



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 832 OF 2015

DELAMIER WAMBOGO WAMBOGO.....PLAINTIFF

VERSUS

ANASTANSIA ALUOCH ANINO.....1ST DEFENDANT

OKELO ANINO.....2ND DEFENDANT

MARGARET WANDALA AMANJA.....3RD DEFENDANT

ABALE OWITI.....4TH DEFENDANT

JUDGEMENT

1. Dalamier Wamboga Wamboga, the Plaintiff, commenced this suit through the plaint dated the 16th November 2001 and amended on the 11th March 2004, against Anastasia Aluoch Anino, Okello Anino, Margaret Wadhala Amanja and Abale Owiti, the 1st to 4th Defendants seeking for;

a) “An order of permanent injunction restraining the Defendants from entering and cultivating his parcels of land known as North Gem/Malunga/1308, 1297 and 1294, (The suit properties).

aa) An order of eviction of the Defendants from the suit parcels together with mesne profits and or damages for trespass to land.

b) Costs of this suit.

c) Such further or other relief or orders that this Honourable Court may deem just and expedient to grant.”

2. The plaintiff avers that he is the registered proprietor of the suit properties having succeeded his late father through Kisumu H.C. Succession Cause No. 111 of 1999. That the Defendants trespassed onto the suit properties in 2000 and started cultivating without his consent. That he has severally given the Defendants notice to vacate from the suit lands but they have refused, ignored and or neglected to comply and hence this suit.

3. The Defendants opposed the Plaintiff’s claim through their defence dated the 11th June 2002, 14th October 2002 and amended on the 26th March 2004 averring as follows, among others;

a) That the Plaintiff has never been the registered proprietor of the suit properties.

b) That the decision in Kisumu H.C. Succession Cause No. 111 of 1999 is subject matter of an appeal that is pending with Court of Appeal.

c) That the Defendants did not enter onto the suit properties in 2000, but have been cultivating there for periods ranging from 17 to 23 years.

d) That the Defendants bought the suit lands they use from the late Silvanus Wambogo, who is father to the Plaintiff, and from the 3rd Defendant.

e) That they have never been served with notice to vacate the suit lands and the Plaintiffs is not entitled to mesne profit.

f) That the Plaintiff had sued the Defendants in Siaya Land disputes Tribunal in case No. 435 of 1998 which was dismissed and that this court lacks jurisdiction as the suit is res judicata.

4. The hearing of the Plaintiff's case commenced on the 26th March 2007 when the Plaintiff testified as PW1. He told the Court that he was 35 years old and the only surviving son of the late Silvanus Wambogo Wambogo, who died in 1986. That his mother and stepmother had passed on before his father. That he filed a Succession Cause in respect of his late father's estate, and obtained a grant and confirmation thereof. That thereafter he was registered as proprietor of the three parcels of land. That the Defendants had entered onto the suit lands claiming that they had bought portions thereof from his sister, the 3rd Defendant. That he took the matter to the Chief and after the Defendants failed to prove that they had bought the lands, they were told to vacate but they did not and hence this suit. That the 3rd defendant had lodged objection proceedings in the Kisumu High Court Succession Cause but her objection was dismissed. That 3rd Defendant had been given leave to file an appeal but none had been filed or served to him. During cross examination, PW1 said he had written to, and served the Defendants notices to vacate dated 8th March 1992, but had not retained a copy. That 3rd Defendant cultivates on parcel 1297 but lives/resides on her husband's land. That 1st and 2nd Defendants live on parcel 1297 since 1991, when they built their houses. That the 4th Defendant only cultivates on the land without residing there. That in 1998, the suit lands numbers 1297 and 1298 had been registered with the 3rd defendant. The Plaintiff then called Olando Okode Maua and John Ochuongo, who testified as PW2 and PW3 respectively. PW2, aged 69 years testified that the 1st and 2nd Defendants had lived on the disputed land since before 1986, when father to the Plaintiff died. He added that the two Defendants were living on that disputed land by the time he was born. PW3 testified that the Defendants had been given a portion of land by Samwel Wambetha a neighbour to the Plaintiff's father. That after the death of the Plaintiff's father, they encroached onto the suit properties and the dispute has not been resolved.

5. The defence case started on the 4th July 2012 when Anastacia Aluoch Anino, the 1st Defendant, testified as DW1. She told the Court that the land in dispute had been bought by her husband who died in the 1993, in the year 1967. That her husband built on the land and they have lived there since. That the 2nd Defendant is her co-wife and was married and settled on the same land. Wilfridah Okello Anino, the 2nd Defendant, testified as DW2, She told the court that she was married and settled on the suit land in 1978. The 3rd Defendant Margaret Wandala Amanja testified as DW3. She told the Court that she has no relationship with the Plaintiff, and that she came to know him in 1993 when he sued her at Siaya in a case she won. DW3 stated that she does not know her age, which the court estimated to be about 60 years old. DW3 told the Court that she had learnt her late father had sold land to the 1st and 2nd Defendants and another portion to 4th Defendant. That her father died in 1986. Abele Owiti, the 4th Defendant testified as DW4 and told the court that he got to know the Plaintiff in 2000 when he was constructing a house and claimed to own the portion of land parcel No. 1308 that he, (Abele), had bought from the Plaintiff's late father. Jackton Abel Owiti, Peter Owino and Francis Achwela Owino, the Land Registrar Siaya, testified as DW5 to DW7 respectively. DW5 told the Court that he had bought parcel 1308 from the late Silvanus and produced some letters acknowledging payment. He added that he had used the land from 1968 to 2002 when he was stopped. That the late Silvanus died before transferring the land to him. DW6, a son to the late Daniel Anino, who died in 1993 testified that his family had used land parcel 1294 from the time he was born in 1973, until 2014 when they were stopped. That the land had been bought by his father from the late Silvanus Wambogo in 1966. That the Plaintiff had filed Tribunal Case No. 79 of 1999 against DW6's father but was defeated. That his late father was registered proprietor of parcel 1294, but the title was later taken by the Land Registrar and transferred to the Plaintiff's name. That he know the Plaintiff as Joseph Ndolo, which is the name he had used while filing the Siaya Land Disputes case, but had later seen the name in his National identity Card as Dalamier Wambogo Wambogo. That during cross-examination, DW6 confirmed that they had bought one acre from parcel 1294 but were now staying on parcel 161, and not 1297. DW7 produced the adjudication record and green card for parcel North Gem/Malunga/1308 that was registered on 1st July 1977 in the name of Wambogo Wambogo. That the proprietor's name was on 9th October 1980 corrected to Silvanus Wambogo Wambogo and title transmitted to Dalamier Wambogo Wambogo on the 28th August 2001. He also produced copies of green card and adjudication record for North Gem/Malunga/1294 that was first registered on the 1st July 1977, in the name of Wambogo Wamboga. That the green card shows a caution was filed by John Oriero Anino on 1st August 2001 claiming beneficial interest. The land was on the 23rd August 2001 transmitted to Dalamier Wambogo Wambogo. That then on 28th August 2001, John Oriero Anino filed a caution claiming beneficial interest, but it was lifted by the Land Registrar on the 30th January 2002. The witness also produced the adjudication record and green card for North Gem/Malunga/1297 showing it was registered with Wambogo Wamboga, and Mbaya Wamboga each holding half share, on the 27th October 1975. That the half share of Wambogo Wamboga was transmitted to Dalamier Wambogo Wamboga on the 28th August 2001 and on the 11th March 2005 another transmission in respect of the half share of Mbaya Wambogo was registered in favour of Dalamier Wambogo Wambogo. The witness testified that he traced a copy of a transfer document for parcel 1294, from Wambogo Wambogo and Mbaya Wambogo to Daniel Anino Oriero, dated the 27th October 1975, with stamp duty paid and entered in the presentation book but not registered in the parcels register. That he had also traced the documents of Kisumu H.C. Succession Cause No. 857 of 2003 in favour of the Plaintiff. During cross examination DW7 confirmed that the transfer document that had not been registered had been signed by Mbaya Wambogo in favour of Daniel Anino Oriero on the 22nd October 1975 in respect of parcel 1297. He added that he did not know that Mbaya Wambogo had died in 1971. He agreed that page 2 of the transfer document had not been filled and signed as required, though page 1 indicated that it had been entered in the presentation book.

6. The learned Counsel for the Defendants filed their submissions dated the 24th January 2019 after closing the defence case on the 20th February 2018. The Plaintiff had then indicated that he would not be filing any submissions.

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

- a) Whether the Plaintiff was registered with the three parcels of land, the suit properties, regularly and procedurally.**
- b) Whether the Plaintiff has proved that the Defendants, or any of them, are trespassers on the suit properties.**
- c) Whether the Plaintiff has established that he is entitled to mesne profits and or damages for trespass onto the suit properties and if so how much.**

d) Whether the Plaintiff is entitled to the prayers sought.

e) Who pays the costs.

8. The Court has after carefully considering the pleadings in the amended plaint, and amended defence, the oral and documentary evidence presented by PW1 to PW3, DW1 to DW7, submissions by the learned Counsel for the Defendants, come to the following conclusions;

a) That from the copies of the Adjudication Record in respect of parcel 1294, measuring 2.4 hectares, the land was recorded in the name of Wambogo Wamboga. That the copy of the Green Card also of the same parcel produced as exhibit by DW7 confirms that it was registered with Wambogo Wamboga on the 1st July 1977, and is currently registered in the name of Dalamier Wamboga Wambogo the Plaintiff, through Succession since 23rd August 2001.

b) That DW7 had also produced as exhibit copies of Adjudication Record and Green Card for parcel 1297, measuring 10.2 hectares, that show it was recorded on the 9th February 1971 in the names of Wambogo Wamboga and Mbaya Wamboga, each holding a half share. That the Green Card confirms that the said land was subsequently registered on the 27th October 1975 in the names of Wambogo Wamboga and Mbaya Wamboga, each holding half share interest. That the land is currently registered with Dalamier Wambogo Wambogo as proprietor through transmission since 11th March 2005.

c) That the copy of the Adjudication Record and Green Card for parcel 1308, measuring 1.0 hectares, shows that the land was recorded in the name of Wambogo Wamboga on the 4th March 1971, and registered in his name on the 1st July 1977, as first registered proprietor. That the land was on the 28th August 2001 registered in the name of Dalamier Wambogo Wambogo through Succession.

d) That when the Plaintiff testified, he produced copies of the Grant of Letters of Administration Intestate dated the 8th May 2000, and Certificate of Confirmation of a Grant issued on the 21st June 2001, in respect of the estate of Silvanus Wambogo Wamboga, alias Wambogo Wamboga issued in Kisumu H.C. Succession Cause No. 111 of 1999, showing that Dalamier Wambogo Wambogo was to inherit the whole of the land parcels North Gem/Malunga/1308, 1297 and 1294, the suit properties herein. That as the copies of the Green Cards for the three parcels produced by DW7 as exhibits confirms that Dalamier Wambogo Wambogo was registered as the proprietor of the three parcels of land after the date of the confirmation of the Grant, the court finds no basis of faulting the process through which he attained registration as a beneficiary of the late Wambogo Wamboga alias Silvanus Wambogo Wamboga. That the only question that is not explained by the Grant and Certificate of Confirmation issued in Kisumu H.C. succession Cause No. 111 of 1999 is how the half share of the late Mbaya Wamboga in parcel North Gem/Malunga/1297 was transmitted to Dalamier Wambogo Wambogo, the Plaintiff. That question or issue was however answered by DW7 who produced a copy of the R.L 7 dated 11th March 2005, and a copy of certificate of confirmation of Grant in respect of the estate of Mbaya Wambogo Olando issued in Nairobi H.C. Succession Cause No. 857 of 2003, dated the 10th January 2005, showing that Dalmia Wambogo Wambogo, who the Court takes to be the Plaintiff, was to inherit the whole of North Gem/Malunga/1297. That it appears the Plaintiff was granted the whole of parcel North Gem/Malunga/1297 in both Kisumu H. C. Succession Cause No. 111 of 1999 and Nairobi H.C. Succession Cause No. 857 of 2003.

e) That the 1st, 2nd and 4th Defendants, DW5 and DW6 claim entitlement to portions of the suit properties, based on alleged sale transaction between them or their relatives and the late Silvanus Wambogo Wambogo, the father to the Plaintiff. That though some documents were produced dated from 1960's to 2002, the Court has noted that the suit lands were not registered until after adjudication in 1971. That the copies of the green cards for the suit lands shows they were first registered in 1975 for parcel 1297 and in 1977 for parcels 1294 and 1308. That none of the Defendants before the court, or DW5 and DW6 availed evidence that the late Silvanus Wambogo Wamboga had transferred the portions of the land that they claim to have purchased from him before he passed on in 1986. That no evidence has been availed to confirm that the consents of the Land Control Board to the alleged sale agreements were obtained within six (6) months as required under **Sections 6 and 8 of the Land Control Act Chapter 302 of Laws of Kenya**. That the alleged sale agreements became void at the expiry of six (6) months from their dates and all the Defendants (buyers) could claim probably from the administrator of the estate of the Late Silvanus Wambogo Wamboga (the seller) under **Section 7 of the said Act**, is a refund of the money paid under the alleged agreements. That the Defendants continued use or possession of the portions of the suit land based on the void sale transactions is frowned upon as a crime under **Section 22 of the said Act**.

f) That as the Defendants entry onto the suit lands were pursuant to the alleged sale agreements with the late Silvanus Wambogo Wamboga, and or the 3rd Defendant, then their occupation and possession of the suits lands, or portions thereof, were not adverse to the title of the registered proprietor as it was with their consent. That the evidence adduced shows that by the time Silvanus Wambogo Wamboga died, the Plaintiff was about ten (10) years, and therefore a minor. That it was not until 1999 that he filed the Succession Cause in respect of his late father's estate. That the Plaintiff was appointed administrator on the 8th May 2000 as shown in the Grant, and became the registered proprietor of the suit lands through transmission between 2001 and 2005. That by the time this suit was filed in 2001, no rights under adverse possession had accrued to the Defendants against his title.

g) That the foregoing findings show that the Defendants, who have been using the suit properties, or portions of the suit properties, had the permission of the Plaintiff's late father. That the Plaintiff had neither repossessed those parcels nor used them before the year 2001 when he erected his house thereon.

h) That the Plaintiff and his witness did not testify on the nature of loss the Plaintiff may have suffered from the Defendants use of the suit lands, or portions thereof. There is therefore no material presented before this court to demonstrate the amount of mesne profits, or damages claimed, or how to arrive at such damages. (See the Court of Appeal decision in **Peter Mwangi Mbuthia & Another vs Samow Edin Osman [2014] eKLR at paragraphs 24 and 25**).

i) That the Defendants, especially the 3rd Defendant, alleged that there is an appeal pending in the Court of Appeal against the decision of the High Court, in Succession Cause No. 111 of 1999 of 6th March 2001, awarding the entire estate of the late Silvanus Wambogo Wamboga to the Plaintiff. There is however no evidence presented before this Court to confirm that any appeal was ever filed. That the court therefore takes the decision on the distribution of the estate of the late Wambogo Wamboga to be in accordance with the Certificates of Confirmation of Grants presented in evidence by PW1 and DW7. That accordingly, the Court finds that the Plaintiff is the absolute and indefeasible registered proprietor and owner of the suit properties as evinced by the copies of the green cards produced as exhibits until and unless otherwise challenged and or impugned under **Section 26 of the Land Registration Act No. 3 of 2012**.

j) That the copy of the proceedings and award in Siaya Land Dispute Tribunal Case No. 435 of 1998 shows that it was between the Plaintiff and the 3rd Defendant, and concerned the ownership of North Gem/Malunga/1297 and 1308. The proceedings shows that the Plaintiff was claiming that the 3rd Defendant had caused the registration of the said parcels of land in her name without his knowledge and consent while they should have been in his late father's name, who died in 1986. The 3rd defendant had in her testimony to the Tribunal indicated that the Plaintiff had signed some document indicating his consent for their late father's lands to be transferred to her. That the Tribunal finding and award was that the Plaintiff's claim over the suit land 1297, that had been subdivided into parcels 1516, 1517, 1518 and 1038 and registered with 3rd Defendant, had been dismissed and the parcels of the land awarded to 3rd Defendant.

k) That further to (j) above the Jurisdiction of the tribunal as set out under **Section 4 of the Land Disputes Tribunal Act Chapter 303A of Laws of Kenya, (Repealed)**, did not extend to determining the question of title to registered land. The Plaintiff had therefore filed his claim over the land against the 3rd Defendant in a tribunal without Jurisdiction to decide on the dispute. That the Tribunal's award dated 5th May 1999, in favour of the 3rd Defendant, was ultra vires the powers of the Tribunal, and therefore null and void *ab initio*. That award, not having been made by a court with jurisdiction under the Constitution and statute does not make this suit contravene **Section 7 of the Civil Procedure Act Chapter 21 of Laws of Kenya**, and this suit is therefore not res judicata.

9. That flowing from the foregoing, the court finds that the Plaintiff has partially succeeded in proving his case against the Defendants to the standard required. The Court therefore enters judgment in favour of the Plaintiff against the Defendants in the following terms;

a) That the Defendants are hereby ordered to vacate from Land Parcels North Gem/Malunga/1308, 1297 and 1294, and give vacant possession to the Plaintiff, within ninety (90) days and in default eviction orders to issue.

b) That upon the defendants giving vacant possession of the suit lands to the Plaintiff or being evicted, an order of permanent injunction is hereby issued restraining them from entering and cultivating on the suit lands without the consent and authority of the Plaintiff.

c) That the Defendants pay the Plaintiff costs of the suit.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 3RD DAY OF APRIL 2019

In the presence of:

Plaintiff Present

Defendants Absent

Counsel Mr. Yogo for the Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE