installed electricity and also constructed a diesel posho mill that is operating.

He after the death of his father Maureice Omedo Maunga, he went to the lands office towards the end of 2001 to ascertain whether the above parcel of land had already been transferred to his name by Guya Odongo. He discovered that the parcel of land had been transferred to one Harrison Ochieng' Kojwang' (the Defendant herein) on 7<sup>th</sup> November, 1996;

That he was greatly alarmed by this he had never heard about the Defendant before that date and started making enquiries about him.

That later in the year 2002, the Defendant went to the above parcel of land in the company of two other people, and informed the plaintiff that he bought a portion of the said parcel of land from one Richard Otiende Okore.

That the said Richard Otiende Okore was well known to the plaintiff and the plaintiff knew that he died before the death of plaintiffs own father who died in 2001. That the said Richard Otiende Okore was not related to the late Guya Odongo or to any member of the plaintiffs family.

He knows that the late Guya Odongo died in 1986 and could not have been alive on 7<sup>th</sup> November, 1996 when the transfer was made in favour of the Defendant herein. That the said Richard Otiende Okore was not the personal representative of the estate of Guya Odongo.

That the said Richard Otiende Okore was the registered proprietor of land parcel No. Kisumu/Kogony/357 where he was buried.

The plaintiff asserts that despite the registration of the title in the name of the Defendant/Respondent, he has continued to occupy the said land parcel No. Kisumu/Kogony/358 undisturbed, peacefully and as of right without any interference from the Defendant/Respondent since 2002, a period exceeding 13 years to date.

The Defendant/Respondent has not occupied or used the said land parcel No. Kisumu/Kogony/358 or any portion of it, nor has he received any profits from the land. The Defendant/Respondent knew and has known all along that the plaintiff has been in possession of the suit land contrary to his rights.

The plaintiff has requested the Defendant/Respondent several times to surrender the title deed but he has refused to do so.

He has been advised by my lawyer, which advice I believe to be true and correct, that the Defendant/Respondent's title to and interest in the said land parcel No. Kisumu/Kogony/358 has been extinguished by operation of the law and that he is now holding the title in trust for him and that the said land parcel No. Kisumu/Kogony/358 should now be registered in the plaintiff's name by virtue of my continuous, peaceful, exclusive and uninterrupted occupation of the same for a period exceeding 13 years from 2002 to date.

Samuel Otieno Kojwang the registered Attorney of the defendant filed a replying affidavit stating that the defendant bought a portion of the suit parcel in 1996. He bought a portion of 0.3 ha out of 0.8 Ha of the suit property. He applied for the consent for subdivision of the suit property and the same was granted. He states that he has allowed the plaintiff to use the suit property as heir to the defendant. He states that the plaintiff has never used the portion meant to the defendant as the plaintiff's user has been reserved in the portion meant to be transferred back to the deceased.

I have considered the evidence on record and do find that the plaintiff not sure whether he should claim adverse possession or Cancellation and rectification of title and/or an interest in the estate of the deceased Guya Odongo. He does not give evidence of the gift inter-vivos and does not demonstrate that he has actually put up a home on the whole suit parcel of land. There is no evidence that the plaintiff's father looked after Guya Odongo. There is no evidence that the plaintiff's father took care of the burial arrangements of Guya Odongo.

Moreover, if it is true that Guya Odongo died in the year 1986, then definitely there is fraud as Guya Odongo who died in 1986 could not transfer the property in the year 1996 and therefore this could be a clear case of the defendant obtaining title by fraud or illegality.

Mr Moses J.A Orengo learned counsel for the plaintiff has gone at great length to demonstrate that the defendant was illegally registered as the proprietor of the suit parcel of land and has properly invoked **Article 40(6) of the constitution of Kenya 2010** that prohibits protection of illegally or unlawfully acquired title. He has also invoked section 26(1) of the land registration act 2012 that does not protect land acquired illegally, unlawfully and or corruptly. However, in my view this is not a proper case for invoking Order 37 Rule 1 and 7 of the Civil Procedure Rules 2010.

Adverse possession cannot be invoked where the registered owner acquired registration by way of fraud, illegality or corruption. This court would be the last institution to support or rely on title obtained fraudulently as a proper title.

I do find the originating summons misconceived as the plaintiff being the administrator of the estate of the deceased Guya Odongo should file a suit for cancellation of the title issued to the defendant allegedly fraudulently. Fortunately the plaintiff withdrew the prayers number 1,3,4 and 5 of the originating summons and therefore the same are considered as having been withdrawn hence the claim on adverse possession has been withdrawn and the only issue remaining is whether the transfer of land parcel No. KISUMU/KOGONY/358 registered on 7<sup>th</sup> November, 1996, in favour of the Defendant was made after the death of the first registered proprietor, Guya Odongo on 15<sup>th</sup> August, 1986, and if so, whether the said transfer was made without a grant of letters of administration to the deceased's estate and was therefore

irregular and null and void.

**Order 37 rule 1 provides as follows**

**1. “The executors or administrators of a deceased person, or any of them, and the trustees under any deed or instrument, or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, heir, or legal representative of a deceased person, or as cestui que trust under the terms of any deed or instrument, or as claiming by assignment, or otherwise, under any such creditor or other person as aforesaid, may take out as of course, an originating summons, returnable before a judge sitting in chambers for such relief of the nature or kind following, as may by the summons be specified, and as circumstances of the case may require, that is to say, the determination, without the administration of the estate or trust, of any of the following questions- (a) any question affecting the rights or interest of the person claiming to be creditor, devisee, legatee, heir or cestui que trust; (b) the ascertainment of any class of creditors, devisees, legatees, heirs, or others;**

**(c) the furnishing of any particular accounts by the executors, administrators or trustees, and the vouching, when necessary, of such accounts; (d) the payment into court of any money in the hands of the executors, administrators or trustees; (e) directing the executors, administrators or trustees to do, or abstain from doing, any particular act in their character as executors, administrators or trustees; (f) the approval of a sale, purchase, compromise or other transaction; (g) the determination of any question arising directly out of the administration of the estate or trust.”**

The above provision does not envisage a claim by the administrator of the estate of the deceased against a person who is allegedly illegally registered as the proprietor of property that belonged to the deceased. These provisions would only apply to property that has been declared to be part of the estate of the deceased. The suit property is not part of the property of the estate of the deceased. The defendant is not a creditor, devisee, legatee, heir, or legal representative of Guya Odongo. Title to property cannot be cancelled by virtue of an Originating Summons filed under Order 37 of the Civil Procedure Rules 2010.

The upshot of the above is that the suit is misconceived and is dismissed with costs. Orders accordingly.

**DATED, DELIVERED and SIGNED THIS 8<sup>th</sup> 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 15<sup>TH</sup> March 2019 and with the consent of the parties.

**A.O. OMBWAYO**

**ENVIRONMENT & LAND**

**JUDGE**