

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC (OS) CASE NO. E023 OF 2023

IN THE MATTER OF REGISTERED LAND ACT CAP.300 (Repealed)

AND

IN THE MATTER OF SECTIONS 26 AND 61 OF THE LAND

REGISTRATION ACT, NO.3 OF 2012

AND

IN THE MATTER OF THE LAW OF SUCCESSION ACT, CAP 160

AND

IN THE MATTER OF PARCEL OF LAND NO. KISUMU/OJOLA/1586

BETWEEN

PAUL OTIENO OINDO APPLICANT/PLAINTIFF

VERSUS

PHILICE EMILY ANYANGO OKECH 1ST RESPONDENT/DEFENDANT

PETER OMONDI OINDO 2ND RESPONDENT/DEFENDANT

J U D G E M E N T

Vide the Originating Summons dated 26th May, 2023 Paul Otieno Oindo, the Applicant, who claims proprietary interest in land parcel No. KISUMU/OJOLA/1586 as an heir/beneficiary, placed before court for determination the following questions against the Respondents;

1. whether the transfer of land parcel No. KISUMU/OJOLA/1586 was first registered in the joint names of OINDO MISUMBA (deceased) and AGENGO MISUMBA (deceased), and if so, whether the transfer of the same to PETER OMONDI OINDO (the 2nd Respondent/Defendant) was made without a grant of Letters of Administration to the deceased's estate and further whether the registration of the same in the name of the 1st Respondent/Defendant was obtained illegally, unprocedurally and through a corrupt scheme and is therefore null and void.
2. whether the register for the said land parcel No. KISUMU/OJOLA/1586 should be rectified by cancelling the registration of 1st Respondent/Defendant as proprietor thereof and by restoring and registering the said parcel of land in the joint names of OINDO MISUMBA (deceased) and AGENGO MISUMBA (deceased), pending succession.
3. Whether the costs of this Summons should be provided for and be paid by the Respondents/Defendants.

The grounds upon which the Originating Summons was based are that;

- (a) The Applicant is one of the sons of the late OINDO MISUMBA who died intestate on 8th August, 2001, and is interested in the deceased's estate as an heir.
- (b) Under Order 37 Rule 1 of the Civil Procedure Rules, the Applicant, as an heir, is entitled to take out as of course, an Originating Summons returnable before a judge for the determination of any relief without the administration of the estate, affecting his right or interest as an heir of the deceased.
- (c) The said OINDO MISUMBA (deceased) was until his death, the registered absolute co-proprietor of land parcel No. KISUMU/OJOLA/1586 jointly with his brother AGENGO MISUMBA, deceased with effect from 21st July 1978.
- (d) Both the Applicant/Plaintiff as well as the 2nd Respondent/Defendant are sons of the said OINDO MISUMBA and both are entitled to share in the said property as part of the estate of the deceased.
- (e) The said land parcel No. KISUMU/OJOLA/1586 was transferred from the name of the deceased to the name of the 2nd Respondent on 25th October, 2011, who in turn

transferred the same to the 1st Respondent on 20th March, 2012.

(f) Under Section 61 of The Land Registration Act, 2012 (just like under the Section 119 of the Registrar Land Act, Cap.300, repealed), the 2nd Respondent/Defendant could only have been “*registered by transmission as proprietor in place of the deceased*” if he had a Grant of Letters of Administration which had been confirmed and pursuant to which the said land parcel No. KISUMU/OJOLA/1586 had been distributed as part of the deceased’s estate.

(g) In this case, the said land parcel No. KISUMU/OJOLA/1586 had not been administered or distributed as part of the deceased’s estate pursuant to any Grant of Letters of Administration which had been confirmed by any court.

(h) In the premises, and in terms of the provisions of Section 26(1)(b) of the Land Registration Act, 2012, the transfer of the said land parcel No. KISUMU/OJOLA/1586 from the name of the deceased to the name of PETER OMONDI OINDO (the 2nd Respondent), and further the registration of the same in the name of the 1st Respondent/Defendant was obtained or

acquired illegally, unprocedurally and through a corrupt scheme and is therefore null and void.

(i) It is now necessary to determine whether the transfer of the said land parcel No. KISUMU/OJOLA/1586 to PETER OMONDI OINDO (the 2nd Respondent/Defendant) as well as the registration of the said parcel of land in the name of the 1st Respondent/Defendant, should be annulled and the register rectified by cancelling the registration of 1st Respondent/Defendant as proprietor thereof and by restoring the said parcel of land in the joint names of OINDO MISUMBA (deceased) and AGENGO MISUMBA (deceased), pending succession.

The Originating Summons was supported by the contents of the Supporting Affidavit sworn by the Applicant and the annexures thereto.

The 1st Defendant, though served with the originating Summons, filed no response. Affidavits of Service sworn by Moses J. A Orengo on 23rd October 2024 and 11th November 2024 show that the 1st Defendant/Respondent was served. She failed to respond to the Originating Summons and to attend court for the hearing.

In response to the Originating Summons the 2nd Defendant/Respondent filed a Replying Affidavit sworn on 8th November, 2021.

Pursuant to directions given on 31st October, 2024, the suit proceeded by way of oral evidence.

The Applicant testified as PW1. He adopted the contents of his witness statement as his evidence in chief. He produced the green and for LR NO. KISUMU/OJOLA/1586, Death Certificate for Oindo Misumba and Death Certificate for Agengo Misumba as exhibits in the case. He stated that though the suit land is registered in the name of the 1st Respondent, he did not know how the transfer from the deceased person to the 1st Respondent happened.

The 2nd Respondent testified as DW1. He stated that he did not know the 1st Defendant/Respondent and that he did not know how the suit land was transferred from the deceased person to the 1st Defendant. That the 1st Defendant had never claimed the land. That no succession had been undertaken in respect of both deceased persons.

The 1st Defendant adduced no evidence.

Submissions

Written submissions dated 2nd May 2025 were filed by Moses J. A Orenge Advocate for the applicant. Counsel submitted that the application is not dealing with the distribution of the estate of the late Oindo Misumba. That the applicant has come to court as an heir without the administration of the estate in the wording of Order 37 Rule 1 of the Civil Procedure Rules to challenge the procedure by which the parcel of land in issue was transferred from the name of the deceased, that the procedure affected his right or interest as an heir to the deceased.

Counsel submitted that under section 80 of the Law of succession Act, a Grant of Letters of Administration shall take effect only as from the date of the Grant. Counsel also relied on sections 55 and 82 of the Law of succession Act to the effect that no Grant of representation shall confer power to distribute any capital assets in an estate unless and until the Grant has been confirmed as provided for by section 71 of the Act and that no immovable property shall be sold before confirmation of the Grant.

That in terms of section 26 (1) (b) of the Land Registration Act, 2012, the transfer of the said land parcel No. KISUMU/OJOLA/1586 from the names of the deceased persons to the 2nd Defendant and further the registration of the same in the name of the 1st Defendant

can be impeached as having been acquired illegally, un-procedurally and through a corrupt scheme and is therefore null and void.

In addition, Counsel relied on article 40 (6) of the Constitution of Kenya 2010 and sections 26 (1) and 80 of the Land Registration Act on impeachment and or cancellation of unlawfully acquired title to land.

Counsel further relied on a number of authorities including Adan Abdirahani Hassan & 2 others vs Registrar of Titles Ministry of Lands & 2 others (2013) eKLR and Elijah Makeri Nyang'wara vs Stephen Mungai Njuguna & Another where it was held that if it is proved that the title was obtained illegally, un-procedurally or through a corrupt scheme, the register in respect thereof should be rectified.

The 2nd Respondent filed written submissions dated 13th March 2025. He acknowledged that both the applicant and himself are biological children of Oindo Misumba, deceased, and are entitled to share in the suit property as part of the estate of the deceased. He submitted further that the 1st Defendant was a stranger to him.

He prayed that the entries on the green card be expunged and nullified together with all consequential title documents emanating from the said transfer as all of them were obtained by fraud.

Determination

The first question that the Applicant placed before court for determination is whether transfer of land parcel NO.KISUMU/OJOLA/1586 was first registered in the joint names of Oindo Musumba deceased and Agengo Musumba, deceased, and if so, whether the transfer of the same to Peter Musumba Oindo (the 2nd Respondent/Defendant) was made without a grant of Letter of Administration to the deceased's estate and further whether the registration of the same in the name of the 1st Respondent/Defendant was obtained illegally, unprocedurally and through a corrupt scheme and is therefore null and void.

The Originating Summons is brought pursuant to the provisions of order 37 Rules 1 and 8 of the Civil Procedure Rules 2010 which enables specified categories of person to present specified question for the court's determination. Heirs are one of the categories of such persons.

The green card in respect of the suit land was produced as exhibit by the Applicant. It shows that the register in respect of the suit land was opened on 21st July, 1978 when the suit land measuring 0.4Ha was registered in the names of Oindo Misumba and Ageng'o Misumba as tenants in common holding $\frac{1}{2}$ share each.

The green card further shows that on 25th October, 2011, the suit land was transferred in favour of Peter Omondi Oindo, the 2nd Defendant and title deed issued to him on the same date. It shows further that on 20th March, 2012, the land was transferred to Philice Emily Anyango Okech and title deed issued to her on the same date. Death certificate dated 1st September, 2010 in respect of Oindo Misumba shows that he died on 8th August, 2001 aged 74 years and for Richard Ageng'o Misumba dated 23rd February, 2010 shows that he died on 4th February, 2001.

This shows that both the transfer of the suit land to the 2nd Defendant on 25th October 2011 and the subsequent registration of the same in favour of the 1st Defendant happened after the death of the registered owners. Meaning that the only way registration of the land could be moved from the names of the deceased persons to the name of Peter Omondi Oindo is by way of transmission through a succession process as provided for in the Law of Succession Act and section 61 of the land Registration Act. Both the Plaintiff and the 2nd Defendant are in agreement that succession in respect of the estate of the deceased person as at the time of filing the present suit had not been undertaken.

The 2nd Defendant denied knowledge of the 1st Defendant, he denied that the suit land was ever transferred to him. He also denied that he ever transferred the suit land to the 1st Defendant.

There is no evidence that succession had been undertaken in respect of the estate of the deceased persons as at the time of the transactions complained about.

There is no dispute as to whether the applicant is heir of the deceased entitled to a share of the estate. The 2nd Defendant admitted as much. The applicant is not seeking distribution or administration of the estate. He has not brought the claim on behalf of the estate of the deceased or the other beneficiaries of the estate. I find that the applicant is pursuing his personal interest as heir and that his claim is within the provisions of Order 37 Rule 1 of the Civil Procedure Rules.

I find the transfer of the suit land to the 2nd Defendant was made without a grant of Letter of Administration to the estate of the deceased persons hence the subsequent transfer to the 1st Defendant was illegal and therefore null and void for contravening the provisions of Section 2, 45, 79, 80 and 82 of the Laws of Succession Act thereby defeating the interests of the applicant as heir of the estate of the deceased.

The second question is whether the register for the said land parcel No. KISUMU/OJOLA/1586 should be rectified by cancelling the registration of 1st Respondent/Defendant as proprietor thereof and by restoring and registering the said parcel of land in the joint names of OINDO MISUMBA (deceased) and AGENGO MISUMBA (deceased), pending succession.

The grounds upon which register in respect of given parcel of land can be rectified are specified in Section 80 of the Land Registration Act. These include when registration was obtained, made or omitted by fraud or mistake where the registered owner 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.

In the present case the 2nd Defendant denies knowledge of the fact that the suit land was ever transmitted from the deceased persons to himself and subsequently transferred to the 1st Defendant. He denied knowledge of the 1st Defendant. The 1st Defendant, though served, tendered no evidence to explain how she became registered owner of the suit land when succession to the estate of the lawfully registered owners had not been undertaken.

I find that the grounds for rectification of the register in respect of the suit land have been demonstrated herein hence the register for land parcel NO. KISUMU/OJOLA/1586 should be rectified by cancelling the registration of the 1st Respondent as proprietor thereof and restoring and registering the said parcel in the name of the deceased person as earlier registered as earlier registered, pending succession and administration of their estates as provided for in the Law of succession Act.

The third question regards costs of the Originating Summons. As the plaintiff and the 2nd Defendant are brothers and the 2nd Defendant does not contest the relief sought, each party to bear own costs of the action

In the end, the court finds that the Applicant has proved his claim on a balance of probabilities. Question 1 and 2 are answered in the affirmative and makes the following order:

- i. The court finds and declares that land parcel No. KISUMU/OJOLA/1586 was first registered in the joint names of OINDO MISUMBA (deceased) and AGENGO MISUMBA (deceased), and the transfer of the said land to PETER OMONDI OINDO (the 2nd Respondent/Defendant) was made without a grant of Letters of Administration to the

- deceased's estate and further the subsequent registration of the said land in the name of the 1st Respondent/Defendant was obtained illegally, un-procedurally and through a corrupt scheme and is therefore null and void.
- ii. the register for the land parcel No. KISUMU/OJOLA/1586 be rectified by cancelling the registration of 1st Respondent/Defendant as proprietor thereof and by restoring and registering the said parcel of land in the joint names of OINDO MISUMBA (deceased) and AGENGO MISUMBA (deceased) as registered on 21st July 1978, pending succession.
 - iii. Each party to bear own costs of the Originating Summons.

Orders accordingly.

Judgment dated and signed at Kisumu, read virtually this 9th day of October 2025 through Microsoft Teams Online Application.

E. ASATI
JUDGE.

In the presence of:

Maureen: Court Assistant.

Plaintiff/Applicant present in person.

2nd Defendant/Respondent present in person.