



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC CASE NO.11 OF 2013

CHARLES OLUOCH OKUMU.....PLAINTIFF

VERSUS

CYPRIAN OLUOCH OBIERO.....1ST . DEFENDANT

PATRICK OCHIENG OBONYO.....2ND DEFENDANT

JOHN ODHAIMBO OBONYO.....3RD DEFENDANT

LAND REGISTRAR (UGENYA DISTRICT).....4TH DEFENDANT

JUDMENT

1. **Charles Oluoch Okumu**, the Plaintiff, commenced this suit through the Plaint dated 21st January 2013 and filed in court on the 22nd January 2013 against **Cyprian Otieno Obiero, Patrick Ochieng Obonyo, John Odhiambo Obonyo and The Land Registrar, Ugenya**, hereinafter referred to as the 1st to 4th Defendants respectively. The Plaintiff avers that after his father passed on, one Obonyo Munuango fraudulently had land parcel **East Ugenya/Ramunde/557** registered in his name. That thereafter the 1st Defendant with the assistance of the other Defendants, had the suit land registered in his name fraudulently inspite of a caution he had filed on the 5th August 2012. The Plaintiff prays for an order for revocation of the suit land's title, costs and interests.

2. The Plaintiff's claim is opposed by the 1st to 3rd Defendants through their statement of defense dated 4th February 2013. They aver that the 1st Defendant acquired proprietorship of the suit land legally.

3. The hearing of the suit commenced on the 7th February 2017 in the absence of all the Defendants and their advocates after the court was satisfied service of hearing notices had been done. The Plaintiff testified as PW1. He told the court that land parcel **East Ugenya/Ramunde/557** was on first registration in the name of Kambu Muyere, who was the younger brother to his father namely Kaminyieri. That his father was assisted by one Obonyo Mumwango to charge the said land with Kenya Commercial Bank to secure a loan of Ksh.15,000/= in 1979. That in 1981, the Plaintiff received a message from his father that the said Obonyo had started harvesting sugarcane from the suit land. The Plaintiff contacted the Bank who advised that he makes a report to the police. The Plaintiff then engaged an advocate who did some letters to the Bank, the Land Registrar and to Obonyo. That the advocate then filed a suit against Obonyo in Nairobi which was later transferred to Kisumu and restraining orders were issued. Later Obonyo passed on. The Plaintiff waited for Obonyo's family to file a succession cause but none was filed. That after some time he learned that the Obonyo family wanted to sell the land. He filed a suit at Ukwala court and thereafter filed a caution against the title, but the land was later transferred to the 1st Defendant.

He then filed this suit. The Plaintiff prays that the 1st Defendant's title be cancelled and the land be returned to him with costs. During cross-examination by the court, the Plaintiff disclosed that Kambu Muyere left three daughters who are still alive. He also informed the court that his father died before Kambu Muyere and that he has not obtained a grant in respect of the estate of Kambu Muyere. He said he is only interested in having his mother inherit the land.

4. The following are the issues for the determination by the court;

- a) Whether the Plaintiff has established fraud on the registration of the suit land in the name of Obonyo Munwango and the 1st Defendant.
- b) Whether the Plaintiff has capacity to file and prosecute this suit.
- c) Whether the Plaintiff's claim is statute barred.
- d) What orders to issue.
- e) Who pays the costs.

5. The court has carefully considered the pleadings by both sides, the evidence by the Plaintiff, the statements by the Defendants filed with their list of witnesses dated 4th February 2013 and come to the following determinations;

- a) That Kambu Muyere, who is reportedly the first registered proprietor of land parcel **East Ugenya/Ramunde/557**, died on 25th February 2003 aged 29 years according to the certificate of death No.101229 in the Plaintiff's further list of documents dated 8th April 2013.
- b) That the land parcel **East Ugenya/Ramunde/557** had been charged to Kenya Commercial Bank to secure a loan of Ksh.15,000/= on the 23rd January 1979. That even though the Plaintiff claims that Obonyo Mumwango obtained the suit land fraudulently, the documents filed by the Defendants through their list of documents dated 4th February 2013, specifically the certificate of sale by Damco Auctioneers, application for consent, letter of consent, and transfer by chargee in exercise of power of sale leads the court to conclude that the chargor had defaulted in the repayments of the loan leading to Kenya Commercial Bank (Chargee) realizing their security by auctioning the land. That Kenya Commercial Bank, who exercised the chargees power of sale and transferred the land to Obonyo Mumwango, has not been enjoined in this suit and the court find no grounds on which to fault the transaction.
- c) That though the Plaintiff has availed a copy of an order issued on 1st October 1992 in Kisumu H.C. Civil case No.198 of 1985, his evidence in court clearly shows that no final orders were issued because of Obonyo Mumwango, the Defendant's, death on the 17th March 2007. [See certificate of death No.88113 in the Defendants list of documents].
- d) That there is no evidence that Kambu Muyere took any legal action to challenge the registration of the Land with Obonyo Mumwango from the 26th January 1981 to the date he died on the 25th February 2003. That the period between the two dates was 12 years, one month and one day. That in terms of **Section 7 of the Limitation of Actions Act Chapter 22 of Laws of Kenya**, the twelve years within which Kambu Muyere, or anyone claiming under him, could have lodged a claim for recovery of the land had lapsed about a month before his death.
- e) That the said Kambu Muyere is reportedly survived by three daughters and no succession cause in respect of his estate has been filed to date. Though the Plaintiff indicated in his evidence that his interest is to have the land inherited by his mother, he is without capacity to file a suit to recover the property of Kambu Muyere without first obtaining a grant from the succession Court. That in any

case, this suit was filed on 22nd January 2013, which is about 32 years from the date the land was registered in the name of Obonyo Munwango, and is therefore statute time barred.

f) That whereas the 2nd and 3rd Defendant did not avail a copy of the certificate of grant under which the estate of Obonyo Munwango was distributed before being sold and transferred to the 1st Defendant, the court do not find any need to question the transaction in view of the finding above on the Plaintiff's lack of capacity and suit being time barred.

6. That flowing from the foregoing the court finds that the Plaintiff has failed to establish his claim against the Defendants to the standard required of balance of probability. The Plaintiff's claim against all Defendants is therefore dismissed with no orders as to costs as the Defendants did not attend court during the hearing.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 17TH DAY OF MAY 2017

In presence of;

Plaintiff Present

Defendants absent

Counsel None

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

17/5/2017

17/5/2017

S.M. Kibunja Judge

Oyugi court assistant

Plaintiff present

Defendant present

Court: Judgment dated and delivered in open court in the presence of the Plaintiff.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

17/5/2017