



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC PETITION CASE NO.1'B' OF 2014

DAVE ODHIAMBO ORICHO.....1ST PETITIONER

BENADATE KASYOKA MBALA.....2ND PETITIONER

VERSUS

THE COUNTY LAND REGISTRAR1ST DEFENDANT

ATTORNEY GENERAL.....2ND DEFENDANT

DIRECTOR OF SURVEY.....3RD RESPONDENT

JUDGMENT

1. **Dave Odhiambo Oricho** and **Bendate Kasyoka Mbala**, the 1st and 2nd Petitioner, vide the petition dated 3rd February 2014 and amended on the 17th February 2014, against **The Hon. Attorney General**, **The County Registrar of Lands Kisumu** and **The Director of Surveys**, hereinafter referred to as 1st to 3rd Respondents respectively, prays for the following;

“ **i)** A conservatory order barring the Respondents from in any manner interfering with the Petitioners’ quiet possession of land parcel No.**Kisumu/Wathorego/3635** formerly part of **Kisumu/Wathorego/139**.

ii) A declaration that the status quo prior to the amendment to reflect **Kisumu/Wathorego/139** and cancellation of the Petitioners’ title by the 2nd Respondent be maintained.

iii) A declaration that the Respondents are in breach of the provisions of Article 40 of the Constitution of Kenya by interfering with the Petitioners’ the rightful use of their land.

iv) A declaration that the 2nd Respondent lacks moral probity, has betrayed public trust, has failed to ensure objectivity and impartiality in decision making, has practiced favoritism, discrimination, improper motives and has engaged himself in corrupt practices and does not deserve to exercise the functions of a state officer and should be thus removed and barred from holding a state office in future.

v) A declaration that the 2nd Respondent is perpetuating breaches of the law, the constitution of Kenya and carrying out and legalizing impunity contrary to the Constitution of Kenya and exhibiting arrogance and ignorance in performance of their public duties contrary to law.

vi) An order be issued quashing the Respondent's decision of amending **Kisumu/Wathorego/139** and a Declaration that **Kisumu/wathorego/3635** belongs to the Petitioners.

vii) Damages for infringement of rights of the petitioners to be paid by the Respondents jointly and severally.

viii) An order be issued directing the County Registrar of Lands, Kisumu to issue the petitioners with title documents for **Kisumu/Wathorego/3635**.

ix) An order for the rectification of the register in respect of **Kisumu/Wathorego/3635**.”

2. The Petitioners' case is summarized as follows;

a) That they bought land parcel **Kisumu/Wathorego/3635** from George **Otieno Ojany**, through sale agreement dated 25th March 2013, and become registered proprietors.

b) That the purchase price was Ksh.1,300,000/= and that the land had been charged to K-Rep Bank by the previous owner. That the loan was discharged and the land procedurally transferred to the Petitioners.

c) That in November 2013 the petitioners learnt that the Respondents wanted to redistribute the land parcel **Kisumu/Wathorego/139** and revoked all titles issued from it earlier even though the subdivisions had been done by the bona fide owners.

d) That the Petitioners received a letter from the district Land Registrar, Kisumu East, to the effect that their land had been consolidated to **Kisumu /Wathorego/139**, and that the title deed they held was no evidence of ownership of land parcel **Kisumu/Wathorego/3635**.

e) That the act by the 2nd and 3rd Respondents to consolidate the titles to **Kisumu/Wathorego/139** was irregular, ultra vires, unconstitutional, null and void as it was in breach of Articles 40, 48 and 50 of the Constitution.

3. The Petition is opposed by the Respondents through the replying affidavit sworn by Isaac Njiru, District land Registrar, Kisumu East whose deposition are summarized as follows;

a) That the suit land was initially **Kisumu/Wathorego/139** registered in the names of Mathew Owuor Ojany, Alex Odongo Ojany and Otieno Ojany.

b) That Alex Odongo Ojany passed on the 5th May 2002 and Dominic Odhiambo Odongo and Kesia Atieno Osodo were appointed as joint administrators of his estate and the grant later confirmed on 18th June 2008 in Kisumu H.C.SUCC Cause No.250 of 2007. The two joint administrators were entered into the register for Kisumu/Wathorego/139 as proprietors of 1/3 share.

c) That land parcel Kisumu/Wathorego/139 was later subdivided into parcels Kisumu/Wathorego/3488, 3489 and 3490.

d) That parcel 3488 was later subdivided into parcels Kisumu/Wathorego/3634 to 3636.

e) That the Petitioners could not be registered as proprietors of the land they had bought as the title had a charge to K-Rep Bank for Ksh.950,000/= registered on 23rd May 2013. That further there was also a criminal case being Winam SRM CR.C.No.1043 of 2012 over the said land and that the Chief Magistrate Court, Kisumu had in **Land Case No.1 of 2011** issued an order cancelling all the titles emanating from the subdivisions of land parcel **Kisumu/Wathorego/139** which affected the suit, land Kisumu/Wathorego/3635 among others.

f) That the Land Registrar had only entered the petitioners names in the register but, could not register the transfer for the foregoing reasons.

4. The issues for determinations are as follows;

- a) Whether the Respondents action of cancelling the titles for the suit land, which was one of the subdivisions, and consolidating it to **Kisumu/Wathorega/139** was lawful.
- b) Whether the Respondents action amounted to breach of the petitioners constitutional rights.
- c) What orders to issue.
- d) Who pays the costs.

5. The court has considered the petition, replying affidavit, submissions filed and come to the following determination;

- a) That the Land parcel **Kisumu/Wathorego/3635**, the suit land, is a subdivision from **Kisumu/Wathorego/3488** which was itself a subdivision from **Kisumu/Wathorego/139**.
- b) That **Kisumu/Wathorego/139** was first registered on the 29th November 1994 in the names of Mathews Owuor Ojany, Alex Odongo Ojany and Otieno Ojany, each holding a third share.
- c) That Alex Odongo Ojany reportedly died on 5th May 2002 and Dominic Odhiambo Odongo and Kisia Atieno Osodo were appointed the administrators of his estate in Kisumu H.C. Succession Cause No.250 of 2007 and entered in the title for **Kisumu/Wathorego/139** on 20th January 2009 for 1/3 share.
- d) That the title for **Kisumu/Wathorego/139** was closed on 13th July 2009 upon the land being subdivided into parcels 3488 to 3490.
- e) That parcel **Kisumu/Wathorego/3488** was registered in the names of Dominic Odhiambo Odongo, Kisia Ateino Osodo, Mathews Owuor Ojany and Otieno Ojany on the 13th July 2009 and the title subsequently closed on subdivision to parcels 3634 to 3636 on 23rd March 2010.
- f) That parcel **Kisumu/Wathorego/3635**, the suit land, was registered in the names of Dominic Odhiambo Odongo, Kisia Atieno Osodo, Mathew Owuor Ojany and Otieno Ojany on the 24th April 2010 and on the 7th October 2010, it was transferred to the names of George Otieno Ojany, who charged it to k-Rep Bank Limited for Ksh.950,000/= on the 5th July 2011.
- g) That the said George Oiteno Ojany entered into a land sale agreement with the Petitioners on 25th March 2013 for sale of **Kisumu/Wahtorego/3635** for Ksh,1,300,000/=. The transfer document was executed on the 15th April 2013 and registered on the 29th May 2013 following the registration of discharge of charge on the 23rd May 2013.
- h) That by letter dated 7th November 2013, addressed to the Petitioners among others, the District Land Registrar communicated the effect of the decree in Kisumu C.M. Land Case No.1 of 2011 that the parcels subdivided from **Kisumu/Wathorego/139** had been cancelled. The Petitioners have availed a copy of the decree dated, 1st February 2011, through the further lists of documents dated 31st September 2016. The court has noted that the parties in Kisumu C.M.CCNo.1 of 2011 were Mathews Owuor Ojany, John Ouma Ojany, Agnes Adera Oyugi as the Plaintiffs while George Otieno Ojany, Kisia Atieno Osodo were the Defendants. That as George Otieno Ojany was one of the parties to the said case, he must have known of the decision of

1st February 2011 thereof by the time he entered into the sale agreement dated 25th March 2013 with the petitioners.

i) That the said George Otieno Ojany knew or ought to have known that his title to land parcel **Kisumu/Wahtorego/3635** had been affected by the cancellation order of 1st February 2011 issued in Kisumu C.M. Land Case NO.1 of 2011 and therefore did not have a good title to pass to the Petitioners when they made the sale agreement dated 25th March 2013.

j) That the Petitioners recourse should obviously have been against the said George Otieno Ojany, the Vendor, as the Respondents herein had acted in accordance with the court order which has not been challenged to date. The said Vendor, George Otieno Ojany, had been charged in Winam S, RM Criminal case No.1043 of 2012, as evidenced by the copy of the witness summons dated 30th January 2015 addressed to the Land Registrar Kisumu East. The court however notes that the nature of the charge, its relevance to this petition and outcome was not disclosed to the court.

6. That in view of the foregoing the court finds that the petitioners have failed to establish any breach of their constitutional and fundamental rights attributable to the actions or omission of the Respondents in relation to the cancellation of the subdivisions arising out of Land parcel **Kisumu/Wathorengo/139**. The prayers and declarations sought are not available to the Petitioners and the petition is therefore dismissed with costs.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 08TH DAY OF MARCH 2017

In presence of;

Petitioners 1ST present

Respondents absent

Counsel None

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

8/3/2017

8/3/2017

S. M. Kibunja Judge

Oyugi court assistant

1st Petitioner present

Court: Judgment dated delivered in open court in presence of the 1st Petitioner only.

S. M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

8/3/2017