



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**ELC. CASE NO. 383 OF 2015 (FORMERLY KISUMU HCCC NO. 173 OF 2009)**

**LEOCADIA AKUMU ABUOR (Suing as the**

**Administratrix of the Estate of MARTIN ABUOR ODERO).....PLAINTIFF**

**VERSUS**

**ALBERT AWINDA NYAG'ANG'A.....DEFENDANT**

**JUDGMENT**

1. Leocadia Akumu Abuor, the Plaintiff, suing as the administratrix of the estate of Martin Abuor Odero, sued Albert Awinda Nyanganga, the Defendant, through the plaint dated 9<sup>th</sup> November 2009, seeking for the lifting of caution lodged over Kisumu/Kogony/2223 on the 18<sup>th</sup> August 2009, eviction of the Defendant from the portion of the said land, permanent injunction, general damages and costs. The plaintiff avers that sometime on the 22<sup>nd</sup> August 2008, she discovered that the Defendant had encroached onto the suit land, illegally subdivided it without her authority as the co-legal administrator of the estate of the late Martin Abuor Odero who is the registered proprietor.

2. The Defendant opposed the Plaintiff's claim through the statement of defence and counterclaim dated 8<sup>th</sup> April 2011. The Defendant avers that he did not trespass onto Kisumu/Kogony/2223 or the subdivisions thereof as he is the one lawfully entitled to the land. He avers that he is the nephew of Christopher Otengo Osore who died intestate on the 16<sup>th</sup> September 1998 without leaving a surviving issue. That he is the administrator of the said deceased's estate under grant issued in Kisumu H.C. Succession Cause No. 614 of 2009. That the deceased had sold a quarter (¼) acre of the said land to Martin Abuor Odero, deceased, who fraudulently transferred the whole land to himself. That he has been in possession of the suit land for more than 12 years and that the Plaintiff's claim is therefore statute barred and should be dismissed with costs. That in the counterclaim the Defendant avers that the Plaintiff holds the title to the suit land in trust for herself and the Defendant and that the land should be subdivided into two portions for the plaintiff to get the portion bought by the late Martin Abuor Odero and the remaining portion to the Defendant.

3. The Plaintiff filed a reply to the defence and defence to the counterclaim dated 6<sup>th</sup> May 2011. She averred that the Defendant filed the Succession cause in respect of the estate of the late Christopher Otengo Osore in 2009 while he had purported to transfer the land to himself and others on or about the 26<sup>th</sup> May 2008 without legal authority. That Kisumu/Kogony/2223 is not part of the estate of the late Christopher Otengo Osore. That the late Martin Abuor Odero, her late husband, had not bought a portion of the land but the whole parcel. That the Defendant is not entitled to the suit land. That the Defendant counterclaim is incompetent as it is not accompanied by a verifying affidavit and should be dismissed with costs.

4. The hearing of the suit commenced on the 25<sup>th</sup> September 2013 when Leocadia Akumu Abuor, the Plaintiff, testified as PW1. She told the court that she is the widow of the late Martin Abuor Odero who died on the 3<sup>rd</sup> December 2002. That after her husband's death, she filed a succession cause and obtained the grant on the 14<sup>th</sup> January 2005 which was later confirmed on the 28<sup>th</sup> February 2011. That her late husband had bought Kisumu/Kogony/2223 and was issued with the title deed on the 8<sup>th</sup> May 1992. That in 2008, she learnt that somebody was constructing on the land. She visited the land and found it was the Defendant. On making enquiries with the land office, she found that the Defendant had transferred the land to himself, subdivided it and transferred portions thereof to others. She lodged her complaint with the Land Registrar who reversed the subdivisions and returned the land to her late husband's name. The Plaintiff denied that her late husband had only bought a quarter portion and that he had fraudulently transferred the whole land to himself. The Plaintiff called Isacc Njiru, the Land Registrar Kisumu who testified as PW2. He confirmed that Martin Abuor Odero was the first registered proprietor of Kisumu/Kogony/2223 having been so registered on the 3<sup>rd</sup> February 1992 and title deed issued on the 8<sup>th</sup> May 1992. That the green card shows that the Defendant then got registered as proprietor through transmission but the details of the succession cause were not indicated. That the Defendant proceeded to subdivide the land to parcels 4721 to 4724. That the transfer to the Defendant and the subdivisions were later cancelled and the title returned to the name of Martin Abuor Odero. The witness produced a copy of the green card for the suit land plus adjudication record and demarcation sketch note as exhibits confirming that Kisumu/Kogony/2223 was owned by Abuor Martin Odero.

5. The Defendant testified as DW1. He told the court that he is a nephew to Christopher Otengo Osore who was allocated Kisumu/Kogony/2223 during demarcation. That the said Christopher died on the 16<sup>th</sup> September 1988. That he has filed a Succession Cause that was gazetted under gazette notice No. 11009 of the 16<sup>th</sup> October 2009 being Kisumu P.A. Succ. Cause No. 614 of 2009. That he later learnt that Martin Abuor Odero had bought a ¼ acre of the land in a year he cannot recall and boundaries were planted. That those who were present during the transactions are dead except James Malawo. That during adjudication, Martin Abuor Odero had the land registered in his name but Christopher filed an objection which was dismissed in 1983 as shown in the copy of the adjudication record produced as exhibit. That the Defendant later had the land registered in his name and then subdivided it but those transactions were later revoked after the Plaintiff lodged a complaint with the Land office. That though he had filed a succession cause in respect of the estate of the late Christopher, he has not obtained a grant. That the first registered proprietor of the suit land was Christopher Otengo Osore even though he had no documentary evidence to support that position. The Defendant also produced a witness statement under oath made by one James Malawo Ombebu on the 3<sup>rd</sup> February 2015 who allegedly passed on in July 2016.

6. That upon the parties closing their cases, Mr. Onyango and Orengo, the learned counsel for the Plaintiff and Defendant filed the written submissions dated 7<sup>th</sup> February 2017 and 30<sup>th</sup> May 2017 respectively.

7. The issues for the determination by the court are as follows:

**a) Whether the first registered proprietor of Kisumu/Kogony/2223 was the late Martin Abuor Odero or the late Christopher Otengo Osore.**

**b) Whether the registration of the late Martin Abuor Odero as proprietor of the suit land was through fraud.**

**c) Whether the Plaintiff is registered with the suit land in trust for the Defendant and herself.**

**d) Who pays the cost of the suit and counterclaim.**

8. The court has after considering the pleadings, oral and documentary evidence tendered, written submissions by counsel come to the following conclusions;

a) That from the copies of the green card, certificate of official search, title deed and the adjudication record of Kisumu/Kogony/2223, the land was allocated to Abuor Martin Odero in 1980. That one Christopher Otengo Osore filed objection to the registration which was dismissed in 1983. That thereafter the register of the suit land was first opened on the 3<sup>rd</sup> February 1992 with Abuor Martin Odero as the first registered proprietor and the title deed issued to him on the 8<sup>th</sup> May 1992. That the court takes Abuor Martin Odero to be the same as Martin Abuor Odero, who died on the 3<sup>rd</sup> December 2002, and in whose estate the Plaintiff was appointed a co-administratrix, on the 14<sup>th</sup> January 2005 in Nairobi H.C. Succession Cause No. 3495 of 2004.

b) That though the Defendant has claimed that Kisumu/Kogony/2223 was on demarcation allocated to the late Christopher Otengo Osore, his uncle, and in respect of whose estate he filed Kisumu P & A Succession Cause No. 614 of 2009, he has not availed any documentary evidence from the Land and Adjudication office and Land Registrar's office to confirm that claim. That other than a copy of Kenya gazette Notice dated 16<sup>th</sup> October 2009 that carried the publication of the notice of the filing of the cause, there is no evidence that the Defendant has obtained a grant of the estate of the late Christopher Otengo Osore who passed on the 16<sup>th</sup> September 1988.

c) That though the adjudication record confirms that the objection to the registration of the suit land with Abuor Martin Odero filed by Christopher Otengo Osore was dismissed in 1983, there was no record of any successful further challenge of that decision by the said Christopher until he passed on the 16<sup>th</sup> September 1988. The complaint deposed to by James Malawo Ombebu whose affidavit DW1 produced as exhibit, must have been of before the objection proceedings which was dismissed in 1983.

d) That the claim by the Defendant that Martin Abuor Odero had only bought a quarter an acre from the suit land cannot be verified as no documentary evidence was availed. The Defendant was not present during the sale transaction. That further, James Malawo Ombebu, whose affidavit the Defendant produced as exhibit, was not among the elders called to witness the transaction as can be seen at paragraph 6 of the said affidavit. The deponent was only present during the hearing of a subsequent dispute as detailed at paragraph 9 and 10 of the witness affidavit. That as the Plaintiff has averred and testified that her late husband had bought the whole Kisumu/Kogony/2223 and not a portion and in the absence of evidence to support the Defendant's claim that the registration was fraudulent, the Defendant's claim that he is entitled to a portion of that land fails.

e) That the Defendant's averment that the Plaintiff's suit is time barred has not been established or proved. The Plaintiff's case is that she found the Defendant building on the land in 2008 and this suit was filed in 2009. That the Defendant did not avail evidence to rebut the Plaintiff's evidence or show that he had been on the land for a longer period. That the revoked or cancelled entries in the green card of the suit land were all made in 2008 which supports the Plaintiff's claim that was when the Defendant started interfering with the suit land. That accordingly, the Defendant's claim that the Plaintiff's suit is statute barred fails.

f) That the court having found no evidence of fraud in the registration of late Abuor Martin Odero with the suit land, and that the suit land was never a part of the estate of the late Christopher Otengo Osore whose estate the Defendant has applied to administer, it follows that the Defendant has no legal or beneficiary interest upon which the caution he filed on the land can be sustained and the same should therefore be lifted.

g) That the transfer of the suit land to the name of the Defendant on 26<sup>th</sup> May 2008, issuing of title deed and the subdivision of the

land into parcels 4721 to 4724 on the 22<sup>nd</sup> August 2008, which were later revoked and or cancelled by the Land Registrar upon the Plaintiff lodging a complaint, were unlawful, illegal and un-procedural. That those transactions could amount to intermeddling with the estate of a deceased person contrary to **Section 45 of the Law of Succession Act Chapter 160 of Laws of Kenya** as no confirmed grant in respect of the estate of Abuor martin Odero had been obtained by the Defendant.

h) That though the Plaintiff had prayed for general damages, she did not adduce any evidence on the nature of loss she has suffered and the court take it that she abandoned that prayer.

9. That from the foregoing, the court finds that the Plaintiff has proved her case against the Defendant on a balance of probabilities. That the court further finds that the Defendant has failed to prove his case to the standard required in the counterclaim against the Plaintiff. The court therefore enters judgment for the Plaintiff against the Defendant in the following terms;

**a) That the caution/restriction registered on the 18<sup>th</sup> August 2009 against Kisumu/Kogony/2223 be lifted upon a copy of this order being presented to the County Land Registrar Kisumu**

**b) That the Defendant and or his agent, servants, employees or any person deriving authority from him do vacate from the portion of the suit land in their possession in ninety (90) days and in default eviction order to issue and to be executed in accordance with the law.**

**c) That upon giving vacant possession or eviction as in (b) above, permanent injunction in term of prayer (c) of the plaint dated 9<sup>th</sup> November 2009 to issue.**

**d) The Defendant do meet the Plaintiff's costs of the suit.**

**e) That the Defendant's counterclaim against the Plaintiff is hereby dismissed with costs.**

It is so ordered.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**

**DATED AND DELIVERED THIS 26<sup>th</sup> DAY OF September 2018**

**In the presence of:**

Plaintiff      Absent

Defendant      Absent

Counsel      M/s Ayiera for the Plaintiff

Mr. Orengo for the Defendant

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**