



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 784 (B) OF 2015 (FORMERLY CIVIL CASE NO. 173 OF 2010)**

**SABINA ONYACH RANDA (suing as the legal representative of**

**ANDREA OKULU OULU alias OKULO OULU (DECEASED).....PLAINTIFF**

**VERSUS**

**JORAM ODHIAMBO ABAYO.....DEFENDANT**

**JUDGEMENT**

1. Sabina Onyach Randa, suing as the legal Representative of Andrea Okulu Oulu alias Okulo Oulu (deceased), the Plaintiff, vide the plaint dated 5<sup>th</sup> November 2010, claims against Joram Odhiambo Abayo, the Defendant, for the following;

**a) Kshs. 171, 700/=, being the value of her crops damaged by the Defendant.**

**b) Cancellation of Defendant's title to Kisumu/Kadongo/3225 and registering the same in the Plaintiff's name.**

**c) Permanent injunction against the Defendant, and those claiming under him from interfering with the Plaintiff's use of the said land.**

**d) Costs.**

The Plaintiff avers that she is the legal representative of the estate of Andrea Okulu Oulu alias Okulo Oulu, who was the registered proprietor of Kisumu/Kadongo/3225, the suit property, at the time of adjudication. That after the death of the said proprietor, the Defendant conspired with the Land Officials, and tampered with the suit property's register and fraudulently got registered as the proprietor. That the Defendant thereafter threatened the Plaintiff, who has been in actual possession for over 30 years, with dire consequences unless she vacates. That in October 2010, the Defendant damaged the Plaintiff's crops, growing on the suit property, valued at Kshs. 171,700/=.

2. The Defendant opposed the Plaintiff's claim through his defence dated 18<sup>th</sup> November 2010, and amended on the 2<sup>nd</sup> June 2011, averring that the land was transferred to him during the lifetime of Andrea Okulu Oulu and that he obtained the title deed thereafter. That the Plaintiff and her son had trespassed onto the land resulting to two Criminal cases being Maseno Law Courts Criminal Cases No. 3 and 1137 of 2010.

3 The hearing commenced on the 20<sup>th</sup> April 2016 with the Plaintiff testifying as PW1. She called Richard Ombote Randa, Amollo Awiti, alias Leonard Amollo Awiti and Dominic Akoth who testified as P2 to PW4 respectively. The Plaintiff's case is that Land Parcel Kisumu/Kadongo/3225, the suit property, was after adjudication registered in the name of Andrea Okulu Oulu, the late brother to her husband. That Andrea died on 13<sup>th</sup> July 2003 leaving no widow or child. That the Plaintiff and Andrea were living and farming on the suit property, which she has used from 1958. That in 2010 the defendant damaged her crops valued by the land agricultural officer at Kshs. 171,700/=. The Plaintiff testified that before filing this suit, she had obtained a limited Grant in Succession Cause No. 54 of 2010, and produced a copy as exhibit. That in 2009 she got to know that the Defendant, who she used to see visiting Andrea during his life time, was the registered owner of the land and hence this suit. PW2, who is her son, and PW3 who is a relative also testified confirming that the land was registered with Andrea Okulu Oulu upon adjudication. That the family of PW1 left the land to establish their home on another land in 1990, leaving Andrea on his land. PW4 told the court how he assessed the crops that had been damaged on the suit property at Kshs. 171,700/=.

4. The Defendant testified on the 25<sup>th</sup> January 2018 as DW1, and called Nicholas Amoke Mwanda as DW2. The Defendant's case is that the suit land was given, and transferred to him by his late brother Andrea Okulu Oulu, on the 22<sup>nd</sup> December 1994. He produced the copy of the title deed and green card as exhibit. He also told of the objection proceeding upon the land being registered with the late Andrea, which was allowed and his name inserted in the adjudication record, a copy of which he produced. That he had left Andrea to look after the land and went to Tanzania. That later, Andrea called him and reported that the son of PW1 had caused some damage to the fence and crops therein. The son of PW1 was arrested and charged with trespass in Maseno Criminal Case No. 3 of 2010. That on the dates he is alleged to have

damaged the crops belonging to the Plaintiff, he was away in Tanzania.

5. That after the parties closed their cases, the counsel for the Plaintiff and Defendant filed their written submissions dated the 16<sup>th</sup> February 2018 and 8<sup>th</sup> March 2018 respectively.

6. The following are the issues for the court's determinations;

- a) **Whether Andrea Okulu Oulu was registered with the suit property after adjudication.**
- b) **Whether the registration of the Defendant with the suit property was obtained fraudulently.**
- c) **Whether the Plaintiff has presented evidence to show that the Defendant is the one who damaged her crops valued at Kshs. 171,700/=**
- d) **Who pays the costs.**

7. The Court has carefully considering the pleadings, evidence tendered by PW1, PW2, PW3, PW4, DW1 and DW2, the Counsel's submissions plus the Superior Court's decisions cited therein and come to the following conclusions;

- a) That both the Plaintiff and the Defendant are in agreement that the suit property was after first registered with Okulu Oulo, who reportedly passed on the 13<sup>th</sup> July 2003. The copies of the demarcation register provided by both parties confirms that position.
- b) That though the Plaintiff appeared not to know of the subsequent development over the suit property's ownership until the year 2009, when she discovered that the Defendant was the registered proprietor, the Defendant has availed copies of the adjudication record, summary of objection proceedings, involving Kisumu/Kadongo area and a receipt No. W 60278 of Kshs. 450/=, showing that the Defendant objection proceeding was allowed on the 22<sup>nd</sup> December 1994, and his name entered in the adjudication record in place of that of Okulu Oulu. That the copy of the green card confirms that the Defendant became the suit land's first registered proprietor on the 27<sup>th</sup> October 2008 and had a title deed issued in his name on the 6<sup>th</sup> April 2009. That though the Plaintiff had alleged that the Defendant obtained registration with the suit property fraudulently and in collusion with the Land Officials, the court finds no evidence has been tendered to prove fraud on the part of the Defendant to the standard required under the law. This is especially so when the court notes that the Defendant's name was substituted for that of the late Okulu Oulu in 1994, about nine (9) years before his death. That the Court of Appeal in the case of **Virjay Marjoria vs Nansing Darbar & Another [2000] eKLR** restated that the allegations of fraud must be proved to a level beyond that applicable in ordinary civil cases. That in this case, there is only allegations of fraud which are discerned from the pleadings in the plaint, and testimony of the Plaintiff, without any cogent evidence in support.
- c) That the provisions of **Section 23 of the Registration of Titles Act Chapter 281 of Laws of Kenya**, now repealed, and **Section 26 (1) of the Land Registration Act No. 3 of 2012** requires the certificate of title issued by the Registrar to **"be taken by all courts as prima facie evidence that the person named as the proprietor of the land is the absolute and indefeasible owner....."**. That as held in (b) above, no evidence has been presented to show that the Defendant's title to the suit property was not legally, procedurally and regularly obtained and the court finds that the Plaintiff's attempt to impugn his title has therefore failed.
- d) That though the Plaintiff's crops on the suit land valued at Kshs.171, 700/=, as per the report by PW4, was occasioned sometimes in 2010, the Plaintiff (PW1), and her son (PW2), did not state that they saw the damage being done. They also did not say that they saw the Defendant do the damage. The evidence by PW3 suggested that the damage was done by some youth sent by the Defendant. The identity of those youths, and their relationship to the Defendant was not disclosed to the court. The defence offered by the Defendant on the score is that he was in Tanzania at the alleged time. That though the Defendant indicated that his passport could confirm to the court that he was in Tanzania at the time, he did not provided the court with a copy of the same in proof. That as there was no other party contesting with the Plaintiff over the suit land, the court nevertheless finds that the Plaintiff has, on a balance of probability, proved that the Defendant caused the said damage to crops.

8. That flowing from the foregoing, the court finds that the Plaintiff has partly proved her case against the Defendant and orders as follows;

- a) **That the Defendant do pay the Plaintiff for the damaged crops, at Kshs. 171,700/=, (One hundred seventy one thousands seven hundred) with interest at courts rates.**
- b) **That prayers (b) and (c) of the plaint dated the 5<sup>th</sup> November 2010 fails for the reasons set out above.**
- c) **That each party do bear her/his own costs in view of their relationship with the hope that this will promote good relations between them.**

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

**JUDGE**

**DATED AND DELIVERED THIS 20<sup>TH</sup> DAY OF FEBRUARY 2019**

**In the presence of:**

Plaintiff                      Absent

Defendant                     Absent

Counsel                        Mr. Ondieki for Oyoko for Plaintiff

                                      Mr. Ojuro for the Defendant

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**