



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**  
**ELC CASE NO.782 OF 2016**  
**[FORMERLY HIGH COURT CIVIL SUIT NO.168 OF 2009]**

**MAUREEN ADHIAMBO .....PLAINTIFF**

**VERSUS**

**CHARLES OTIENO OYUGI .....1<sup>ST</sup> DEFENDANT**

**JAMES OMONDI OCHULA.....2<sup>ND</sup> DEFENDANT**

**OWINO OPONDO KARONDO.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. **Maureen Adhiambo**, the Plaintiff, commenced this suit through the plaint dated 2<sup>nd</sup> November 2009, and amended on the 14<sup>th</sup> November 2014, against **Charles Otieno Oyugi, James Omondi Ochula and Owino Opondo Karondo**, hereinafter referred to as 1<sup>st</sup> to 3<sup>rd</sup> Defendants respectively, seeking for the following;

- That the Defendants names on land parcel Central **Alego/Komolo/2387, 2386, 2189** be cancelled and the titles be registered in her names.
- Declaration that the sale, transfer and registration of the said parcels in the names of the Defendants was unlawful and null.
- Costs.

The Plaintiff avers that she is the only child of the late **Charles Kome Othieno**, who died on the 17<sup>th</sup> April 2000, and the administratrix of his estate. That the deceased owned land parcel central **Alego/Komolo/1229** which he registered in the names of the 1<sup>st</sup> Defendant to hold in trust for her. That in contravention of the trust, the 1<sup>st</sup> Defendant subdivided the land into parcels Central **Alego/Komolo/2139, 2386 and 2387** and transferred some of the portions to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

2. The claim is denied by the Defendant through their joint statement of defence, amended on the 20<sup>th</sup> February 2015. They aver that the deceased gave the suit land to the 1<sup>st</sup> Defendant in 1979 and transferred it to him after obtaining the Land Control board on 22<sup>nd</sup> January 1981. That the 1<sup>st</sup> Defendant subdivided the land into parcels **2396, 2139 and 3287** with the full knowledge of the deceased. That the 1<sup>st</sup> Defendant did not hold the land in trust of the Plaintiff and the sale to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants was properly done. That the Plaintiffs suit is statute time barred. That the suit land was subject matter in the tribunal case No. SYA/29/2008 and was awarded to the 1<sup>st</sup> Defendant.

3. The hearing of the suit took place on the 22<sup>nd</sup> October 2015 when the Plaintiff testified as PW1. For the defence, the 1<sup>st</sup> Defendant testified as DW1 Mr. Samba and Mr. Nyanga, learned counsel for the Plaintiff and Defendants thereafter filed the submissions dated 16<sup>th</sup> November 2015 and 5<sup>th</sup> September 2015 respectively.

4. The following are a summary of the evidence adduced by the parties and the submission by their respective counsel.

#### **A. PLAINTIFF EVIDENCE AND SUBMISSIONS BY THE COUNSEL:**

- That the Land parcel **Central Alego/Komolo/2387** was registered in the Plaintiff's name before it was transferred to the 1<sup>st</sup> Defendant's name to hold in trust for her as she was then a minor.
- That when the Plaintiff became mature and asked the 1<sup>st</sup> Defendant to transfer the land to her, he declined on the basis that as a female, she did not need a big land.
- That the Plaintiff's parents are buried on the suit land.
- The Plaintiff confirmed that though her father had told her that the 1<sup>st</sup> Defendant was registered with the land in trust for her that fact was not noted on the register.
- That the land the Plaintiff has sued for is parcel **Central Alego/Komolo/1229**.
- The Plaintiff agreed that parcel **Central Alego/Komolo/1245** was still in her father's name.
- That the Plaintiff's cousin, George Otieno, and herself had lost the claim over the land in the Tribunal case.
- That the Plaintiff was born in 1965 and agreed that she did not avail before the court any documents on ownership of the suit land and the subdivisions thereof.
- That the registration of the 1<sup>st</sup> Defendant with the land did not extinguish the Plaintiff's right to inherit the land in view of **Section 24 to 29 of Land Registration Act 2012** that provides that trust may arise out of customary rights.

The counsel referred to the decisions in **Mukangu –V- Mbui** (2014) 2 KLR, where the Court of Appeal cited the decision of Khamoni J, in **Gathiba –V- Gathiba** (2001) 2 E.A. The counsel also referred to **Kanyi –V- Muthiora** (1984) KLR 712, **Re Estate of Leviuka Ole Ntutu** (2008) eKLR, **Peter Kiara**

**Kuria –V- Hannah Nyambura Kuria** (2004) eKLR, in **Dr. Christopher M. Mbatha –V- Dr. Florence Mukii Mukitu** Nairobi H.C.C. NO.525 of 2008 and **John G. Bruno & Another –V- Jakson Bruno** (2003 eKLR).

#### **B. DEFENDANT'S EVIDENCE AND COUNSEL'S SUBMISSIONS:**

- That land parcel central **Alego/Komolo/1229** was gifted to the 1<sup>st</sup> Defendant by his uncle in 1979. That a year later they obtained the land control board consent to transfer the land to his name. That they then went to the land's office, Siaya and got the land transferred to him.
- That later, his uncle wanted some money for the Plaintiff's school fees and upon his request he transferred a portion of the Land to 3<sup>rd</sup> Defendant for Ksh.10,000/=.
- That later the Defendant transferred a portion of the land to the 2<sup>nd</sup> Defendant.
- That the uncle also owned land parcel 1245 which is still in his names and is used by the Plaintiff.
- That the Plaintiff lived with her parents on the suit land until when she reached secondary school and moved to Nakuru to live with her aunt and remained there until she got married.
- That the Plaintiff's parents are buried on the suit land.
- That he sold the portions registered with the 2<sup>nd</sup> to 3<sup>rd</sup> Defendants on the directions of his uncle.
- That the land was given to him as a gift and not to hold in trust.
- That the Plaintiff filed this suit at the behest of her uncles who live in the vicinity of the

- land.
- That the Plaintiff had filed a tribunal case over the land but lost and never filed an appeal.
  - That the Defendant has been the registered proprietor of the suit land for 29 years.
  - The learned counsel referred the court to the case of **Jephiter Idewa Otungu –V- Andrew Juma** [2015] eKLR in which Mukunya J, cited the decision in Nyeri C.A..C.A No.26 & 27 of 2011, **Macharia Mwangi Maina & 87 others –V Davidson Mwangi Kagiri**.
  - That the Plaintiff case is res judicate in view of the Siaya Land disputes Tribunal whose award was adopted in Siaya S.R.M. CASE No.69 of 2009, which decision has not been challenged to date.
  - That the suit is statute time barred as transfer of the land to the 1<sup>st</sup> Defendant was done in 1981.
  - That the Plaintiff's case should be dismissed with costs.

5. The following are the issues for the determination by the court:

- a. Whether the late Charles Kome Othieno transferred land parcel central **Alego/Komolo/1229** to the 1<sup>st</sup> Defendant.
- b. If the answer to (a) above is in the affirmative, whether the transfer was a gift to the 1<sup>st</sup> Defendant or to hold in trust for the Plaintiff.
- c. Who the registered proprietor(s) of the said land or the subdivisions thereof are currently.
- d. Whether the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are innocent purchasers for value, and if so, for which parcel.
- e. What order to issue
- f. Who pays the costs.

6. That court has carefully considered the oral testimonies of the parties, their written statements, the documentary evidence availed, submissions by both counsel and come to the following determinations;

- a. That under the provision of **Section 107** of the Evidence Act, Chapter 80 of Laws of Kenya, the Plaintiff has the duty to prove her case against the Defendants on a balance of probabilities.
- b. The Plaintiff claim is that the transfer of the land parcel **East Alego/Komolo/1229** by her late father to the 1<sup>st</sup> Defendant was for him to hold the land in trust for her. That claim has been opposed by the 1<sup>st</sup> Defendant who pointed out that the suit land was given and transferred to him as a gift in 1981 by the Plaintiff's father. He further testified that the father of the Plaintiff directed him to transfer two portions out of the suit land to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants during his life time. That the father and mother of the Plaintiff died in 2000 and 2007 respectively without asking him to return the land to them.
- c. That even though the 1<sup>st</sup> Defendant did not deny that land parcel **Central Alego/Komolo/1229** was transferred to him by the Plaintiff's father, the late **Charles Kome Othieno**, the Plaintiff did not avail any documentary evidence to confirm that parcels **Central Alego/Komolo/2387, 2386 and 2139** are subdivisions from **Central Alego/Komolo/1229**. The Plaintiff did not also avail documentary evidence to confirm which of those subdivisions is or are registered in the name of each of the Defendants.
- d. That from the evidenced adduced by the 1<sup>st</sup> Defendant on how he subdivided two portions out of the suit land and transferred one each to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants on the instructions of late **Charles Kome Othieno**, the court finds and hold that even though the land had been registered in

the name of the 1<sup>st</sup> Defendant, the late **Charles Kome Othiemo** had retained control over the land. That the deceased's control is confirmed by the Plaintiff's testimony that the 1<sup>st</sup> Defendant did not use the land, even though he was the registered proprietor, until after the death of her mother in 2007. That confirmation gives credence to the 1<sup>st</sup> Defendant's testimony that his uncle transferred the land to his name to stop his brothers and other relatives from lodging any claim over the land. The 1<sup>st</sup> Defendant therefore held the land as a trustee and not as an absolute owner as he claims as the deceased retained control to even subdivide and sell portions thereof.

e. That even though the Plaintiffs parent's did not take any steps to ask the 1<sup>st</sup> Defendant to transfer the suit land to her upon attaining the age of majority, the 1<sup>st</sup> Defendant remained a trustee of the deceased over the portion of the suit land that was left in his name after the transfer of two portions to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. That the Plaintiff as the only child of the deceased is entitled to inherit that land.

f. That the evidence by the 1<sup>st</sup> Defendant that the transfer of portions of the suit land to 2<sup>nd</sup> and 3<sup>rd</sup> Defendant was done during the lifetime of the parents of the Plaintiff and that there was no objection during the transactions confirms the Defendants averments that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were innocent purchasers for value and without notice of any defect in the title. That in any case, the 1<sup>st</sup> Defendant has exhibited copies of the land Control board application for consent, letter of consent to transfer and transfer document all showing that the late **Charles Kome Othiemo** participated in the transaction. The Plaintiff's claim against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants must therefore fail.

g. That though this suit was filed on 2<sup>nd</sup> November 2009, which is about 28 years after the suit land was registered in the name of the 1<sup>st</sup> Defendant in 1981, the issue of being statute barred under **Section 7** of the Limitation of actions Act Chapter 22 of Laws of Kenya was cured by the court order of 24<sup>th</sup> November 2010 granting the Plaintiff's chamber summons dated 26<sup>th</sup> February 2019 for enlargement of time. That order has not been challenged to date.

h. That the Plaintiff and one George Walong Otieno had filed Siaya Land Disputes Tribunal case No.SYA/29/2008 against the 1<sup>st</sup> Defendant demanding the suit land. That though the tribunal did not have Jurisdiction to determine the issue of title to registered land under **Section 3(1)** of the Land Disputes Tribunal Act (repealed), it came to among others the finding that the claim was statute barred and dismissed it. The award did not alter or confer any legal rights over the suit land to any of the parties. That further, as the Tribunal was without jurisdiction its award was null and void.

7. That flowing from the foregoing, the court finds that the Plaintiff has proved her case on a balance of probabilities against the 1<sup>st</sup> Defendant that he holds the portion of land parcel **Central Alego/Komolo/1229** that is still in his name as trustee for the Plaintiff. That the court therefore orders as follows:

a. That the Plaintiff case against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants is dismissed with costs.

b. That the Plaintiff do avail a certified copy of the register and certificate of official search in respect of the portion of land parcel **Central Alego/Komolo/1229** that is still in the name of the 1<sup>st</sup> Defendant to the court in 30 days.

c. That the matter be fixed for mention for further directions.

It is so ordered for further orders.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

DATED AND DELIVERED THIS 15<sup>TH</sup> DAY OF JUNE 2017

In presence of;

Plaintiff                      Absent

Defendant                    1<sup>st</sup> present

Counsel                      Mr. Nyanga for the Defendant

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**15/6/2017**

15/6/2017

S.M Kibunja Judge

Oyugi Court assistant

1<sup>st</sup> Defendant present

Mr. Nyanga for Defendants

The counsel for the Plaintiff absent.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**15/6/2017**

Court: The judgment dated and delivered in open court in presence of the 1<sup>st</sup> Defendant and Mr. Nyanga for Defendants.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**15/6/2016**