



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 611 OF 2015

(FORMERLY KISUMU HCC NO. 89 OF 2011)

JUDITH ANYANGO OJWANG'.....PLAINTIFF

VERSUS

PASCALIA NDEGE OLWENY.....1ST DEFENDANT

CHAN OLWENY.....2ND DEFENDANT

OGUTA OLWENY.....3RD DEFENDANT

NGOYA OLWENY.....4TH DEFENDANT

JUDGEMENT

1. Judith Anyango Ojwang, the Plaintiff, commenced these proceedings through the plaint dated the 16th June 2011, against Pascalia Ndege Olweny, Chan Olweny, Oguta Olweny and Ngoya Olweny, the Defendants, seeking for an order of possession of land Parcel Kisumu/Kochieng/2510, the suit land, permanent injunction and costs. The Plaintiff averred that she became the registered proprietor of the suit land on the 6th May 2010 after purchasing it from Josephat Obwon. That she has used the said land since becoming the registered proprietor, but in January 2011 the Defendants trespassed onto the land and took possession. The particulars of trespass are set out under paragraph 7 of the plaint, which includes putting up their sisal boundary after uprooting her barbed wire fence, planting crops like maize, beans and sweet potatoes. That the Defendants were served with a demand notice dated the 16th January 2011 but have declined to vacate.

2. The Plaintiff's claim is opposed by the Defendants, through their statement of defence dated the 11th July 2011, in which they among others averred as follows;

- **That the root of the Plaintiff title to the suit land is the fraudulent and illegal registration in the name of Josephat Obwon, while they have been in possession since 1992. That the Plaintiff's title is therefore defective, irregular, null and void and that she has never used the land.**
- **That the suit land originally belonged to the late Alfred Olweny Okeyo, husband and father to the Defendants. That the said deceased allowed Josephat Obwon to settle on the suit land temporarily in 1975 and he later vacated in 1992.**
- **That the said Josephat Obwon not having been from their clan could not have become the first registered proprietor of the suit land, and his registration could only have been as trustee for the Defendants.**
- **That the suit land was secretly and fraudulently created from Kisumu/Kochieng/2509 by Josephat Obwon who in breach of duty caused it to be registered in his name.**
- **The Defendants have set out the particulars of fraud and breach of trust attributed to the said Josephat Obwon, under paragraph 12 of their statement of defence.**
- **That by the time the Plaintiff got registered as proprietor on the 6th May 2010, the Defendants had been in possession of the suit land since 1992 for a period of over 12 years, and the registered owners title had been extinguished.**
- **That they had not been served with demand or notice of intention to sue as alleged.**

3. The Defendants' Chamber Summons for leave to issue Third Party notice dated 17th May, to Josephat Obwon Agumba was allowed on the 13th October 2011. That the Third Party notice dated the 13th October 2011 was filed on the same day and served on the 22nd October 2011, upon Josephat Okwon as shown by the affidavit of service of James Odhiambo Okumu sworn on the 24th November 2011.

4. The hearing commenced on the 17th November 2016 when the Plaintiff testified as PW1. She told the court how she bought the suit land from Josephat Obwon. That thereafter she got a container to carry out a business from, and when she went to place it on the suit land, she found the 1st Defendant, her sons and grandsons cultivating on it and they threw stones at her. She reported the incident to the chief as they had claimed the land was theirs and would not allow her to take possession of it. During cross-examination PW1 conceded that the Defendants own Kisumu/Kochieng/2509, which neighbours the suit land on three sides. She agreed that the Defendants had been charged with a criminal case for cultivating on her land but the charge was later withdrawn. The Plaintiff called Josephat Obwon Agumba as a witness and he testified as PW2. He confirmed selling the suit land to the Plaintiff. He testified that he had been given the land by his father and Olweny Okeyo, and that he established a home on it in 1965. That the land was adjudicated in 1973 when he was registered as proprietor, while Olweny Okeyo, who was still alive, was registered with parcel 2509. That the Defendants had not challenged his ownership of the suit land. During cross-examination, PW2 told the court that he later moved from the suit land to another land that belonged to his father as the suit land was next to the road. That by the time he sold the suit land to the Plaintiff, nobody had been using it. He denied that the arrangement between his late father, and the late Olweny Okeyo, was for him to use the suit land for a temporary period and then vacate or leave. He agreed that he was served with the Third Party notice but did not file any response. He denied ever being asked to surrender the land to the Olweny's family or that he had acquired the land fraudulently.

5. The defence hearing commenced on the 15th November 2018, when the 1st Defendant testified as DW1. She told the court that the 2nd to 4th Defendants are her sons and that her husband was the late Alfred Olweny Okeyo. That the suit land belonged to her late husband, and that she does not know why it was registered with PW2. That PW2 had been allowed to settle on the land for a while, upon his father making a request to her late husband. That PW2 later left the suit land for his home which is across the road. That she then took over the suit land and continued cultivating it until the court stopped her. That after this suit was filed, she and her sons were arrested and charged with criminal charges. The criminal court referred the matter to the chief to arbitrate it. During cross-examination, DW1 testified that her late husband passed on in 2002. That by the time the Kisumu/Ahero road was constructed, PW2 had already left the suit land.

6. That upon closing the oral evidence taking, the learned Counsel for the Plaintiff and Defendants filed their written submissions dated the 30th January 2019 and 31st January 2019 respectively.

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

a) Whether the registration of the suit land in the name of Josephat Obwon , and thereafter the Plaintiff, was obtained fraudulently and irregularly.

b) Whether the Plaintiff's title to the suit land has been extinguished through prescription.

c) Who pays the costs.

8. The Court has carefully considered the pleadings by both sides, evidence tendered by PW1, PW2 and DW1, submissions by both Counsel, and come to the following determinations;

a) That from the copy of the green card for Kisumu/Kochieng/2510, the suit land, produced as exhibit P2, the land was first registered on the 29th May 2003 in the name of Obwon Agumba, who the court taken to be PW2. That the green card further shows that the land was transferred to the Plaintiff on the 6th May 2010. That though the Defendants claim that the land was created from parcel Kisumu/Kochieng/2509 that belonged to their late husband and father secretly and fraudulently, they have not availed any documentary evidence to prove that allegation. That exhibit P2 do not in any way suggest that the parcel was a subdivision from parcel Kisumu/Kochieng/2509 or any other parcel.

b) That the Defendants have claimed that the arrangement between their late husband and father, and the father to PW2 was that the land would revert to them ones PW2 vacates. That as that arrangement appears to have been verbal, the Defendants have failed to explain how then PW2 got registered with the title of that land after adjudication. DW1 stated during cross-examination that though her late husband was alive during the land adjudication, she does not know why he was not the one registered as proprietor of the suit land. That as PW2 has disputed in his evidence that his occupation of the land was meant to be temporary, and as there was no challenge to his being recorded as the owner, and later registered as the proprietor, during adjudication and the lifetime of the late Alfred Olweny Okeyo, the court finds that PW2 was procedurally and regularly registered as the proprietor of the suit land. That there is no evidence to show that PW2 was so registered in trust for the Defendants.

c) That the sale transaction between PW1 and PW2 over the suit land has been performed in accordance with the law. That the court therefore finds that the plaintiff obtained good title to the suit land, upon being transferred into her favour by Josephat Obwon Agumba alias Obwoni Agumba, the first registered proprietor.

d) That the available evidence shows that the Defendants reside on land parcel Kisumu/Kochieng/2509 that surrounds the suit land on all but one face. That though they claim that they had been cultivating the suit land since 1992, the testimony of PW2 contradicts their claim materially, as he told the court that nobody was using the land from the time he left, to the time he sold it to the Plaintiff. That evidence of PW2 supports that of the Plaintiff that the Defendants moved onto the land in 2011 after she became the registered proprietor. That the court therefore finds that the Defendants have failed to prove that they have been in continuous and exclusive use of the suit land for more than twelve (12) years by the time this suit was filed.

e) That though the Plaintiff has proved her case against the Defendants, and under **Section 27 of the Civil Procedure Act**, she would be entitled to costs, the court having considered the history of how PW2 got the land through the generosity of the Defendants' patriarch, considers it appropriate for each side to bear their own costs.

9. That flowing from the foregoing, the court finds that the Plaintiff has proved her claim against the Defendants, jointly and severally, and enters judgment in her favour in terms of prayers (i) and (ii) of the plaint, dated and filed on the 16th June 2011.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 10TH DAY OF APRIL 2019

In the presence of:

Plaintiff Present

Defendants Absent

Counsel Mr. Otuoma for Ochanji Opondo for Plaintiff

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE