



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC NO.113 OF 2012

MICHAEL NYAGWA OTULA.....PLAINTIFF

= VERSUS =

MAGDALINE ALUOCH DAUDI.....1ST DEFENDANT

JOANES AMIMO OTULA.....2ND DEFENDANT

MOSES SHIKUKU SULE.....3RD DEFENDANT

CHARLES OMBATI OMWENGA.....4TH DEFENDANT

FREDRICK OCHIEING WOKORI.....5TH DEFENDANT

JUDGEMENT

BACKGROUND

1. By a Complaint dated and filed herein on 20th June 2012 and Amended on 19th September 2012, the Plaintiff, Michael Nyagwa Otula accuses his elder brothers of breach of trust by sub-dividing their father's land and registering the same between themselves in a manner that left other brothers homeless. The Plaintiff particularly takes issue with the fact that his brothers-the husband to the 1st Defendant as well as the 2nd and 3rd Defendants failed to register their father's homestead in the name of his two younger brothers by the name Ezekiel Nyaori and Alfred Miyumo. It is his case that the registration of the land on which his father's homestead stood was done in breach of Luo Customary Laws which dictate that the beneficiaries thereof should be the youngest sons of the owner of the homestead. In addition he accuses his brother Joanes Amimo Otula, the 2nd Defendant of wrongfully sub-dividing part of the land on which the homestead stood and selling the same to the 4th and 5th Defendants.

2. Accordingly he prays for Judgment against the five(5) Defendants jointly and severally for:-

(a) General damages for breach of trust

(b) An order cancelling the registration of Kisumu/Kasule/530,531,532 and 533 and reverting the same to the name of their father Samuel Otula Dete.

(c) Costs of the Suit.

3. On their part, the 1st, 2nd, 3rd and 5th Defendants in their Statement of Defence dated 4th June 2015 have refuted virtually all the averments made by the Plaintiff. It is their case that at the time of adjudication, the parcels of land referred to by the Plaintiff were evenly and properly distributed to the houses of the four wives of their father, the late Samuel Otula. It is further their case that in accordance with Luo Customary Law that requires the last born to inherit the homestead when both parents are deceased, they had sub-divided the homestead into four parcels and the last born son of each of the four wives of the late Samuel Otula had been registered as a beneficiary of each of the four resulting parcels of land.

4. On his part, the 5th Defendant avers that contrary to the Plaintiff's allegations that land parcel No. Kisumu/Kasule/530 was sold to him by the 2nd Defendants, the said parcel had instead been sold to him by one Naftali Momanyi.

5. In his Statement of Defence filed separately on 26th July 2012, the 4th Defendants Charles Ombati Omwenga avers that sometime in the year 1990, the 2nd Defendants sold to him a portion of land parcel number Kisumu/Kasule/530 then registered in the name of the 2nd Defendant. The said portion was later registered as Kisumu/Kasule.2233 in the 4th Defendant's name. Similarly in 1991 the 2nd Defendant sold to the 4th Defendant another portion which he sub-divided and subsequently registered in his name as Kisumu/Kasule/3407 and 3408 respectively.

6. All the Defendants aver that the Plaintiffs claim raises no triable issue, is frivolous, vexatious and an abuse of the Court process. They therefore urge this Court to dismiss the suit with costs.

THE PLAINTIFF'S CASE

7. The Plaintiff, Michael Nyagwa Otula testified as PW1 in his case and did not call any other witness. He informed the Court that he is an Engineer by profession and works as a Roads Engineer with the Kenya Rural Roads Authority in Kakamega.

8. PW1 told the Court that his father Samuel Otula died in 1976 leaving behind four wives. These were:-

(i) *Madgaline Ochieng*

(ii) *Olick*

(iii) *Peris Songo(the Plaintiff's mother)*

(iv) *Maritha Aoko*

9. All the four wives have also since died. The old man left behind seven sons and seven daughters. PW1 told the Court that during the period land adjudication was done in their village around 1979, the young sons of Otula including himself were still in school. One day when they came from school, they found the home sub-divided with a fence made of cactus. According to the Plaintiff, the sub-division was done by his brothers Joanes Amimo (2nd defendant) and Daudi Sule (now deceased and husband to the 1st Defendant). PW1 then reported the matter to his elder brother the late Achola Otula and a meeting was held to deliberate on the issue. Thereafter the 1st Defendant's husband and the 2nd defendant were ordered to return the papers used to sub-divide the land. PW1 and the others then removed the cactus that had been used to sub-divide the homestead.

10. PW1 told the Court that his brothers had divided the home and created new parcels of land which they shared as follows:-

(a) *Kisumu/Kasule/530-Joanes Amimo (2nd Defendant)*

(b) Kisumu/Kasule/531- Ezekiel Nyaori (now deceased)

(c) Kisumu/Kasule/532-Daudi Sule (1st Defendant's husband)

(d) Kisumu/Kasule/533-Alfred Miyumo (Plaintiff's youngest brother).

11. It was the Plaintiff's case that his elder brothers resisted the changes that were agreed on by the family. In 1991, they discovered that the 2nd defendant had sold his portion No. 530 to Charles Omwenga, the 4th defendant herein. To stop any further sub-division, the Plaintiff proceeded in 1992 to place a caution on parcel No.s 530 and 532 which belonged to the 1st and 2nd defendants.

12. PW1 further told the Court that while the family had agreed that the homestead be left to the two last sons of the late Samuel Otula, the other brothers started sub-dividing the land and selling it to 3rd parties. In 2008, PW1 took the case to the Land Disputes Tribunal Kisumu. The Tribunal concurred with PW1 that the homestead be left to the two youngest sons of Otula and hence all title deeds already issued should have been rescinded and the parcel of land comprising the homestead reconsolidated into one. The decision was later adopted by the Kisumu Chief Magistrates Court as Land Case No. 64 of 2011. Thereafter, PW1 received a letter from the Provincial Appeals Tribunal indicating that his brothers had appealed. As PW1 was waiting for the Appeal, his brothers resumed using the land. PW1 then went to Court in Kisumu CMCC No. 64 of 2011 aforesaid and sought an injunction to restrain his brothers. To his surprise, his application for injunction was dismissed.

13. Accordingly PW1 now requests this Court to adopt the findings of the tribunal and return the land to the two last sons of Otula who according to him are in accordance with Luo Customary Law, the only ones allowed to inherit the land.

14. On cross-Examination, Pw1 admitted that his father had other parcels of land other than the homestead. He had himself been allocated Kisumu/Kasule/423 and he had no problem with his allocation. He also agreed that the two last born sons had been catered for but he stated he was in Court to stop his elder brothers from taking over land belonging to his younger brothers. The Plaintiff told the Court that one of the youngest sons of Otula by the name Ezekiel who should have inherited the land had died. It was his case that the children of Ezekiel had not joined this case because they are still young.

1st DEFENDANT'S CASE

15. In opposition to the Plaintiff's case, DW1 Magdaline Aluoch Daudi told the Court that she was the wife to the late Daudi Sule Otula who was the Plaintiff's eldest brother. She told the Court that she was married in 1967. During land adjudication, her husband was given land parcel No. Kisumu/Kasule/532. She re-called her brother-in-law Joanes Amimo (2nd defendant) was given parcel No. 530.

16. DW1 told the Court that Mzee Otula-her father-in-law is the one who sub-divided the land. Even though Mzee Otula died before adjudication, each of his four wives' portions were demarcated by trees. According to DW1, the plaintiff and his mother were around when the sub-division was done but they never objected thereto. The last born sons of Mzee Otula-Ezekiel Ouru and Alfred Miyumo were also alive but they did not object.

17. DW1 told the Court that the plaintiff who was then a student at Kisumu Boys High School was given his parcel of land outside the homestead. All the last borns of the four wives were given land.

18. On Cross-examination, DW1 denied that they are the ones who invited people to come and sub-divide the land. She testified that at the time, the Government was carrying out land adjudication all over and it was not just in Mzee Otula's land. She told the Court that since her marriage in 1967, she has seen many homes being sub-divided while people are residing therein. This was the case with their home which was sub-divided when all the four wives of Mzee Otula were living therein.

19. Recounting how the sub-division was done, DW1 stated that her husband Daudi Sule was the last born in the house of Mzee Otula's first wife. In the 2nd house, the 2nd defendant Joanes Amimo was allocated the land because his only younger brother died. Mzee Otula's 3rd wife was the Plaintiff's mother. The Plaintiff's younger brother Alfred Miyumo was given a parcel in the homestead. Similarly in the 4th wife's family, the last born son Ezekiel Ouru was given land within the homestead.

2nd DEFENDANT'S CASE

20. DW2, Joanes Amimo Otula told the Court that land adjudication in the area was done around 1976. By then, his father Mzee Samuel Otula had died. Their home was then sub-divided into four portions during the adjudication. The parcels were registered as follows

(a) No. 530- Joanes Otula(DW2)

(b) No. 531-Ezekiel Ouru Otula

(c) No. 532- Daudi Sule (1st Defendant's husband)

(d) No. 533- Alfred Otula(Plaintiff's last born brother)

21. According to DW2, this sub-division took care of all the four wives of their father. Daudi Sule was the last born in the 1st wife's house; DW2 the last born in the 2nd Wife's house and Ezekiel was the last in the 4th wife's house.

22. It was DW2's case that he rightfully sold half of his portion to Charles Ombati Omwenga (4th defendant) and Fredrick Ochieng Wokori (5th defendant). The other half he has given to his son Raphael Amimo who has since built his house thereon. According to DW2, it is their Mothers who sub-divided the land and not himself and the 1st Defendant's husband as claimed by the plaintiff.

23. During cross-examination, DW2 conceded that his father had two homes, one in Kokuoga and the other in Kanyaika-the disputed parcel of land. He further conceded that his mother did not have a house in the disputed parcel in Kanyaika. It was however his case that it was agreed that he would represent his mother in the parcel in Kanyaika and hence his allocation of parcel No. 530. He lived in the said parcel all along until the time he bought land elsewhere and moved.

3RD DEFENDANT'S CASE

24. Testifying as DW5, Moses Shikuku Sule told the Court that he is the son of Daudi Sule Otula, who was a son of Mzee Otula's 1st wife, Magdaline Ndege. DW5's father Daudi died on 5/1/1993. According to DW5, prior to his father's death, they used to live in land parcel No 532, where he has now built his home. DW5 however testified that he has not been able to use the land effectively since the plaintiff who is his uncle has lodged a caution thereon.

25. On cross examination, DW5 stated that his mother is the 1st defendant herein. It was his case that the land he lives on is still registered in his later father's name as he is not able to transfer the title due to the caution lodged therein. He told the Court that as a grandchild of Mzee Otula, he was allowed under Luo Customary Law to build a home in his grandfather's former home.

4th DEFENDANT'S CASE

26. Caren Kerubo Omwenga, the wife to the 4th defendant and a holder of a power of attorney from the 4th defendant testified as DW3. She told the Court that her husband purchased a portion of land Parcel No. 530 from the 2nd Defendant on 11/11/1990. The said parcel of land was then sub-divided into parcel

Nos. 2222 and 2223. The 4th Defendant took No. 2223. She produced in Court the Sale Agreement dated 11/11/1990.

27. DW3 further testified that the 2nd Defendant sold to them another portion after sub-dividing No. 2222 which he had remained with into Nos 2378 and 2379. The 4th Defendant purchased Parcel No. 2379 through a Sale Agreement dated 6/8/199. The 4th Defendant has a title deed for the parcels which he has also since sub-divided into four different portions, each with its own title.

28. On cross examination, DW3 told the Court that they did a search on the titles in 1990 before they purchased a portion of Parcel No 530. They have however had difficulty using the land for the past 25 years due to the cases filed by the plaintiff.

5TH DEFENDANT'S CASE

29. Fredrick Ochieng Wokori testified herein as DW4. It was his case that he bought land Parcel No. Kisumu/Kasule/2378 from Naftali Momanyi Makia. Naftali had bought the land from the 2nd Defendant. He produced a Sale Agreement dated 25/11/2008 as evidence of the purchase. He stated that he has since processed a title deed in his name a copy whereof he also produced in Court. It is his case that he used the right procedure in purchasing land. He prayed that the case against him be dismissed.

ANALYSIS OF THE EVIDENCE

30. I have considered the Plaintiff's case and evidence tendered in support. I have also similarly considered the Defence Case and the evidence tendered by the various defendants sued herein. It is the Plaintiff's case that his elder brother Daudi Sule (now deceased and husband of 1st Defendant) and Joanes Amimo (2nd Defendant) breached the trust placed on them and sub-divided their land in a manner that failed to take into account the rightful entitlement of the two last born sons of Mzee Samuel Otule, Alfred Miyumo Otula and Ezekiel Ouru Otula in accordance with the Luo Customary Law.

31. Further and in addition to the foregoing, the plaintiff avers that as a result of the said breach, the homestead of the Plaintiff's now deceased father was sub-divided into land Parcel nos. Kisumu/Kasule.530, 531,532 and 533. The Plaintiff is aggrieved by the sub-division and now seeks an order cancelling the registration of the sub-divisions and to have the land revert into the name of his father the late Samuel Otula Dete.

32. Prior to filing this Suit, the plaintiff had filed a claim before the Kisumu East District Land Dispute Tribunal. In their determination issued on 24th June 2011, the Tribunal made a number of recommendations including one to the effect that the land parcel No.s 530 to 533 which were sub-divided be combined in one parcel as per the Claimant's Prayer to restore the same to the name of the original owner of the homestead. Perhaps aware of the impact of the recommendations they were making, and in a clear appreciation of their jurisdiction over the decision to have land titles cancelled and/or rescinded as they put it the Tribunal observed at the penultimate paragraph of their decision as follows:-

“Going by our jurisdiction as Tribunal elders, we hereby recommend to the High Court to deal with the case to expedite the needful.”

33. In my mind, the elders Tribunal was being very wise in making this recommendation for it is trite that the tribunals established under Section 3 of the (now repealed) Land Disputes Tribunal Act were prohibited from undertaking a determination with respect to title to land. Thus having failed to enforce the tribunal's recommendations, the Plaintiff moved to this Court and filed the present suit.

34. It is the Plaintiff's testimony during these proceedings that while he was still young and in school his brothers Daudi Sule and Joanes Amimo (2nd Defendant) proceeded to sub-divide their homestead into the aforesaid parcels of land and thereafter took two portions for themselves contrary to the established

procedure under Luo Customary Law which, according to the plaintiff, required that the land be left to their father's two last born sons Ezekiel Ouru Otula and Alfred Miyumo Otula.

35. It is telling that while both sides of the dispute referred to a large extent to the norms and procedures of inheriting a homestead under Luo Customary Law, no attempt was made to call an elder or expert in the said custom to provide an opinion which the Court could consider while arriving at its decision. As it were each side had their own version of what was the right procedure to be followed.

36. Be that as it may, it was the Plaintiff's case that the procedure required that the land be left to the last born sons of the owner of the homestead. The Defendants however contended that the sub-division was done fairly and in accordance with the agreement of the entire family.

37. In this regard, I must say that I found the evidence of the 1st Defendant quite compelling. Magdaline Aluoch Daudi testifying as DW1, told the Court that she was the wife to the late Daudi Sule who was an elder brother to the plaintiff. Her husband died in 1993 and she was sued herein in the husband's stead. DW1 told the Court that she was married to the late Daudi Sule in 1967. She recalled that during the land adjudication, her husband was given land parcel No. 532 while her brother-in law Joanes Amimo-the 2nd Defendant was given Parcel No. 530. She told the Court that the Plaintiff who was then a student was also given a separate parcel of land outside the homestead in which they lived.

38. DW1 told the Court it was her father-in law who had determined where everyone got a piece of land. According to her, even though Mzee Otula died before adjudication of the land, he had ensured that each of the four of his wives portions were demarcated by some trees. When the sub-division was being done, each of the last born sons of all Mzee Otula's four wives was given a portion of the homestead. In the end, each of the houses were represented as follows:-

1st Wife- Daudi Sule (her husband)

2nd Wife- Joanness Amimo

3rd Wife- Alfred Miyumo

4th Wife- Ezekiel Ouru

39. DW1 explained that even though the 2nd Defendant was not a last born strictly speaking, the 2nd Defendant's younger brother had died in his childhood and the family therefore agreed that the 2nd Defendant would represent the Mother's household as he was then by default also the last born.

40. DW1 further denied that the 2nd Defendant and her husband were responsible for instigating the process of submission. It was her case that during the time, the Government was generally carrying out land adjudication in the area and it was therefore not an exercise that was limited to Mzee Otula's home.

41. I am inclined to believe DW1's testimony that this exercise was not instigated by the 2nd Defendant and/or her late husband. This is because the Plaintiff was not able to tell this Court what was the Original Parcel Number of land that was in their father's name.

42. From the totality of evidence placed before me I was unable to discern any wrong-doing and/or breach of trust committed against the Plaintiff and/or his younger brothers Alfred Miyumu and Ezekiel Ouru by the Defendants herein. Indeed it is telling that while Alfred Miyumo who is the last born son in the Plaintiff's mother's house is alive and well, he did not come to Court to support the case which brother prosecuted purportedly for his (Alfred's) benefit. Similarly, the Ezekiel Ouru, the other brother on whose behalf the case was brought has a family. When asked why they did not join the case, the Plaintiff stated that Ezekiel's children were still young. There was no explanation whatsoever why the wife was neither called as a witness nor enjoined in the proceedings. This is more so considering the fact

that the Plaintiff made a choice to join the 1st Defendant herein who is his brother Daudi Sule's widow and also sued the 3rd Defendant who is the said Daudi Sule's son.

43. As the Plaintiff Admitted during cross-examination, the only reason he sued the 4th and 5th Defendants was the fact that they purchased the land that was in dispute. From the testimony of Caren Kerubu Omwenga (the 4th Defendant's wife) and Fredrick Ochieng Wokori, it was clear that the two were bonafide purchasers for value without notice of any family dispute that the Plaintiff's family was going through. It is indeed unfortunate that for more than 20 years, the two have been dragged into a dispute which they did not know and could have done nothing about. When the 2nd Defendant sold a portion of the parcel of land in question they conducted a search and established the ownership of the land before they proceeded to purchase the same. At the said time, in 1990 neither the Plaintiff nor his young brothers had registered a caution on the parcel registered in the 2nd Defendant's name.

44. Accordingly, I find and hold that the Plaintiff has failed to prove his case on a balance of probability. The same is dismissed with costs to the Defendants.

Dated, signed and delivered at Kisumu this 24th day of October 2017.

J.O. OLOLA

JUDGE