



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 27 OF 2017

GEORGE A. ODHIAMBO.....PLAINTIFF

VERSUS

AUGUSTINE AMEJA WANYANGA.....1ST DEFENDANT

JOHN CHARLES ODHIAMBO WANYANGA.....2ND DEFENDANT

JUDGEMENT

1. George A. Odhiambo, the Plaintiff, filed this suit against Austine Ameja Wanyanga and John Charles Odhiambo Wanyanga, the 1st and 2nd Defendants respectively, through the plaint dated the 24th August 2010, seeking for an order directed to the Land Registrar to cancel the fraudulent transfer of Land Parcel East Gem/Nyamininia/739 by Defendants and revert the title to him plus costs and interests. The Plaintiff avers that he has been the registered proprietor of East Gem/Nyamininia/739, the suit land, at all material times. That the Defendants fraudulently had the land transferred to their names when there was a pending case between him and his brothers. That the Defendants' action has denied the Plaintiff peaceful occupation of the suit, land.

2. The Plaintiff's claim is denied by the Defendants through their statement of defence dated 27th October 2010. They among others aver that the Plaintiff has never been the registered proprietor of the suit land, and that they fraudulently had the land transferred to their names.

3. The Plaintiff filed a reply to the defence among others averring that the suit No. 197 of 1992 was about the suit land and 736 and was decided by Mwera J, as he then was, on the 18th October 2006 in the presence of Mr. Kopot Advocate who was his brothers counsel, and Advocate for the Defendants in the current suit.

4. The Plaintiff testified as PW1. His case is that he is in possession of the suit land and has the original title. That the Defendants have acquired another title for the suit land without him transferring it to them. That the title held by the Defendants should be cancelled. During cross-examination, the Plaintiff testified that he bought the suit land from his uncle Johana Manyanga Magoha, whose wife was Helena Obando Manyanga. That he does not know how the suit land moved from Helena to the Defendants. That he did not involve Helena in the Maseno Court Succession cause as he had bought the land from her husband.

5. The 1st Defendant testified as DW1. He told the court that he had inherited the suit land from his grandfather, and that Helena transferred it to them. That the plaintiff had inherited the suit land without involving Helena. That the matter was heard by the Land Control Board who decided that it be returned to Helena. That the Defendants took the matter to the Land Disputes Tribunal, Siaya that was resolved in their favour, though the Plaintiff has remained in possession of the suit land. The 1st Defendant called Ignatius Omolo Onjak, the retired chief of East Gem location, who testified as DW2. He told the court how in 1987, the District Officer sent him to investigate a report that the Plaintiff had been disturbing the peace. That he visited the suit land and found two houses of cousins. That upon consulting the Assistant Chief and elders he found out that the suit land belonged to one Onyango Makokha and that the Plaintiff had filed a Succession Cause at Maseno court and obtained a grant over it. DW2 then wrote to the District Officer recommending that he helps the widow of Onyango Makokha to be registered with the suit land. That after the death of Wanyanga Makokha who was the registered owner of the suit land, the heirs to the estate were his widow, Helena and Emmanuel Wanyanga.

6. The Plaintiff and 1st Defendant filed their written submissions dated the 6th May 2019 and 21st June 2019 respectively.

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

a) Who between the Plaintiff and Defendants is the legally registered proprietor of the suit land.

b) What order to issue.

c) Who pays the costs.

8. The Court has carefully considered the pleadings filed by the Plaintiff and Defendants; oral and documentary evidence by PW1, DW1 and DW3; the written submissions by the Plaintiff and 1st Defendant and come to the following findings;

a) That from the evidence tendered by the Plaintiff in form of copy of the green card/register for East Gem/Nyamininia/739, the suit land, which is undisputed or challenged, the land was first registered on the 26th October 1970 in the name of Wanyanga Makokha. That the said Wanyanga Makokha is claimed by both the Plaintiff and the 1st Defendant to have been their kin.

b) That the evidence adduced by the Plaintiff in the form of certified true copy of court order issued on the 2nd March 1973 in Maseno District Magistrate Court Succession Cause No. 4 of 1973, which is not rebutted or controverted, George A. Odhiambo, the Plaintiff, was declared the legal owner of the suit land and an order issued for him to be registered as its proprietor. That subsequently the Plaintiff was registered as the proprietor of the suit land on the 23rd May 1973 through transmission (Succession) and had a correction of name registered on the 11th December 1990 as confirmed by the copy of the green card/register. That the Plaintiff was issued with a title deed, which he told the court he still retains, though the land has reportedly changed hands to Helena Alando Wanyanga on 20th January 1995, and later to the Defendants on the 19th March 1997 allegedly through transfer as per the copy of the green card/register. That the Defendants were then issued with a title deed on the 19th March 1997.

c) That the Plaintiff has denied transferring the title of the suit land to the said Helena and stated that the signature appended on the transfer form was not his. That the Land Control Board application form he remembered signing were for subdivision to enable him give the land to his son Patrick Gumba. The 1st Defendant agreed that the dispute over the ownership of the suit land between the Plaintiff and Helena had been heard by the Land Control Board, after which the land was returned to Helena, who later transferred it to them. The court has noted that there is no evidence tendered that the Plaintiff has ever lodged a complaint with the police or Land Registrar that documents bearing a signature not by him, had been used to transfer the land to Helena without his knowledge. That though the Plaintiff had obtained good title to the suit land when he got registered with it on the 23rd May 1973, he relinquished all interests he held upon transferring it to Helena Oando Wanyanga on the 20th January 1995. The transfer was properly done as the Land Control Board consent was applied for and obtained on the 29th October 1987. That had the Plaintiff been dissatisfied with the land being transferred to Helena, he would have taken legal steps including reporting to the police, but did not. That it is the Defendants who lodged the Siaya Land Disputes Tribunal Case No. 71 of 2009 against the Plaintiff, that was decided on the 17th November 2010 in favour of the Defendants. That no appeal appear to have been filed and there is no confirmation that the award was ever filed with the court and adopted as the court's judgment.

d) That as the Plaintiff has not particularized the fraudulent activities that he attributed to the Defendants, and he has not tendered evidence as required by **Section 107 of the Evidence Act, Chapter 80 of Laws of Kenya** to prove that the Defendants acquisition of title to the suit land was fraudulent, his claim must fail. That however, due to the history relating to the suit land, the court finds this is a case where costs should not follow the events as required by **Section 27 of Civil Procedure Act, Chapter 21 of Laws of Kenya**. That therefore each party will bear his own costs.

9. That as shown above, the court finds that the Plaintiff has failed to prove his case against both Defendants and his claim is dismissed with each party bearing his own costs.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 5TH DAY OF **SEPTEMBER** 2019

In the presence of:

Plaintiff Absent

Defendants Absent

Counsel Absent

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE