



REPUBLIC OF KENYA

IN THE Environment And Land Court At Kisumu

ELC CASE NO.815 OF 2015

LILIAN AKEYO.....1ST PLAINTIFF

SAMUEL OTIENO ONJORE..... 2ND PLAINTIFF

JAMES HANDA OGULA.....3RD PLAINTIFF

VERSUS

CHARLES ONYANGO MIRASIDEFENDANT

JUDGMENT

1. Lilian Akeyo, Samuel Otieno Onjore and James Handa Ogula, the plaintiffs, commenced this suit against **Charles Onyango Mirasi** the Defendant, through the plaint dated 13th May 2010 seeking for the following;

- “(a) Nullification of the registration of **land parcel East Uyoma/Katwenga/2957** from the Defendant’s name into the Plaintiffs’ names.
- (b) An order of injunction restraining the Defendant by himself, agent and or servants from entering and or interfering with the land in question.
- (c) The defendant to be condemned to pay costs of the suit plus interest and any other or further relief the court may deem fit to grant.”

The plaintiff aver that the 1st Plaintiff is the administrator of the estate of the late Jotham Geoffrey Achieng who died on the 7th October 1999 while the 2nd and 3rd Plaintiffs are beneficiaries of the said estate that comprises of land parcel **East Oyuma/Katwenga/2957**. That between the years 2008 and 2009, the Plaintiffs discovered that the Defendant had illegally and fraudulently transferred land, parcel **East Uyoma/Katwenga/2957**, the suit land, to his name from that of the late Jotham Geoffrey Achieng. The Plaintiffs have set out the particulars of fraudulent and illegal transfer attributed to the defendant at paragraph 5 of the Plaint summarized as follows:

- i. Purporting to have acquired the suit land through transmission while no succession cause was filed in relation to the estate of the late **Jotham Geoffrey Achieng** who was the registered proprietor.
- ii. The failure to obtain letter of consent from the land control board.
- iii. Having fraudulent entries made on the parcel’s green card at the land registry.

2. The Plaintiffs claim is opposed by the Defendant through his filed statement of defence dated 28th June 2010. The Defendant avers that the suit land was transferred to his name lawfully, legally and procedurally. He prays for the Plaintiffs suit to be dismissed with costs.

3. The hearing commenced on the 19th September 2016. The Plaintiffs were in person and had agreed that the 2nd Plaintiff, **Samuel Otieno Onjore**, who testified as PW1, would give evidence on their behalf. Mr. Odongo advocate represented the Defendant who testified as DW1.

4. The Plaintiffs case is that the suit land was registered in the names of Geoffrey Jatham Achieng who died on the 19th October 1999. That the late Geoffrey had on 2nd October 1998 gifted the land to the 2nd Plaintiff but died before the transfer transaction could be done. That the 1st Plaintiff and her sister Millicent were appointed administratrixs of the estate of the late Geoffrey in Kisumu H.C. Succ. Cause No.675 of 2006, in which an order to share the estate between the two administratrixs equally has been issued. That the Defendant claim to have bought the land from the late Geoffrey's son called **George Olweny** but the Plaintiffs said they were not aware of it.

5. The Defendant's case is that he purchased the suit land in 1999 from **Geoffrey Jotham Achieng** and it was transferred to him in 2001 and he obtained title in 2002. That he has been in exclusive use of the land since then. That the land was transferred to him by the son of **Geoffrey Jotham Achieng** lawfully and that there was no fraud in the transaction and the Plaintiffs suit should therefore be dismissed with costs. The Defendant stated that he could not tell how **George Olweny** succeeded the estate of his late father to be able to transfer the suit land to him.

6. The following are the issues for the determination of the court;

- a. Whether the Plaintiffs have established fraud and illegality in the process leading to the Defendant being registered as proprietor of the suit land.
- b. Whether the Plaintiffs have established a case for revoking the Defendant's registration with the suit land.
- c. Whether the Plaintiffs have established entitlement to the suit land.
- d. What orders to issue.
- e. Who pays the costs.

7. The court has carefully considered the evidence adduced by both sides, written submissions filed also by both sides, pleadings filed and come to the following findings;

- a. That land parcel **East Uyoma/Katwenga/2957** is a subdivision of Plot No.1375 and was first registered on the 5th January 1990. This is according to the copy of the register and title deed in the Plaintiffs list of documents dated 21st December 2010.
- b. That the suit land was first registered in the name of **Jotham Geoffrey Achieng**, who is said to have died on 19th October 1999, on the 5th January 1990. That there is no evidence of any succession cause having been filed before the land was transferred from his names.
- c. That the second registered owner is shown as **George Olweny Achieng** who got registered on 18th February 2000 through succession whose details have not been given. That it is the Plaintiffs case that no succession cause was filed.
- d. That the third registered owner is **Chales Onyango Mirasi**, the Defendant who became the registered proprietor on 17th August 2001 and obtained the title deed on the 19th June 2002.

e. That **George Olweny Achieng** died on the 29th September 2001 according to certificate of death **No.B.744405** availed by the Plaintiffs in their list of documents.

f. That the 2nd and 3rd Plaintiff are cousins and clansmen of the late **Jotham Geoffrey Achieng** who was the first registered proprietor of the suit land. The said **Jotham Geoffrey Achieng** was reportedly survived by a widow, son named **George Olweny** and daughter named **Lilian Achieng** who is the 1st Plaintiff. That the widow and son have since passed on and the daughter, the 1st Plaintiff, has filed H.C. Succ. Cause No.675 of 2006 to administer the estate.

g. That it is the Plaintiffs case that no succession cause was filed in respect of the estate of the late **Jotham Geoffrey Achieng** before the suit land was transferred to the name of his son **George Olweny**, and thereafter to the Defendant. The Defendant response is that it was **George Olweny** who is a son of **Jotham Achieng** who transferred the land to him as he knew of the sale transaction between his late father and the Defendant.

h. That the title of a registered proprietor of land is indefeasible and absolute unless impugned on a ground of fraud, or misrepresentation in which the registered proprietor is proved to be a party in accordance with **Section 26 (1)** of the Land Registration Act No. 3 of 2012. The Plaintiffs have set out the particulars of fraud, including purported succession cause and lack of land Control board consent to transfer the suit land from the late Geoffrey to his son **Olweny** (deceased) and thereafter the Defendant. The Defendant stated in his defence that he could not tell whether the late **Olweny** had filed a succession cause to administer the estate of his father before transferring the suit land to him. The Plaintiffs have established that there was fraud and illegality in the way Defendant got registered with the suit land. The Defendant did not avail a copy of the sale agreement under which he allegedly bought the land or the letter of consent to transfer obtained within six months from the date of the sale agreement.

i. That in the case of **Munyu Maina –V- Hiram Gathima Maina** [2013] eKLR , the court of Appeal held 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 interest which would not be noted in the register.”

The Defendant has failed to show that he got registered with the title of the suit land procedurally, legally, and regularly.

j. That it is only fair and just that the suit land reverts to the names of the first registered proprietor namely, **Jotham Geoffrey Achieng**. This will enable those with beneficial interest over the estate of the late **Jotham Geoffrey Achieng** to pursue them in accordance with the **Law of Succession Act Chapter 160 of Laws of Kenya**.

8. That flowing from the foregoing, the court enters judgment for the plaintiffs against the defendant as follows;

a. That the **Land Registrar Siaya/Bondo** is hereby ordered to rectify the register of land **parcel East Uyoma/Katwenga/2957** by deleting entries numbers 3 and 5, and any other that may have been made thereafter, and revert the ownership of the land to **Jotham Geoffrey Achieng** (deceased).

b. That each party do meet their own costs.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 08TH DAY OF MARCH 2017

In presence of;

Plaintiffs 1st Absent, 2nd & 3rd present

Defendant Present

Counsel Mr Ingosi for Odongo for Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

8/3/2017

8.3.2017

S.M. Kibunja Judge

Oyugi court assistant

2nd & 3rd and Plaintiffs present

Mr. Ingosi for Odongo for Defendant

Court: The judgment dated and delivered in open court in presence of the 2nd and 3rd Plaintiff, the Defendant and Mr Ingosi for Odongo for the Defendant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

8/3/2017