



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC MISC. CASE NO.3 OF 2015

IN THE MATTER OF SECTIONS 24, 34, 35, 50, 52, 57, 58, 64, 65, 77 AND 79

OF THE REGISTRATION OF TITLES ACT LAWS OF KENYA

AND

IN THE MATTER OF SECTION 34, 38, 40, 41, 42, 45, 46, 47 AND 52 OF THE

LAW OF SUCCESSION ACT

AND

ANY OTHER ENABLING PROVISIONS OF THE LAW

AND

REGISTERED LAND TITLE NO. KISUMU/KORANDO/3453

BETWEEN

AMOS ODHIAMBO OLANG.....1ST PLAINTIFF

PETER SEWE OLANG.....2ND PLAINTIFF

WASHINGTON OTIENO ADONGO.....3RD PLAINTIFF

VERSUS

JOSEPH OTIENDE OTHULA alias JOSHUA

OTIENO OTHULA.....1ST DEFENDANT

OLANG OGONDA.....2ND DEFENDANT

OBIERO OLANG.....3RD DEFENDANT

MARGARET ADHIAMBO OWINO.....4TH DEFENDANT

CHARLES RAMBO.....5TH DEFENDANT

NEHEMIA ODONGO AMOLLO.....6TH DEFENDANT

REGISTRAR OF LAND.....7TH DEFENDANT

JUDGMENT

1. **Amos Odhiambo Olang, Peter Sewe Olang and Washington Otieno Adongo**, the Plaintiffs, filed this suit through the originating summons dated 20th November 2015 against **Joseph Otiende Othula alias Joshua Otieno Othura, Olang Ogonda, Obiero Olang, Margaret Adhiambo, Nehemia Odongo Amollo, and Registrar of Land**, herein after referred to as 1st to 7th Defendants respectively. The Plaintiffs seeks for the following orders;

- a. A declaration that they have beneficial interest over land parcel **Kisumu/Korando/3453**.
- b. Permanent injunction be issued restraining the Defendants from selling or otherwise dealing with the said land pending the determination of the succession cause of the estate of the late **Othula Olang** who was one of the registered proprietors of the said land.
- c. A declaration that the subdivision made on the said land, without complying with the Law of Succession Act procedures in respect of the estate of the four out of five registered proprietors who have since died, and the titles issued thereof, is null and void.
- d. That the Land Registrar be ordered to cancel all the subdivisions and titles issued out of the said land and revert it to the names of the original registered proprietors namely, **Benjamin Onthiro, Odhula Olang, Otiende Tuju, Olang Ogonda and Rambo Osir**.

2. The originating summons is supported by three affidavits each sworn by the 1st to 3rd Plaintiffs on 20th November 2015.

3. The Plaintiffs had also filed a notice of motion dated 20th November 2015 seeking for temporary injunction orders against the 1st, 4th and 5th Defendants in respect of which the court issued an inhibition order on the 19th May 2016 over the land to pave way for the main suit hearing. The parties were then given timelines to file and serve their respective pleadings. The main suit then came up for hearing on the 15th November 2016 and on confirming that the Defendants had not served their pleadings to the Plaintiffs, the court allowed the hearing to proceed.

4. The Plaintiffs case was presented by Washington Otieno Adongo, the 3rd Plaintiff, who testified as PW1. He told the court that upon completion of the land adjudication, land parcel **Kisumu/Korando/3453** was registered in the names of **Benjamin Onthiro, Odhula Olang, Otiende Tuju, Olang Ogonda** and **Rambo Osir** each owning 1/5 share. That **Olang Ogonda**, the 2nd Defendant, is one of the five registered proprietors of the said land and the only one alive as the four others have since passed on. That in 2014 the Defendants engaged into an exercise of subdividing the land without the Plaintiffs knowledge and created parcels **5184 to 5194**. That the said subdivisions was illegally and unprocedurally done as the succession cases of the four deceased registered proprietors had not been filed and concluded. That the Plaintiffs filed this suit to safeguard their beneficial interests and seeks for the subdivision to be revoked and title reverted to the names of the original proprietors.

5. The issues for determination are as follows:

- a. Whether the subdivision of land parcel **Kisumu/Korando/3453** was procedurally, legally and lawfully done.
- b. Whether the subdivision done, and titles created out of land parcel **Kisumu/Korando/3453**, should be cancelled and ownership reverted to the original title under the names of the first

registered proprietors.

c. What orders to make.

d. Who pays the costs.

6. The court has considered the pleadings filed, affidavit evidence presented, oral evidence by PW1 and come to the following conclusions;

a. That land parcel **Kisumu/ Korando/3453** was upon completion of the adjudication exercise registered in the names of Benjamin Onthiro, Odhula Olang, Otiende Tuju, Olang Ogonda and Rambo Osir, as proprietor in common in equal shares. This is confirmed by the copy of the adjudication record dated 12th august 1989, letter from the district Land Officer, Kisumu dated 25th January 1990, copies of certificate of official search issued on 26th October 2012 and 4th June 2013, in the Plaintiffs list of documents.

b. That the two copies of the certificates of official searches for land parcel **Kisumu/Korando/3435** dated 26th October 2012 and 4th June 2013 confirms that the land was first registered on the 7th February 1992.

c. That according to the evidence of PW1, which is confirmed by the contents of the copy of mutation form registered on 23rd October 2013, Land parcel **Kisumu/Korando/3453** was subdivided into parcels **5184 to 5194**. The names appended on the mutation document as the persons interested with the subdivision are Margaret Adhiambo Owino, Joseph Otiende Othula, Obiero Olang, Sewe Ogonda and Charles Rambo. That four of those names belongs to 1st, 3rd, 4th and 5th Defendants herein.

d. That the Plaintiffs have availed certificates of death No.0444060 and 0260560 showing that Blasto Olang Othula and Joseph Othula Olang died on 20th October 1979 and 10th December 1986 respectively. That in addition, the evidence of PW1 indicates that Sewe Oganda died in 1980, yet he is shown to have been involved in the mutation exercise of 2013. This was humanly impossible as there is no evidence that the said Sewe Ogonda had resurrected after his death to participate in the subdivision of the land. That the foregoing and the fact that the 2nd Defendant, who is the only surviving person out of the five registered proprietors of land parcel **Kisumu/Korando/3453** did not sign the mutation form means that those that engaged in the subdivision, registration and issuance of title deeds for the subdivisions did so unprocedurally, illegally, irregularly and unlawfully as there were no confirmed grants issued by a competent succession court in respect to the distribution of the shares of that land belonging to the deceased registered proprietors. That it is equally surprising that the 7th Defendant registered the mutation and the subdivisions thereof without confirming that those signing the documents were the registered proprietors or lawfully appointed administrators of the estates of the deceased registered proprietors.

e. That the title of the parcels created out of land parcel **Kisumu/Korando/3453** did not confer indefeasible and absolute titles to those registered with them as they have been successfully impugned in accordance with **Section 26 of Land Registration Act No.3 of 2012**. That it is no wonder that the Defendants did not put a challenge to the Plaintiffs claim as they knew their action of subdividing the land did not have the backing of the law. That it is important to refer to the Court of Appeal decision in **Munyu Maina –V- Hiram Gathina Maina** [2013] eKLR where the court stated as follows:

“ We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not

be noted in the register.”

f. That it will be the court empowered under the Law of Succession Act chapter 160 of Laws of Kenya, that will determine who, and who is not entitled to a share of the estates of the four deceased registered proprietors of land parcel **Kisumu/Korando/3453**.

7. That having found as above the court enters judgment for the Plaintiffs against the Defendants in the following terms:

a. That a declaration is hereby issued that the subdivision carried out on land parcel **Kisumu/Korando/3454** and registered on 23rd October 2013, creating land parcels **Kisumu/Korando/5184 to 5194** was unlawfully, irregularly and unprocedurally done and hence null and void.

b. That a declaration is hereby issued that the registration and issuance of titles in respect of the subdivision done out of land parcel **Kisumu/Korando/3453** namely, parcels **5184 to 5194** was unlawfully, irregularly and unprocedurally done and hence null and void for failure to ensure it had been authorized by the registered proprietors and or legally appointed legal administrators with confirmed grants in accordance with the **Law of Succession Act, Chapter 160 of Laws of Kenya**.

c. That the Land Registrar Kisumu is hereby ordered to revoke all the subdivisions created out of land parcel **Kisumu/Korando/3453** and further cancel the documents of titles issued thereof in respect of land parcels **Kisumu/Korando/5184 to 5194** and revert them to the original land parcel **Kisumu/Korando/3453** in the names of Benjamin Onthiro (deceased), Odhula Olang (deceased), Otiende Tuju (deceased), Oland Ogonda and Rambo Osir (deceased).

d. That those interested with the share of the four deceased registered proprietors of land parcel **Kisumu/Korando/3453** do move the succession court and pursue their interest in accordance with the **Law of Succession Act Chapter 160 of Laws of Kenya**.

e. That each party do take care of their own costs.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 15TH DAY OF MARCH 2017

In presence of;

Plaintiffs Present

Defendants 1ST, 2ND, 4TH and 5th present.

Counsel None

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

15/3/2017

15/3/2017

S.M. Kibunja Judge

Oyugi court assistant

Plaintiff present

1st, 2nd, 4th and 5th Defendants present

Court: Judgment dated and delivered in open court in presence of the Plaintiffs, 1st, 2nd, 4th and 5th defendant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

15/3/2017