



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT KISUMU

ELC. NO. 9 OF 2013

WILLIAM ONYANGO AWERE.....PLAINTIFF

-VERSUS-

SAMUEL ODERO AWIRO.....1ST DEFENDANT

PATRICIAL ADERO AWIRO.....2ND DEFENDANT

REUBEN AGENDA AWIRO.....3RD DEFENDANT

OTIENO AWIRO.....4TH DEFENDANT

JUDGEMENT

1. William Onyango Awere, the plaintiff, commenced this suit against Samuel Odero Awiro, Patricia Adero Awiro, Reuben Agenga Awiro and Otieno Awiro, hereinafter referred to as the 1st to 4th defendants respectively, through the plaint dated 21st January, 2013 and amended on the 11th November, 2013 seeking for the following prayers:-

- a. Permanent injunction restraining the defendants by themselves or agents from invading, alienating, subdividing, charging and or encroaching on land parcel North Gem/Marenyo/591.
- b. Eviction of the defendants from North Gem/Marenyo/591 to be carried out by O.C.S Yala Police Station.
- c. Costs and interests.

2. The plaintiff avers that he is the registered proprietor of North Gem/Marenyo/591, the suit land, and that the defendants have without any color of right illegally and unlawfully trespassed onto it and invited surveyors thereon for the purpose of subdividing and or alienating the said land.

3. The plaintiff's claim is opposed by the defendants through their joint statement of defence and counterclaim dated 18th November, 2013. The defendants avers that the plaintiff does not own the suit land. That in the alternative, if the plaintiff owns the suit land as alleged, then they have acquired title to 0.28 hectares of the land under their occupation since time in memorial. The defendants further avers that the suit land was part of the land belonging to Odiemba, the great grandfather to the defendants. That the said land was demarcated as North Gem/Marenyo/582 to 591, and the suit land given to Rasugu's son, Ismael Agweny Ochola, who in turn bequeathed it to his brother named Samuel Omondi Ochola, who gave it to his son, the 1st defendant. That the defendants have been in peaceful, uninterrupted and open stay of 0.28 hectares of the suit land since the time of their forefathers until September, 2012 when the plaintiff claimed it. That upon conducting a search at the Land office they discovered the plaintiff had illegally acquired the suit land by altering title documents on adjudication records to remove the defendants interests, among others. The defendants prays for the following:-

- a. That the plaintiff's case be dismissed with costs.
- b. That a declaration order be issued that the defendants are entitled to 0.28 hectares on North Gem/Marenyo/591, and the plaintiff be ordered to transfer it to them, and in default the Deputy Registrar be authorized to execute all relevant documents.
- c. That permanent injunction do issue restraining the plaintiff from trespassing onto, or interfering with the defendants quiet possession of their portion "East Gem/Marenyo/591."

4. The hearing commenced on the 22nd January, 2015 when the plaintiff testified as PW 1. The plaintiff called Caroline Atieno Odera, Ressa Oluoch Wasonga and Jack Opiyo Awere who testified as PW 2 to PW 4 respectively. On behalf of the defendants, the third and second

defendants testified as DW 1 and DW 2 respectively. They also called Nicholas Nyaseme Odera who testified as DW 3 and Gilbert Wangwan Okola who testified as DW 4.

5. The learned counsel for the plaintiff and the defendants filed their written submissions dated 24th April, 2018 and 30th July, 2018 respectively.

6. The following are the issues for the court's determinations:-

- a. Whether the registration of the suit land after adjudication was with the kin to the plaintiff or the defendants.
- b. Whether the registration of the plaintiff with the suit land was through fraud.
- c. Who between the parties herein is entitled to the orders sought?
- d. Who pays the costs of the plaintiff's suit and defendants counterclaim?

7. The court has after considering the pleadings, oral and documentary evidence tendered by and for both sides, the written submissions by counsel, and the decided cases cited therein, come to the following conclusions:-

a. That the plaintiff's claim to the suit land North Gem/Marenyo/591 measuring 1.44 hectares, is not only supported by the oral testimonies of his three witnesses, PW 2 to PW 4, but also the documentary evidence in the form of copies of Land certificate issued on 23rd December, 1968 in the name of Joel Awere Liewa, receipt numbers 149032, 416755 and 417606 dated 23rd December, 1968, 5th June, 1967 and 23rd December, 1968 for Kshs.5, Kshs.12 and Kshs.4 respectively, and all in the name of Joel Awere Liewa and all are in respect of parcel 591 Marenyo. That the said documents confirms the plaintiff's case that the said land was registered in the name of his father, named Joel Awere, on adjudication contrary to the defendants claim that the land had been allocated to and registered with their kin, named Ismael Agweny Ochola.

b. That the defendants claim to the suit land appears to be based on the use of the land before land adjudication exercise. That the parcel was part of the land belonging to one Ondiamba, who had died by the time DW 1 was born in 1939. That the late Ondiamba had given the land from which parcel 591 was later created, to the house of Rasugu, who was one of his two wives. That the house of Rasugu and that of the other wife Ondongi later had a dispute over the land which was heard and determined by the Ramuria African Court, (Tribunal), who planted the euphoria boundary in the 1950's.

c. That the history of the use of the land from which North Gem/Marenyo/591 came from as given by the defendants may be true even in the absence of documentary evidence. That the defendants could have had a claim based on customary trust over the suit land even after it was registered, if evidence to establish the trust was tendered. That the court finds that the defendants have not proved the existence of customary trust. That from the testimonies availed, the defendants have not used any portion of the land from 1987 when according to DW 2, she and her family relocated to Kisumu. That accordingly, the defendants cannot base their claim over the 0.28 hectares of the suit land on the adverse possession principle as by the time this suit was filed in 2013 they were not in possession and or occupation.

d. That the plaintiff also availed a certified true copy of the green card (register) for North Gem/Marenyo/591 which confirmed that the land was registered on the 28th November, 1967 and that the first registered proprietor was Joel Awere Liewa. That it is clear under entry No. 2 of 28th November, 2009 that the land was transmitted to William Onyango Awere, the plaintiff, reportedly through transmission. That the plaintiff has also produced a copy of certificate of official search issued on the 17th September, 2012 and title deed issued on the 25th November, 2009 confirming that he is the registered proprietor of the suit land. That though the defendants claimed that the plaintiff had acquired registration of the suit land through fraud, they did not offer any evidence to support or prove their allegations as expected of them under **Section 107** of the Evidence Act Chapter 80 of Laws of Kenya.

e. That from the testimonies tendered by, and for both sides, the adjudication exercise in the area where the suit land is situated took place in the early 1960's. That though DW 4 claimed that the suit land was registered with Ismael Agweny who was then living in Tanzania, no documentary evidence, like a copy of the adjudication register, was availed in support. That the defendants' evidence was that upon the death of Ismael Agweny in 1970's, whom they could not agree whether he was buried in Kenya or Uganda, the suit land was taken over by his brother Samuel Omondi, father to the 1st defendant. That it was Samuel Omondi who authorized William Awere Odera, father to PW 4 to use a portion of the suit land. That the evidence tendered by PW 1 and PW 4 was that William's family had been authorized to use the land by Joel Awere Leiwa, father to PW 1. That having considered the testimonies given by both sides, and noting that the said Ismael Agweny and Samuel Omondi did not lodge any objection to the registration of Joel Awere Leiwa with the suit land during their lifetime, the court finds that the registration of the suit land with Joel Awere Leiwa was regular, legal and procedural. That as the defendants claim against the plaintiff is not based on any beneficial interest, it follows that the plaintiff's registration through transmission is not contested and is therefore proper as he has indicated that he will share the land with his brothers.

f. That just as was held by Mutungi J. in **Odoyo Osodo – Vs – Rael Obara Ojuok & 5 Others (2017) eKLR**, which is not binding, the defendants in this case has failed to prove their counterclaim to the standard required by the law. That the court further finds that the plaintiff has established his claim against all defendants on a balance of probabilities.

8. That flowing from the foregoing, court orders as follows:-

- a. That permanent injunction be and is hereby issued restraining the defendants by themselves, their employees, servants, workers,

agents, and or whomsoever, jointly and severally from trespassing, invading, alienating and or encroaching on the land parcel North Gem/Marenyo/591 registered in the name of the plaintiff without his consent and or authority.

b. That the defendants do pay the plaintiff's costs of the suit.

c. That the defendants counterclaim against the plaintiff be and is hereby dismissed with costs.

Order accordingly.

S. M. KIBUNJA

ENVIRONMENT & LAND - JUDGE

DATED AND DELIVERED THIS 28TH DAY OF NOVEMBER, 2018.

In presence of;

Plaintiff Present

Defendants 2nd & 3rd present

Counsel M/s Otieno for Odeny for Plaintiff

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE