



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT KISUMU

ELC. NO. 84 OF 2012

MONICA ANYANGO ALUOCH.....-PLAINTIFF

VERSUS

LUCIA OLALA.....1ST DEFENDANT

MICHAEL OMONDI OLALA.....2ND DEFENDANT

PAULINE AKINYI OLALA.....-3RD DEFENDANT

HILDA OLALA.....4TH DEFENDANT

OLUOCH OLALA.....5TH DEFENDANT

JUDGEMENT

1. Monica Anyango Aluoch, the plaintiff, vide the amended plaint dated 27th June, 2014 sued Lucia Olala, Michael Omondi Olala, Pauline Akinyi Olala, Helida Olala and Oluoch Olala, the defendants, seeking for the following:-

- a) **An order of eviction against the defendants from Kisumu/Gem Rae/432, the suit land.**
- b) **An order of permanent injunction restraining the defendants from entering or continuing to remain, cultivating, constructing on or interfering with the plaintiff's use of the suit land.**
- c) **In the alternative, a declaratory order that the defendants hold the parcel 931, suit land, in trust for the plaintiff and an order directing them to transfer it to her name.**
- d) **Costs and interests.**

The plaintiff avers that she is the widow of the late Walter Joshua Ongor, the deceased, who passed on the 27th December, 2007. That in the year, 1981, the plaintiff grandmother named Wilkister Agango Angor, allowed one Washington Olala Wende, now deceased, who was the husband to the 1st and 4th defendants, and father to the 2nd and 3rd and 5th defendants, to temporarily stay on the suit land during the floods. That later the said Washington Olala Wende requested that he be allowed to keep the suit land in exchange of Kisumu/Gem Rae/931 and payment of some money. That the exchange was agreed upon and Washington's family continued to stay on the suit land and the plaintiff's family took over Kisumu/Gem Rae/931 until 9th December, 2011, when the defendants claimed it back by fencing it off. The plaintiff avers that as the defendants had taken over Kisumu/Gem Rae/931, land parcel Kisumu/Gem Rae/432, which she has been registered with through transmission remains her land though the defendants have

declined to give vacant possession. That as the plaintiff had continuously farmed on Kisumu/Gem Rae/931, constructed and operated a school thereon, she had acquired it by trust.

2. Defendants denied the plaintiff's claim through their amended statement of defence dated 20th August, 2014. They aver that the plaintiff is not the absolute registered proprietor of Kisumu/Gem Rae/432. They also denied that the plaintiff's grandmother had allowed them to temporarily settle on the suit land in 1981 due to floods, and that there was an exchange of the suit land with Kisumu/Gem Rae/931. The defendants also denied fencing of Kisumu/Gem Rae/931 on 9th December, 2011 or taking it back from the plaintiff. They further pleaded that the suit land was ancestral land and that the late Walter Joshua Ongor was registered with it in trust from his uncle, the late Washington Olala Wende, the husband to 1st and 4th defendants and father to 2nd, 3rd and 5th defendants. That Washington Olala Wende established his homestead on the suit land in 1972 without the plaintiffs or her late husband raising any complaints. That the plaintiff had forcefully taken

over Kisumu/Gem Rae/931 that belongs to the late Washington Olala Wende. That their claim to the suit land is through the late Washington Olala Wende and that the plaintiff holds the title to the land in trust for the defendants and the estate of the late Washington Olala Wende.

3. The hearing of the suit commenced on the 11th May, 2016 when the plaintiff testified as PW 1. She then called Wilkister Agango Ongor, Affayo Ochieng, Wilson Ogelo Oware, George Onyango Okongo, James Omondi Aomo and Morris Oloo Adie who testified as PW 2 to PW 7 respectively. The plaintiff's case is as summarized herein below:-

a) That the plaintiff's late husband family allowed Washington Olala family to settle on the suit land due to floods where he was previously settled. That Washington first elected a home for 4th defendant, the first wife, and later a home for the 1st defendant, the second wife. That PW 2 and her son, who was the husband to PW1, were approached by Washington to let him keep the suit land in exchange with Kisumu/Gem Rae/931 and they agreed.

b) That PW 1 got married by son to PW2 in 1985, and has been using the land parcel 931 and later established a nursery on it.

c) That the 2nd defendant claimed back parcel 931 and fenced it off in year 2011.

d) That PW 1 and PW 2 lodged complaints with the local Provincial Administration who heard the dispute and ruled that if the defendants want to take back parcel 931, then they should release the suit land to the plaintiff. That PW 3 and PW 4 who are related to the PW 1 and PW 2, plus PW 5 to PW 7 who are Chief, Acting Chief and Assistant Chief respectively, confirmed the deliberations of the meetings to the court.

e) The plaintiff produced among other copies of registers and certificates of official searches for Kisumu/Gem Rae/931 and 432 which confirms that they were both first registered on the 31st July, 1980 in the name of Washington Olala Wende and Walter Joshua Ongor respectively. That the said Washington Olala Wende and Walter Joshua Ongor respectively. That the said Washington Olala Wende is the late husband and father to the defendants while Walter Joshua Ongor is the late son to PW 2 and husband to PW 1.

f) That the copy of the register and certificate of official search for Kisumu/Gem Rae/432 confirms that Monica Anyango Aluoch, PW 1, became the registered proprietor of the land on the 29th June, 2012 through order issued in Kisumu High court Succession Cause No. 232 of 2011.

4. That the defendants case commenced on the 28th February, 2018 when Lucia Atieno Olala and Michael Omondi Olala, the 1st and 2nd defendants, testified as DW 1 and DW 2 respectively. The defendants called Henry Otieno Ongenge and he testified as DW 3. The defendants case is as summarized herein below:-

a) That they have been settled on the suit land since 1972. That after DW 1 came from Mombasa in 1987, she farmed on Kisumu/Gem Rae/931 which belonged to her husband for about two years.

b) That parcel Kisumu/Gem Rae/432 is the defendants' ancestral land even though nobody challenged the plaintiff's registration with the title.

c) That the plaintiff established a nursery school on Kisumu/Gem Rae/931 in 2008 but stopped operation after three years.

d) That the defendants' family never exchanged the suit land with parcel 931 as claimed by the plaintiff.

e) That in 2011, DW 2 went to fence his late father's, land parcel 931. That PW 2 went to stop him and the matter was heard by elders and assistant chief, but DW 2 was not allowed to participate after he failed to pay Kshs.500.

f) That the plaintiff and her late husband were registered with the suit land in trust for the defendants' family as their husband and father had acquired it through adverse possession.

5. The learned counsel for the plaintiff and the defendants filed the written submissions dated 23rd July, 2018 and 19th September, 2018 respectively.

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

a) Who the first registered proprietors of Kisumu/Gem Rae/432, the suit land, and Kisumu/Gem Rae/931 was; and who is currently registered as the proprietor of the two parcels.

b) Whether the defendants occupation and use of Kisumu/Gem Rae/432 was by right or with consent of the registered proprietor.

c) Whether the plaintiff's occupation and use of Kisumu/Gem Rae/931 was by right or with consent of the registered proprietor.

d) Whether those registered with each of the two parcels of land hold the title in trust of any of the parties in this suit.

e) What orders to issue.

f) Who pays the costs of the suit.

7. The court has carefully considered the pleadings, the oral and documentary evidence adduced by and for both sides, the written submissions by the learned counsel and come to the following conclusions:-

a) That testimony given by PW 2, PW 3 and PW 4, which is un-rebutted, shows that the patriarchs of the plaintiff's and defendant's families were cousins and therefore related.

b) That both land parcels Kisumu/Gem Rae/432 and 931 were registered on the same date the 31st July, 1980 in the names of Walter Joshua Ongor and Washington Olala Wende respectively. That there is nothing in the title documents to show or suggest that Washington Olala Wende was registered with Kisumu/Gem Rae/931 as trustee for the plaintiff's family or that Walter Joshua Ongor and or the plaintiff were registered with Kisumu/Gem Rae/432 as trustee for the defendants' family.

c) That further, the claim that the said Walter Joshua Ongor was registered with Kisumu/Gem Rae/432 in trust for Washington Olala Wende who was away during adjudication cannot be true. That the fact that Washington was registered with Kisumu/Gem Rae/931, can only mean or signal that he participated in the adjudication or had people to do so on his behalf. That if parcel Kisumu/Gem Rae/432 was at adjudication meant to be registered with Washington Olala Wende, there was nothing that could have prevented his name being registered on the title the same way Kisumu/Gem Rae/931 was registered with him.

d) That though it is not clear from the evidence availed when the defendants family started using land parcel Kisumu/Gem Rae/432, it is obvious that it was with the consent and authority of the plaintiff's family, specifically PW2, and the late Walter Joshua Ogor, husband to the plaintiff. That arrangement has been confirmed by PW 3 and PW 4 and was disclosed to the elders sitting with PW 5 to PW 7 in 2011 and 2012 when they ruled that each family go back to the land registered in their kin's name.

e) That this suit was filed after the defendants declined to vacate from parcel Kisumu/Gem Rae/432 which is currently registered in the name of the plaintiff having inherited it from her late husband through succession. The claim by the defendants that their late father and husband before them, and themselves have acquired title to Kisumu/Gem Rae/432 through adverse possession has no basis as they have been using the land with the consent and authority of PW 2 and her late son until 2011/2012 when they started claiming ownership rights. That as the suit was filed in October, 2012, the period of more than twelve (12) years had not lapsed from the time the defendants occupation and possession of the land started becoming adverse to the title of the registered proprietor.

f) That as the arrangements entered into between PW 2 and her late son on one hand, and the late Washington Olala Wende on the other hand, of exchanging their respective parcels of land appear to have been disowned by the defendants, both before the elders hearing and this court, it is only fair that each family takes back the parcel that is in their name.

8. That flowing from the foregoing, the court finds that the plaintiff has established her claim on a balance of probabilities. The court therefore enters judgment for the plaintiff against the defendants and orders as follows:-

a) That the defendants by themselves, their servants and or agents do give the plaintiff vacant possession of land parcel Kisumu/Gem Rae/432 that is registered in her name in ninety (90) days and in default eviction order to issue to be executed in accordance with the law.

b) That upon the defendants, their servants and or agents giving vacant possession of land parcel Kisumu/Gem Rae/432 to the plaintiff or being evicted, permanent injunction be and is hereby issued restraining them from cultivating, constructing or in any other manner interfering with the plaintiff's use of the said land.

c) That the defendants do pay the plaintiff's costs of the suit and interest thereon.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 21ST DAY OF NOVEMBER 2018

In the presence of:

Plaintiff Present

Defendants Absent

Counsel Mr. Onyango for Plaintiff

Mrs. Onyango for Defendants

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE