



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC NO. 160 OF 2015

**JOSEPH OMOLLO ODAM (suing as the Administrator
of Estate of Konel Adam Omollo – Deceased)**

RICHARD OMOLO OYOO.....PLAINTIFFS

VERSUS

JILI AWINO ODINGO.....1ST DEFENDANT

DOROTHY NEREA OPONDO.....2ND DEFENDANT

FREDRICK ODIWUOR RALAK.....3RD DEFENDANT

JOHN ODHIAMBO OKINYI.....4TH DEFENDANT

CHAGANBHAI MOTIBHAI PATEL.....5TH DEFENDANT

NICHOLAS RANDA OWANO OMBIJA.....6TH DEFENDANT

JOHN ROBERT ODHIAMBO.....7TH DEFENDANT

JOHN ALEX GENGA.....8TH DEFENDANT

CHARLES OKEYO OGOLLA.....9TH DEFENDANT

HAPPY TWINS FREIGHT FORWARDERS LTD.....10TH DEFENDANT

DR. THOMAS OTIENO OBAT KWASA.....11TH DEFENDANT

COUNTY LAND REGISTRAR, KISUMU.....12TH DEFENDANT

RULING

This matter was scheduled for hearing on 10/12/2019 and on the said date the 6th Defendant represented by Mr. Wasuna who was absent but represented by Mr Qieu raised various issues and prayed that the suit be dismissed.

He states that the plaint was filed on 29/6/2018. The plaintiff should have done due diligence as on 18/11/2014 the land had passed over to 3rd party and therefore suing the 6th Defendant in his name was out of order. Mr Ombija argues that the land was passed over to Michale Adingo Opiyo and therefore the matter should not go for a hearing.

The second issue raised by Mr Ombija is that the bundle of documents shows limited grant issued on 24/4/2013 in the Estate Cornel Adams Omolo, the same was issued for 90 days from June 2015. By August 2013, it had lapsed. There is no further grant by the court. The plaintiff has no locus to maintain the suit. The suit is a nonstarter.

The suit has been brought by way of plaint. The cause of action is for adverse possession. The suit is ill advised. In the alternative prayer the

plaintiff prays for adverse possession at paragraph 27. The law is very clear as the suit should be by originating summons.

Under Section 39 (1) of Registered Land Act Cap 300 Laws of Kenya (repealed) the registration of a person vests in that person absolute rights and it not necessary to go behind the title.

There is a pending suit between John A. Genga and Richard Omollo Oyoo in respect of Kisumu/Konya 3484 where they are claiming adverse possession.

Mr. Odeny, Counsel for the plaintiff submits that this suit is scheduled for hearing. The 6th Defendant should have filed a preliminary objection. The issues raised by 6th defendant have been raised before this court and the court has made a decision and therefore the issues raised are res judicata. The 6 issues raised are issues of fact. Need to file a formal application.

The fact that he is not an owner of the property does not save him from the civil suit.

The plaintiff's case is that properties in question are as a result of subdivision of Kisumu Konya/17 owned by 3 people. The 3 are deceased. The 6th Defendant once owned the property that is why he was sued.

The *ad litem* grant gave 90 days to file suit from 24/4/2015. The suit was filed on 29/6/2015 90 days expired on 23/7/2015.

The first plaintiff prays for judgment on the basis that the transaction was fraudulent whilst the 2nd plaintiff prays for judgment on the basis of the concept of adverse possession. The 6th Defendant bought the property from the 1st Defendant.

Mr Odeny further argues that Section 39 of Registered Land Act (repealed) is repealed and therefore inapplicable. Moreover, the right to land can only apply if you acquired the land in the right manner. The pending suit no. 138/2010 was transferred to Winam

Mr. Ombija, in response submits that points of law can be raised at any time. The points of law were not determined by Justice Kibunja and therefore they cannot be res-judicata.

I have considered the issues raised by Mr Ombija and do find that due to the fact that he was once the registered owner of the suit land, he is a necessary party as the suit is grounded on fraud and therefore the court is required to look at the transactions undertaken before the title was issued to Milicent Adongo Opiyo.

On the issue of the expiry of the limited grant, I do find that the grant was given to enable the plaintiffs file suit within 90 days and that the plaintiffs complied. There was no need to obtain the full grant to maintain the suit.

On the issue raised that the suit was brought by way of plaint whilst it is a claim based on adverse possession, I do agree with Mr Ombija that the inclusion of a claim on adverse possession was a misjoinder of issues however this does not make the suit a non-starter. On the issue of the pending suit it was explained that the same was stayed pending the hearing of this suit and that this court orders that for avoidance of doubt, the same is hereby stayed pending the hearing and determination of the suit herein.

The upshot of the above is the application that the suit be dismissed is hereby declined with costs in the cause.

Orders accordingly.

A. O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 11th DAY OF DECEMBER, 2019.

In the presence of:

Mr. Odeny for Plaintiff

Mr. Que for Wasuna for 6th Defendant

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE