



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC CASE NO. 221 OF 2013

JASCA AWUOR ONYANGO.....PLAINTIFF

VERSUS

WILLIAM OMOLLO.....1ST DEFENDANT

REV. WILFRED AMOLLO.....2ND DEFENDANT

JUDGEMENT

1. This suit was commenced by Jasca Awuor Onyanyo, the Plaintiff, against William Omollo and Rev. Wilfred Amollo, the Defendants, through the plaint dated the 28th August 2013 seeking for;

- a) An order of permanent injunction against Defendants by themselves or agents over Siaya/Ambira/228, the suit land.**
- b) An order of eviction of the Defendants from, and demolition of the structure they have erected on the suit land.**
- c) Costs and interests.**

2. The Plaintiff avers that the Defendants had in 2005 trespassed onto the suit land without her consent and commenced constructing houses and established a school therein. That despite her repeated efforts to have an amicable solution, the Defendants have failed, ignored and refused to vacate from the suit land.

3. The Plaintiff's claim is opposed by the Defendants through their statement of defence dated the 25th September 2013, in which they among others avers as follows;

- a) That they disputed that the Plaintiff was the registered proprietor of Siaya/Ambira/228 or that they had trespassed onto the said land in 2005 and erected a school.**
- b) That there has been another suit between the parties over Siaya/South Ugenya/Ambira/2297, being Siaya P.M.C Misc. Civil Application No. 44 of 2005, which the Plaintiff has not disclosed.**
- c) That Siaya/South Ugenya/Ambira/2297 measuring 0.22 ha is registered in the name of Skills for Living Ministries in which they are officials.**
- d) That the Skills for Living Ministries are bona fide purchasers for value of Siaya/South Ugenya/Ambira/2297 which it bought from Dismus Owoko Okoth, and has developed since 2004.**
- e) That Dismus Owoko Okoth, who sold the land to their church, had been issued with a title deed in his name on 9th July 1998 having bought it from George Obuongo Owiso, the first registered proprietor and husband to the Plaintiff.**
- f) That Siaya/South Ugenya/Ambira/2297 is a sub-division of Siaya/Ambira/228. That the other sub-division, Siaya/South Ugenya/Ambira/2296, is still in the name of George Obuongo Owiso, the Plaintiff's husband.**
- g) That the register for Siaya/Ambira/228 was closed upon being subdivided into Siaya/South Ugenya/Ambira/2296 and 2297 in 1998, and that the creation of another register and registration of the Plaintiff as proprietor of Siaya/Ambira/228 in 2001**

was not only fraudulent but also a criminal act and cannot confer legitimate title to the Plaintiff.

h) That the suit is bad in law, misconceived and an abuse of the court's process and should be dismissed.

i) That the Defendants have been improperly sued as Siaya/South Ugenya/Ambira/2297 is registered in the name of Skills for Living Ministries which is a registered society.

4. The hearing commenced on the 26th October 2016 when the Plaintiff testified as PW1. The Plaintiff called Gibson Okure, the District Land Registrar Ugenya/Ugunja Sub-county, who testified as PW2, and Jared Ouma Okoth, a surveyor with the Ministry of Lands Ugunja Sub-county, who testified as PW3. The defence case commenced on the 20th February 2018 with Reverend Wilfred Ochieng Amollo, the 2nd Defendant, testifying as DW1.

5. The learned Counsel for the Plaintiff and Defendants filed their written submissions dated the 1st March 2018 and 29th March 2018 respectively.

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

a) Who is or was the registered proprietor of Land Parcel Siaya/Ambira/228.

b) Whether land parcel Siaya/Ambira/228 exists today.

c) Whether South Ugenya/Ambira/228 and Siaya/Ambira/228 refers to the same parcel of land.

d) Whether Siaya/South Ugenya/2296 and 2297 are sub-division of Siaya/Ambira/228 and if so, who is the registered proprietors of the said sub-divisions.

e) Whether this suit is res judicata in view of Siaya PMC Misc. Civil Application No. 44 of 2005.

f) Whether the registration of Skills for Living Ministries with Siaya South Ugenya/Ambira/2297 was legal and procedural.

g) Whether the Plaintiff has proved her case for the issuance of the injunction, eviction and demolition orders sought.

h) Who pays the costs of the suit.

7. The Court has carefully considered the oral and documentary evidence presented by PW1, PW2, PW3 and DW1, the written submissions by both Counsel, the pleadings and come to the following conclusions;

a) That from the copy of the register of Siaya/Ambira/228 issued on the 4th February 2008, attached to the Plaintiff's list of documents, the land was first registered on the 22nd June, 1976 in the names of Nicolus Owiso and George William Owiso. That then on the 1st February 1993, the name of George William Owiso was changed to George Obuongo Owiso under entry No. 2. That under the same entry the share of each of the two persons was indicated as half (½) share. That on the same date, under entry No. 3, the whole land was registered in the name of George Obuongo Owiso through transmission and title deed issued. That on the 17th July 2001, the land was transferred to Jasca Awuor Onyango and title deed issued under entries Nos. 5 and 6 respectively.

b) That the copies of the register for parcels South Ugenya/Ambira/2296 and 2297 attached to the Defendants' list of documents show that they are sub-divisions of plot No. 228. They were both first registered on 23rd June 1998 in the name of George Obuongo Owiso. The mutation form also attached to the same list shows that George Obuongo Owiso had South Ugenya/Ambira/228 sub-divided into parcels 2296 and 2297 on the 19th March 1998, and that the mutation was registered on the 23rd June 1998, which is the same date appearing as the registration date for the two parcels in the copies of their register. The copy of the register for South Ugenya/Ambira/2296 shows that it is still in the name of George Obuongo Owiso, the husband to the Plaintiff.

c) That the copy of the register for South Ugenya/Ambira/2297 shows that the land was transferred to Dismas Owoko Okoth on the 9th July 1998, and then on the 14th October 2004 to Skills For Living Ministries. That attached to the Defendants' list of documents is a sale agreement between Genson Owino Owiso and Dismas Owoko Okoth dated 4th April 1998 for the sale of a **"part of parcel land known as Ambira/Siaya No. 228 measuring 73 by 92ft by 241ft."** The said agreement at the last paragraph contains the following note-

"Currently, the parcel is still bearing late Nicolus Owiso Oyule. I Genson Owino Owiso and William Okoth Owiso the would be successors. Booth of us have agreed."

That also attached to the said list of documents is a certificate of official search issued on the 17th December 2003, showing that South Ugenya/Ambira/2297 was on the 9th July 1993 registered in the name of Dismas Owoko Okoth. That concurs with the detail of entry No. 2 of the register for the parcel referred to earlier. That also attached to the Defendants' list of documents is a sale agreement between Dismas Owoko Okoth and Rev. Wilfred O. Amollo on behalf of Skills For Living Ministries dated 19th February 2005 over sale of land parcel South Ugenya/Ambira/2297.

d) That from the copies of the proceedings, chamber summons and affidavit filed in Siaya PMC. Misc. Civil Application No. 44 of 2005 which are annexed to the Defendants' list of documents, it is clear the 2nd Defendant had sued the Plaintiff seeking the lifting of a caution filed against the title of South Ugenya/Ambira/2297 on the 22nd July 2005. The reasons given by the cautioner in support of the caution are at the back of the caution document attached to the said list, and are as summarized here below-

- **South Ugenya/Ambira/2297 is currently registered in the name of Skills For Living Ministries.**
- **That the said land belongs to the cautioner and has planted nappier grass on it.**
- **That Skills For Living Ministries started making developments on the land without the cautioner's knowledge and destroyed her nappier Grass.**

e) That both parties in Siaya PMC Misc. Application No. 44 of 2005, who are the Plaintiff and 2nd Defendant in this case, were represented by Counsel during the hearing of the application. That the lower court proceedings show that the ruling was delivered on the 28th September 2005, in which the court directed the Land Registrar to remove the caution placed against South Ugenya/Ambira/2297. Though the Counsel for Jasca Awuor Onyango, who is the Plaintiff in this suit, sought and obtained leave to appeal, the court has not been informed whether the appeal was ever filed and what order if any, was issued. That looking at entry No. 7 of 1st November 2005 of the copy of the register of parcel South Ugenya/Ambira/2297, produced by PW2, the Land Registrar, the caution was removed as directed in Siaya PMC Misc Civil App. No. 44 of 2005.

f) That though the Plaintiff (PW1) initially took the position that South Ugenya/Ambira/228 does not exist, the Court has taken note that she later during cross-examination conceded that South Ugenya/Ambira/228 and Siaya/Ambira/228 refers to the same parcel of land. That the Plaintiff's act of filing a caution against South Ugenya/Ambira/2297 and failing to appeal on the order of the lower court to lift the caution in Siaya PMC Misc. Civil App. No. 44 of 2005 can only be taken to mean she accepted the existence and ownership of the said parcel of land. That the fact that Land Registrar acted on the lower court order and lifted the caution, as confirmed in the register produced by PW2, further goes to confirm that the parcel legally existed contrary to the claim by the Plaintiff in these proceedings. That the lower court had not been called upon to decide on the question of ownership of South Ugenya/Ambira/228 or the subdivisions thereof, and therefore this suit is not *res judicata*.

g) That the court finds it surprising that the Plaintiff in this case did not avail her husband, George Obuongo Owiso, who is one of the two first registered proprietors of land parcel Siaya/Ambira/228, as a witness. That this is even more so when the documents attached to the Defendants' list of documents, that have been referred to above, shows that he is the one who had the said land subdivided into parcels South Ugenya/Ambira/2296 and 2297. That the said George is the only one who could have disputed that Dismas Owoko Okoth did not acquire registration of South Ugenya/Ambira 2297 procedurally and legally. The Court therefore finds that the Plaintiff's failure to call her husband as a witness, who she said was at home, is enough reason to conclude that the evidence he would have given, would have been adverse to her case. That the Court agrees with the decision in **In Estate of Stanley Kori Kiongo alias Kori Kiongo- deceased [2016] eKLR** where the Court held-

“The unexplained failure by a party to give evidence or call a witness or tender certain documents may, in appropriate circumstances lead to an inference that the uncalled evidence would not have assisted the party's case. The failure to call a witness or tender documents can allow evidence that might have been contradicted by such witness or document to be more readily accepted. Further, where an inference is open from the facts proved, the absence of the witness or documents may be taken into account as a circumstance in favour of drawing of the inference.”

That it is strange that the said George Obuongo Owiso, who the Court presumes is aware of the mutation records through which the suit land was subdivided, did not come to court and dispute their genuineness, and brief the court of the steps that he has taken if any, to challenge them.

h) That as the said George Obuongo Owiso and the Land Registrar has never taken any steps to challenge the subdivision of Siaya/Ambira/228 into South Ugenya/Ambira/2296 and 2297, the Court finds and holds that the two parcels were lawfully and procedurally created through the subdivision thereof. That had it have been otherwise, Goerge Obuongo Owiso and or the Land Registrar would at least have reported the matter to the Directorate of Criminal Investigation for appropriate investigations and action.

i) That it follows that the alleged transfer of Siaya/Ambira/228 from George Obuongo Owiso to the Plaintiff on the 17th July 2001, and the subsequent reissue of a title deed on the 14th October 2016, could not have been legally, regularly and procedurally done. That is because the title had ceased to exist upon subdivision into South Ugenya/Ambira/2296 and 2297 on the 23rd June 1998. That it is no wonder that the Plaintiff (PW1) told the Court during cross-examination that-

“I have not traced the letter of consent to transfer the land from my husband to my name. I have not traced the transfer form we used. I cannot remember myself or my husband going to the Land Control Board for consent to transfer the land to me as my husband was sick....”

That as the facts relating to this case is well known by the Land Registrar and the surveyor who testified as PW2 and PW3, the Court hopes that they will seek the assistance of the Directorate of Criminal Investigations to investigate how a title that ought to have been closed upon subdivision on 23rd June 1998 was left open and how the transactions of the 17th July 2001 and 14th October 2016 in favour of the Plaintiff were processed.

j) That the foregoing leads the Court to conclude that the Defendants, as officials of Skills For Living Ministries, who is the registered proprietor of South Ugenya/Ambira/2297, which parcel is a subdivision from Siaya/Ambira/228, cannot be enjoined or evicted from the suit land at the instance of the Plaintiff. That can only happen if their ownership of land parcel South Ugenya/Ambira/2297 is successfully challenged in accordance with the law.

8. That flowing from the foregoing, the Court finds that the Plaintiff has failed to prove her claim against both Defendants to the standard required and her case is dismissed with costs.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 27TH DAY OF MARCH 2019

In the presence of:

Plaintiff Present

Defendants Absent

Counsel Mr. Ojuang for Oyuko for Plaintiff

Mr. Orengo for Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE