



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**ELC CASE NO. 53 OF 2012**

**(CONSOLIDATED WITH KISUMU HCCC NO. 58 OF 2009 ON 27<sup>TH</sup> JULY 2013)**

**VINCENT ONYANGO OJWANG.....PLAINTIFF**

**VERSUS**

**OKOTH ODHUONGO.....1<sup>ST</sup> DEFENDANT**

**GABRIEL ODHUONGO.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

1. This suit was commenced by Martina Amina Ochieng, the late mother of the current Plaintiff, Vincent Onyango Ojwang vide the plaint dated and filed on the 21<sup>st</sup> September 2012, seeking for a declaration that Okoth Odhuongo and Gabriel Odhuongo, the Defendants, have unlawfully encroached and trespassed onto her land Uholo/Rambula/679, the suit land; mandatory injunction compelling defendants at their costs to remove the structures and other developments erected thereon, or alternatively the Plaintiff be allowed to clear them at their costs; permanent injunction restraining the defendants from the said land and costs. The Plaintiff avers that she became the registered proprietor of the suit land on the 27<sup>th</sup> October 2008. That the Defendants unlawfully entered onto the land on or about 18<sup>th</sup> August 2012 and subdivided it amongst themselves and erected structures thereon without consent and hence this suit.

2. The Plaintiff's claim is opposed by the Defendants through their statement of defence dated the 19<sup>th</sup> October 2012 among others averring that if the Plaintiff was the registered proprietor of the suit land, then that registration was obtained fraudulently by the administrators of the estates of James Musewe Ogunja, Paul Ochieng Ogunja and Lucas Ochieng Ogunja, who were holding Uholo/Rambula/423 in trust for Okoth Othuol (deceased), from which parcel the suit land was subdivided, that the suit land is subject matter of Kisumu H.C.C. No. 58 of 2009 in which they are the Plaintiffs and Plaintiff herein the Defendant; that it is the Plaintiff who has trespassed onto the land they have resided on for over 70 years and was hived off parcel Uholo/Rambula/442 with the intention to disinherit the Defendants. That the suit land is the ancestral land for both the Plaintiff and Defendants.

3. That the current Plaintiff moved the court vide the chamber summons dated 20<sup>th</sup> May 2014 to be substituted for Martina Amina Ochieng following her death on the 28<sup>th</sup> December 2103 and on the strength of Grant Ad litem dated the 7<sup>th</sup> April 2014 obtained in Kisumu H. C. P. & A cause No. 285 of 2014.

4. Odhuongo Okoth, the 1<sup>st</sup> Defendant in this proceedings, had filed Kisumu H. C. C. No. 58 of 2009 against Lifrída Nyandera, Amina Ochieng and Vitalis Omondi Musewe, sued as administrators of the estates of the late James Musewe Ogunja, Paul Ochieng Ogunja and Lukas Ocheing Ogunja, through the plaint dated the 21<sup>st</sup> May 2009, and filed on the 22<sup>nd</sup> May 2009, seeking for a declaration that the defendants are holding a portion of Uholo/Rambula/422 in trust for the Plaintiff or in the alternative, a declaration that the Plaintiff has a legal right over a portion of Uholo/Rambula/422 by way of adverse possession and costs. That in support of the claim, the Plaintiff (1<sup>st</sup> Defendant herein) averred that the Defendants instituted Succession proceedings about 2007 to 2008 over the estates of the three deceased without involving him with the aim of locking him out. That the deceased had left out his late father, Okoth Othuol, during demarcation, adjudication and registration of the parcel Uholo/Rambula/422, from which he claimed he was entitled to a portion under trust or adverse possession. The Defendants (who included the Plaintiff herein) had opposed the Plaintiff's claim through their statement of defence dated and filed on the 15<sup>th</sup> June 2009, among others averring that the three deceased were not registered proprietors of Uholo/Rambula/422 or that they held a portion of the land in trust for Okoth Odhuongo (deceased); that the Plaintiff is a stranger to the three estates and had previously attempted through fraud, forgery, dishonest and unlawful means to get a share of the estates without success; that the Plaintiff is not entitled to a share of Uholo/Rambula/422 through trust or adverse possession, that Uholo/Rambula/422 no longer existed and that the suit is defective and bad in law and should be dismissed with costs.

5. That the consolidated suits came up on the 28<sup>th</sup> October 2015 and after hearing the learned Counsel for the Parties, the court directed that the hearing do take place in this file and that the defendants do file and serve an amended defence and counterclaim in 21 days. However no amended defence and or counterclaim was filed.

6. The hearing commenced on the 6<sup>th</sup> June 2016 when the Plaintiff testified as PW1. The Plaintiff called Dorine Oluoch, the Assistant Chief, who testified as PW2. The 1<sup>st</sup> Defendant testified as DW1 while the 2<sup>nd</sup> defendant testified as DW2 and informed the court his correct names are Bernard Otieno Odhuongo. The Defendants called Mark Oduol Onyango and William Oduor Ndolo who testified as DW3 and DW4 respectively.

7. The court visited the locus on the 19<sup>th</sup> January 2017 where PW1 was further examined and cross-examined.

8. That after close of the oral testimonies on the 23<sup>rd</sup> January 2019, the learned Counsel for the Plaintiff and Defendants agreed to file and exchange written submissions but by the 15<sup>th</sup> July 2019, only that for the Plaintiff had filed theirs dated the 18<sup>th</sup> February 2019.

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

**a. Whether the Plaintiff's registration with land parcel Uholo/Rambula/679, the suit land, was regularly and legally done.**

**b. Whether the Defendants' claim of a portion of land parcel Uholo/Rambula/422 under trust or adverse possession affects the Plaintiff's title to Uholo/Rambula/679, the suit land.**

**c. Whether the Defendants are in possession of the suit land or a portion thereof, and if so, from when.**

**d. Whether the Plaintiff is entitled to any of the prayers sought.**

**e. Who pays the costs of each of the two suits.**

10. The Court has after carefully considering the pleadings filed, oral and documentary evidence tendered by PW1, PW2, DW1 to DW4, written submissions by Counsel for the Plaintiff come to the following conclusions;

a. That from the documentary evidence produced in this proceedings in the form of copy of the title deed and certificate of official search in respect of land parcel Uholo/Rambula/679, the suit land, the parcel is a subdivision from Uholo/Rambula/422 and was transferred to the name of Martina Amina Ocheing, the original Plaintiff and whose estate is now represented by Vincent Onyango Ojwang, the Plaintiff, on the 27<sup>th</sup> October 2008. That the court is unable to confirm with certainty the history of the parent title, Uholo/Rambula/422, as none of the parties produced a copy of the green card or register for the said land. That the 1<sup>st</sup> Defendant claim is Kisumu H.C.C. No. 58 of 2009 was for a portion of Uholo/Rambula/422 by virtue of customary trust or adverse possession. That however by the time that suit was filed, it is obvious that land as described did not exist, as the title had been closed when it was having subdivided on or about the 26<sup>th</sup> June 2006 to create Uholo/Rambula/679, which is one of its subdivisions. That as no amendment to the plaint in Kisumu H.C.C No. 58 of 2009 was filed to include the parcel or parcels subdivided from Uholo/Rambula/422, and further that the Defendants herein did not file an amended defence to include a counterclaim to the Plaintiff's suit despite the leave having been granted on the 28<sup>th</sup> October 2015, the 1<sup>st</sup> Defendant's claim is hence a non-starter, defective and is for dismissal with costs to the 2<sup>nd</sup> Defendant who is the Plaintiff herein.

b. That the pleadings filed by the Plaintiff was to the effect that the Defendant encroached and trespassed onto Uholo/Rambula/679, suit land, in 2012. That was confirmed by PW1 when he testified before the court, and during the visit to the locus on the 19<sup>th</sup> January 2017 when he pointed out the three semi-permanent houses and two grass thatched houses on the suit land that were built or erected by the Defendant from 2012. The area Assistant Chief (PW2) also testified that the Defendants moved onto the suit land from their father's land in 2012, and that she witnessed them erecting a new house on the suit land that year when she went there after Mzee Ojwang lodged a complaint. That in 2013 the Plaintiff lodged a complaint against the Defendants with PW2 and on going to the suit land, she found them fencing it and erecting a house. That in his defence the 1<sup>st</sup> Defendant denied that PW2 had visited his home in 2012, though he admitted that she had visited the home three (3) days after he had constructed the house. That DW2, the 2<sup>nd</sup> Defendant, agreed that on the 18<sup>th</sup> August 2012, they constructed an iron roofed house on the suit land. That having considered the parties evidence on when the Defendants moved onto the suit land, the court finds no reasons why PW2, who is the local administrator in the area and therefore with no interest over the suit land, would take sides in the dispute. That the court therefore believes the testimony of the Plaintiff (PW1), that is supported or corroborated by that of the Assistant Chief (PW2) that the defendants entered onto the suit land in late 2012, and have since erected the five (5) houses (structures) the court observed during the visit to the locus. That as the suit land was registered in the name of Martina Amina Ochieng, deceased, on 27<sup>th</sup> October 2008 and that registration has not been successfully challenged or impugned in accordance with **Article 40 (6) of the Constitution and Section 26 of Land Registrations Act No. 3 of 2012**, the Defendants entry onto the land and their continued activities thereon without the consent and authority of the registered proprietor or her legal representative (the Plaintiff) amounts to trespass.

c. That there is no evidence tendered to suggest any irregularity, illegality or fraud in the way the land Uholo/Rambula/422 was adjudicated and registered and thereafter subdivided to create Uholo/Rambula/679, the suit land, that was registered with Martina Amina Ochieng, the deceased. That those of the Defendants and their kin that may have been dissatisfied with the result of the adjudication process had the opportunity provided by **Sections 26 and 29 of the Adjudication Act Chapter 284 of Laws of Kenya** to file objection and appeal proceedings. That there is no evidence availed in this proceedings to suggest that any such challenge was filed. That the court was also told that Succession proceedings were filed and processed before Uholo/Rambula/422 was subdivided and distributed to among others Martina Amina Ochieng, deceased, who got the suit land. That again there is no evidence availed to

show that the administration and distribution has ever been successfully challenged through the Succession Court by the Defendants. That what the court was told by PW1, and was confirmed by the Defendants, is that the 1<sup>st</sup> Defendant had been charged, convicted and sentenced to three (3) years imprisonment on matters to do with Succession proceedings over Uholo/Rambula/422. That however, as no documentary evidence were availed by the parties for the court's attention, the court is unable to with certainty establish how that fact would impact on the issues before the court.

d. That in view of the foregoing, the court finds that the Plaintiff is entitled to the rights and privileges of a registered proprietor of the suit land in accordance with sections 24 and 25 of the **Land Registration Act No. 3 of 2012**. That accordingly the Defendants should give vacant possession by removing themselves, their structures and other developments thereon in reasonable time or demolition, eviction order to issue in default. That the Plaintiff is also entitled to the Defendants being permanently enjoined from the suit land. That further, as costs follow the events under **Section 27 of the Civil Procedure Act, Chapter 21 of Laws of Kenya**, the Plaintiff is entitled to costs.

e. That so as to confirm the extent of the boundaries of the suit land and to avoid a situation where any of the structures belonging to the Defendants, and which the Plaintiff prays to be removed, may be situated outside the suit land, the court on its own volition finds it necessary that the County Land Registrar and Survey visits the suit land and confirms its ground boundaries at their earliest opportunity.

11. That in view of the foregoing, the court finds that the Plaintiff has proved his case against both Defendants and enters judgment as follows;

**a. That the Plaintiff's, claim in Kisumu HCCC No. 58 of 2009, is hereby dismissed with costs to the 2<sup>nd</sup> defendant in that case.**

**b. That in respect of this case, Kisumu ELC No. 53 of 2012, the court orders;**

**i. That a declaration is hereby issued that the Defendants entry and continued possession of Uholo/Rambula/679 since 2012, that is registered in the name of the late Martina Amina Ochieng, amounts to trespass.**

**ii. That the County Land Registrar and Surveyor do urgently visit land parcel Uholo/Rambula/679 and confirm its boundaries in the presence of the parties herein and the local administration, after which the Defendants shall in ninety (90) days remove themselves and all the housing structures and other developments erected by themselves within the boundaries of the said land and give the Plaintiff vacant possession.**

**iii. That should the Defendants fail to comply with the order in (ii) above within the period given, demolition and eviction order to issue at their costs.**

**iv. That the expenses payable to the County Land Registrar and Surveyor for the exercise in (ii) to be recoverable as costs of the suit.**

**v. That upon the Defendants giving vacant possession of the suit land, or being evicted, they be permanently restrained from trespassing onto, alienating and or further converting the Plaintiff's land parcel Uholo/Rambula/679, or otherwise howsoever interfering with the Plaintiff's quiet use and enjoyment thereof.**

**vi. The Defendants do meet the Plaintiff's costs of this suit.**

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**

**DATED AND DELIVERED THIS 5<sup>TH</sup> DAY OF SEPTEMBER 2019**

**In the presence of:**

Plaintiff Absent

Defendants Present

Counsel Mr. Oguso for Defendants

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

JUDGE