



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT KISUMU**  
**ELC. CASE NO. 26 OF 2015**

**MAURICE OGWANG OKONG'O.....PLAINTIFF**

**VERSUS**

**FREDRICK OMONDI OMAMO.....1<sup>ST</sup> DEFENDANT**

**EVERLINE ATIENO OKECH.....2<sup>ND</sup> DEFENANT**

**WYCLIFF ABOK.....3<sup>RD</sup> DEFENDANT**

**DISTRICT/COUNTY LAND REGISTRAR-KISUMU...4<sup>TH</sup> DEFENDANT**

**THE ATTORNEY GENERAL.....5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. MAURICE OGWANG OKONG'O, the Plaintiff, commenced this suit against FREDRICK OMONDI OMAMO, EVERLYNE ATIENO OKECH and WYCLIFFE ABOK, the 1<sup>st</sup> to 3<sup>rd</sup> Defendants respectively, through the originating summons dated 29<sup>th</sup> January 2015 and plaint of the same date but filed on the 3<sup>rd</sup> February 2015. The plaint was with leave granted on the 8<sup>th</sup> October 2015 made under Order 8 Rule 8 of Civil Procedure Rules, amended on the 19<sup>th</sup> October 2015 enjoining the District/County Land Registrar Kisumu and the Attorney General as the 4<sup>th</sup> and 5<sup>th</sup> Defendants respectively. The Plaintiff avers that he was the absolute registered and equitable owner of land parcel Kisumu/Kanyawegi/5783 measuring 5.5 hectares. That the 1<sup>st</sup> to 3<sup>rd</sup> Defendants in conspiracy with the 4<sup>th</sup> and 5<sup>th</sup> Defendants fraudulently and unlawfully and without the Plaintiff's consent transferred the land to their names on or about 14<sup>th</sup> January 2013 and 15<sup>th</sup> October 2012. The Plaintiff prays for permanent injunction, return of the said land to him and costs.

2. The Plaintiff's claim is opposed by the 1<sup>st</sup> to 3<sup>rd</sup> Defendants through their Reply to the Amended Plaint dated 18<sup>th</sup> January 2016. They aver that the land was registered in the names of Rosa Seda Ojwang, Ojwang Oyugi, Odak Ojwang and Paul Omoro Atudo who are all deceased. That it is the Plaintiff who unlawfully obtained the land and sold it to the 3<sup>rd</sup> defendant who in turn sold it to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

3. The Principal Litigation Counsel entered appearance for the 4<sup>th</sup> and 5<sup>th</sup> Defendants vide their memo dated 2<sup>nd</sup> November 2015 but did not file a statement of defence.

4. The hearing started on the 30<sup>th</sup> November 2016 when the Plaintiff testified as PW1. He testified that he was born in 1934 and hence about 82 years old. That the suit land belonged to his relatives who are now deceased. The Plaintiff named those relatives as Ajwang Daudi Odak, his elder brother, Oyugi Ojwang, Seda and Omoro. That after death of the first registered proprietors, the Plaintiff got registered with the land in 1952 after filing objection proceedings. That when the Plaintiff later conducted a search at the registry, he found the land had been registered with 1<sup>st</sup> to 3<sup>rd</sup> Defendants who he did not know and hence this suit. He denied selling the land to 3<sup>rd</sup> Defendant. He produced a copy of the certificate of official search as exhibit. He also produced as exhibit a copy of the register of the land. During cross examination, PW1 conceded that the suit land belonged to Daudi Ajwang Odak who was husband to Rosa Seda Ajwang, father to Odak Ajwang and Oyugi Ajwang and uncle to Paul Omoro Atudo, who were the first registered proprietors of the suit land. That he did not lodge a Succession Cause before getting the land registered in his name on the 12<sup>th</sup> October 2012.

5. That Wycliffe Aboko, the 3<sup>rd</sup> Defendant, testified as DW1. He told the Court that he met the Plaintiff in June 2012 on being introduced by an Assistant Chief called Paul Otieno, who is now a Chief, as the owner of the suit land. DW1 said he conducted a search and confirmed the land was in the name of the Plaintiff and after negotiations agreed to buy it at Kshs. 1.2 million. They made a written sale agreement and paid the Plaintiff Kshs. 100,000/= (One hundred thousands) in cash, in the presence of the Chief. He testified that he made subsequent cash and cheque payments all totaling Kshs. 1.2 Million to the Plaintiff who signed the transfer documents and had it registered in his name. That he subsequently sold the land to 1<sup>st</sup> and 2<sup>nd</sup> Defendants. That he later learnt from other people that the land did not belong to the Plaintiff and that he had transferred it to his names without obtaining a grant, hence dispossessing other beneficiaries. The 3<sup>rd</sup> Defendant informed the Court that he reported the matter to the Chief who summoned the Plaintiff who told them to ignore those raising complaints as he had taken care of all the beneficiaries. He prayed for the suit to be dismissed with costs. That during cross-examination, DW1 testified that he had paid Kshs. 500,000/= to the son of the Plaintiff as part payment of the purchase price but had no documentary evidence to confirm it. That he paid the purchase price between September 2012 and February 2013 but had no documentary evidence to confirm the payments. That only payment he personally made was the first one of Kshs. 100,000/=:, while the others of Kshs. 500,000/=:, 300,000/=:, and 300,000/=: were made by his employees named Oscar and Lilian, then working in his company known as Kisumu Real Estate. That he does not have any copy of the sale agreement between him and the Plaintiff. That the complaints had been raised by a man and a woman who he met at the Chief's office when the Plaintiff was questioned and he confirmed that he had not obtained a grant. That the two people had claimed to be grandchildren of Ajwang. That the Plaintiff and himself did not go for Land Control Board consent to transfer before having the land registered in his name. That he does not have a written sale agreement between him and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, who are husband and wife. That the 1<sup>st</sup> and 2<sup>nd</sup> Defendants paid him Kshs. 1.4 Million for the land but had no documentary evidence to confirm it.

6. The following are the issues for the Court's determination;

- a) Who is the legal owner of the suit land as between the Plaintiff on one part and 1<sup>st</sup> to 3<sup>rd</sup> Defendants on the other hand.**
- b) Whether the transmission of the suit land from the first registered proprietors, who are reportedly deceased, was regularly done.**
- c) Whether the Plaintiff, 3<sup>rd</sup> Defendant and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' registration with the suit land was legally, regularly and procedurally done.**
- d) Whether the 4<sup>th</sup> Defendant processed the transactions involving the suit land regularly, legally and procedurally.**
- e) Who pays the costs of this suit.**

7. The Court has carefully considered the pleadings filed by the parties as set out above, the oral and documentary evidence adduced by PW1 and DW1, the written submissions dated 3<sup>rd</sup> October 2017 and 26<sup>th</sup> February 2018 by Counsel for the Plaintiff and 1<sup>st</sup> to 3<sup>rd</sup> Defendants respectively, and come to the following conclusions;

a) That Land Parcel Kisumu/Kanyawegi/5783, measuring 4.5 hectares, was first registered on 17<sup>th</sup> February 2005 in the names of Rosa Seda Ajwang, Oyugi Ajwang, Odak Ajwang and Paul Omoro Atudo, who are now deceased and were reportedly the widow, sons and nephew to Daudi Ajwang Odak, who passed on in 1957. That under entry No. 2 of the green card, the title deed was issued on the 30<sup>th</sup> July 2007.

b) That under entry No. 3 of the green card, the land was registered in the name of the Plaintiff on the 12<sup>th</sup> October 2012. There are no details under the column of “**CONSIDERATION AND REMARKS**” to disclose the basis of the registration. The Plaintiff has in his testimony agreed that he did not file a Succession Cause nor obtain the consent of the Land Control Board before having the land registered in his name. That as he knew that the land was in the names of deceased persons, he was obligated under **Section 2 of the Law of Succession Act Chapter 160 of Laws of Kenya** to comply with the provisions therein guiding the administration and distribution of deceased persons estates. That to do otherwise would be tantamount to intermeddling with such property contrary to **Section 45** of the said Act.

c) That further, as the suit land is obviously agricultural land, the Plaintiff was obligated to obtain Land Control Board Consent under section 6 and 8 of Land Control Act Chapter 302 of Laws of Kenya but he admitted he did not. That in view of the foregoing, the registration of the Plaintiff as the proprietor of the suit land by the 4<sup>th</sup> Defendant on the 12<sup>th</sup> October 2012 was irregular, illegal and un-procedurally done and in terms of **Section 26 of Land Registration Act No. 3 of 2012** is impugned.

d) That the Plaintiff has denied knowledge of how the 3<sup>rd</sup> Defendant became the registered proprietor of the suit land on 15<sup>th</sup> October 2012 the registration which is only about three (3) days after he (Plaintiff) got registered with the land. The 3<sup>rd</sup> Defendant has alleged that he bought the land from the Plaintiff and that he paid him Kshs. 1,200,000/= between September 2012 to February 2013. The Plaintiff has denied the claim. The Court has noted that the Plaintiff was registered as proprietor in October 2012 and could therefore not have been reflected as the owner in September 2012 when the 3<sup>rd</sup> Defendant claims their transaction commenced. That the 3<sup>rd</sup> Defendant did not produce any documentary evidence to confirm that there was a sale agreement between him and the Plaintiff or that he paid the Plaintiff, directly or through his son, the purchase of Kshs. 1,200,000/= or any part thereof. The burden of proving the existence of a sale agreement and payment of the purchase remained that of the 3<sup>rd</sup> Defendant as provided for under **Section 107 of the Evidence Act Chapter 80 of Laws of Kenya** and he has failed to discharge it.

e) That the 3<sup>rd</sup> Defendant confirmed that he did not obtain a consent from the Land Control Board before being registered as proprietor of the suit land on the 15<sup>th</sup> October 2012. The 3<sup>rd</sup> Defendant has also confirmed that he got to know that no confirmation grant had been obtained before the land was transferred from the first registered owners who had passed on. That as held in (c) above the registration of the 3<sup>rd</sup> Defendant as proprietor of the suit land on the 15<sup>th</sup> October 2012 by the 4<sup>th</sup> Defendant was irregularly, illegally and un-procedurally done and his title is hereby impugned under section 26 of the Land Registration Act.

f) That having found as in (e) above, it follows that the 3<sup>rd</sup> Defendant never obtained good title to the suit land that he could pass through sale, or any other transaction, to the 1<sup>st</sup> and 2<sup>nd</sup> Defendant or any other person (s). That in any case, there is no evidence that the alleged transaction over the suit land between the 3<sup>rd</sup> Defendant as Vendor, and 1<sup>st</sup> and 2<sup>nd</sup> Defendants as purchasers, received

the Land Control Board Consent. That the registration of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, as proprietors of the suit land by the 4<sup>th</sup> Defendant on 14<sup>th</sup> January 2013, was also illegally, irregularly and un-procedurally done.

g) That the Court has noted that the County Land Registrars in this area have been allowing transactions over land registered in the name of deceased persons without requiring the Land Control Board Consents and confirmed grants have been obtained which causes a lot of injustice to the beneficiaries who stand the risk of being disinherited. That forces such beneficiaries to come to Court to challenge such transactions. That such beneficiaries are made to undergo a lot of mental anguish and expenses which would otherwise have been avoided or lessened had the Land Registrars required parties presenting documents for registration in respect of parcels registered in deceased persons' names to have first obtained a confirmed grant. That the complicity of such Land Registrars is likely to make the Government incur unnecessary expenses in form of costs and damages which obviously would come from the tax payers Kitty, which would otherwise have gone to better use. That it is the opinion of this Court that perhaps the time has come for such officers to be asked to show cause why disciplinary proceedings should not be commenced against them with the aim of surcharging them for such losses.

h) That though the Plaintiff has succeeded in challenging the transfer of the suit land to the 3<sup>rd</sup> Defendant and thereafter to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, it is however apparent that his claim to the title of the suit land is also impugned. That the land should therefore return to the names of the original proprietors to enable the beneficiaries of their estates to move the Succession Court for the administration and distribution of their estates, in accordance with the law.

8. That following from the foregoing, the Court enters judgment as follows:

**a) That the 4<sup>th</sup> Defendant do immediately rectify the register of Kisumu/Kanyawegi/5783 by deleting all the entries after number 2 and revert the ownership of the land to the people named in entry number 1, who are all reportedly deceased.**

**b) That the 4<sup>th</sup> Defendant do recall the title deeds issued in all the entries after entry number 2 and cancel them.**

**c) That those interested with the suit land which is registered in the names of the four named deceased persons to move the Succession Court in accordance with the provisions of the Law of Succession Act for its administration and distribution.**

**d) That each of the parties in this suit to bear their own costs.**

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**

**DATED AND DELIVERED THIS 30<sup>TH</sup> DAY OF MAY 2018**

**In the presence of:**

Plaintiff          Absent

Defendants          Absent

Counsel        Mr. Ayayo for Plaintiff only

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**