



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT KISUMU

ELC NO. 554 OF 2015

(FORMERLY HCCC NO. 230 OF 2011)

MAURICE ADINDA ONG'ONG'O.....PLAINTIFF

VERSUS

ONG'ONG'O ARUDO.....1ST DEFENDANT

CLEMENT ABOGE ONG'ONG'.....2ND DEFENDANT

THE HON. ATTORNEY GENERAL

AG. CHAMBERS, KISUMU.....3RD DEFENDANT

JUDGMENT

1. Maurice Adinda Ong'ong'o, the plaintiff, commenced his suit through the plaint dated the 22nd November, 2011 against Ong'ong'o Arudo, Clement Aboge Ong'ong'o and the Attorney General, the defendants, seeking for the following orders:-

a. "A declaration that the judgment and order of Bondo Resident Magistrate's court dated 25th June, 2010 entered in accordance with the proceedings of the Bondo District Land Tribunal in Tribunal case No. 12 of 2005 nullifying the plaintiff's title and subdividing his land parcel number South Sakwa/Migwena/658 into several portions was unlawful as it was made without jurisdiction and therefore a nullity.

b. Costs of this suit together with interest."

The plaintiff avers that he was at all material time the registered proprietor of South Sakwa/Migwena/658, the suit land. That the plaintiff had sued the defendant before Bondo District Land Disputes Tribunal in case No. 12 of 2005, and without taking down the plaintiff's evidence and notwithstanding lack of jurisdiction, the tribunal ordered the suit land to be subdivided into three (3) portions for the 1st and 2nd defendants and himself. That the tribunal award was entered as the court's judgment by Hon. J. W. Onchuru, Resident Magistrate Bondo, on the 25th June, 2010. That the land was given to the plaintiff by his grandfather when he was young and the 1st defendant who is his father, owns South Sakwa/Migwena/728. That the 2nd defendant is son to 1st defendant.

2. The plaintiff's claim, is opposed by Ong'ong'o Arudo, the 1st defendant, through the statement of defence dated the 1st February, 2012. The 1st defendant avers that he is the one who had the plaintiff, who was his eldest son, registered with the suit land when he was one year old, as trustee for his siblings in 1971. That the suit land belonged to his father's brother and was given to him to build a home on it, which he did in 1967.

3. The claim is also opposed by Clement Aboge Ong'ong'o, the 2nd defendant, vide his statement of defence filed on the 1st February, 2012 more or less echoing the averments of the 1st defendant on the material aspects.

4. The 3rd defendant, the Attorney General, also opposes the claim though their defence dated the 23rd October, 2013 averring that the tribunal gave both sides the opportunity to tender their evidence before making their award. That the Hon. Resident magistrate entered the judgment in accordance with the law as he could not alter the decision of the tribunal. That the plaintiff's suit is time barred and defective for failure to comply with Section 13(1) of Cap 40 of Laws of Kenya.

5. The hearing took place on the 17th October, 2018 when the plaintiff and his one witness were heard as PW 1 and PW 2 respectively. The 2nd defendant, who had been present when the hearing date was fixed on the 30th April, 2018, and the 1st and 3rd defendants who had been

served with hearing notice dated 24th May, 2018 on the 3rd and 13th August, 2018 respectively, did not attend and participate in the hearing.

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

a. Whether the plaintiff has established that the Honourable Resident magistrate's, Bondo, order of 25th June, 2010 was without jurisdiction and a nullity.

b. Who pays the costs of the suit.

7. The court has after considering the pleadings filed by the parties, the oral and documentary evidence tendered by the plaintiff and his witness, come to the following determinations;

a. That from the pleadings by the plaintiff, 1st and 2nd defendants, they are all related as father and sons. The 1st defendant is the father to both the plaintiff and the 2nd defendant. That relationship was confirmed by the plaintiff and his witness, Moses Obiero, when they testified in court.

b. That it is also clear from the three parties' pleadings, and evidence tendered by the plaintiff and his witness, plus the Bondo Land Disputes Tribunal proceedings availed by the parties, that both the plaintiff and the 2nd defendant were born on, and still live on, the suit land with their father the 1st defendant and their other siblings..

c. That the plaintiff was reportedly born in 1969 and registered with the land in 1974 which would shows that the decision to register him as proprietor was made by somebody else. That while the plaintiff claimed that the land previously belonged to his grandfather who gave it to him, the 1st defendant position was that the land had been given to him and that he settled on it in 1967. That in view of the obvious minor age of the plaintiff at the time of the land consolidation and adjudication that proceeded the registration in 1974, the court takes the 1st defendant's averment on the matter that the suit land was his to be more reliable and convincing. That noting the Bondo District Land Disputes Tribunal proceedings shows that one Naftali Ongara Okech confirmed before them that he is the one who gave the suit land to the 1st defendant, then the claim by the plaintiff to the contrary has no basis.

d. That the claim by the plaintiff that the tribunal made a decision (award) without recording his evidence cannot be true as a perusal of the copy of the proceedings provided contains several references to the evidence given and relied upon in coming up with the award. That for example, is the first sentence below the heading "DECISION OF THE TRIBUNAL" which states "Having heard and considered the representation of all parties and their witness and having considered all documents submitted to us, we hereby decide as follow –"

That in any case, the plaintiff has not availed any evidence that he requested for a copy of the testimonies tendered before the tribunal and received confirmation that there was none taken or recorded.

e. That the provision of **Section 7 (2) of the Land Disputes Tribunal Act Chapter 303A of Laws of Kenya**, now repealed under **Section 31 of the Environment and Land Court Act** required the magistrates court to adopt the award of the tribunals as judgment of the court. The adoption of the award was primarily for the purpose of execution or enforcement in accordance with Civil Procedure Act. That the law did not allow the magistrates courts to question the merits or otherwise of the awards received for adoption. That the party not satisfied with a tribunal award had recourse to file an appeal with the Provincial Land Disputes Appeals Committee under **Section 8 (1)** of the said Act and thereafter to the High Court order **Section 8 (9)** of the Act. The plaintiff has not explained why he did not file an appeal with the Nyanza Provincial Land Disputes Appeals Committee over the tribunal decision of 20th April, 2010, or with this court after the repealing of the Land Dispute Tribunal Act. The Land Disputes Tribunal award of 20th April 2010 has not been challenged todate either through an appeal or judicial review proceedings. That it has also not been challenged in this suit for declaratory order.

8. That flowing from the foregoing, the court finds no merit in the plaintiff's suit and though the defendants did not tender any evidence, the claim is dismissed with no orders as to costs.

Orders accordingly.

S. M. KIBUNJA

ENVIRONMENT & LAND - JUDGE

DATED AND DELIVERED THIS 13TH DAY OF FEBRUARY, 2019.

In presence of;

Plaintiff Present

Defendants 2nd present

Counsel None

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE