



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC CASE NO.830 of 2015**

**[FORMERLY KISUMU HCC NO.2 OF 1999]**

**FRANCIS ODHIAMBO OTURU (suing as the**

**Administrator of the estate of the late**

**SAMUEL OTURU ADUONGA (deceased).....PLAINTIFF**

**VERSUS**

**JACKTON OKULA ADUOGO.....DEFENDANT**

**JUDGMENT**

1. **Francis Odhiambo Oturu**, the Plaintiff, vide the plaint first filed on the 5<sup>th</sup> October 1999 and amended on 31<sup>st</sup> January 2014, seeks for the following against **Jacton Okula Aduonga**, the Defendant;

- a) Order nullifying the subdivision of parcel number **Kisumu/Bar/1762** and cancellation of the resultant titles being **Kisumu/Bar/2138 and 2139**.
- b) Permanent injunction restraining the defendant together with his family and/or servants from **Kisumu/Bar/1762**, now known as **Kisumu/Bar/2138 and 2139**.
- c) Eviction of the Defendant from the suit parcels.
- d) General damages.
- e) Costs.
- f) Any other relief.

The Plaintiff avers that when this suit was pending, the Defendant filed Kisumu District Land Disputes Tribunal case No. **WIN/LDT/7/98**, claiming a portion of the suit land, **Kisumu/Bar/1762**. That the Tribunal awarded the Defendant a portion of the suit land after which he caused the award to be adopted as a judgment of the court in Winam RM Misc. Appl. No.2 of 2001. That thereafter the Defendant caused the land to be subdivided into **Kisumu/Bar/2138 and 2139** and caused the latter to be registered in his name. That the Tribunal lacked the jurisdiction to issue the award resulting in the subdivision of the suit land and transfer of the portion thereof to the Defendant.

2. The claim is opposed by the defendant through the Amended statement of defence and counterclaim

dated 4<sup>th</sup> February 2014 and amended on the 14<sup>th</sup> October 2014. The Defendant avers that this court has no original jurisdiction to hear and determine this claim as the decision of Winam Land Disputes Tribunal in case No.7 of 1998, and adopted in Winam R.M. Misc. Appl. No.2 of 2001 was never challenged or appealed against. That the land parcel “**East Kisumu/Bar/1762 was registered in the joint names of Samuel O. Aduoga and Francis Odhiambo Oturo who held it in trust for the Defendant.**” That the two registered proprietors were closely related to the Defendant and as the land was ancestral land, the Defendant was entitled to a portion thereof. That the Defendant has been living on that portion of the suit land now registered in his name and has therefore acquired proprietorship through “**prescription as well as adverse possession.**” The Defendant claims against the Plaintiff for the following orders;

a) A declaration that the Plaintiff and the late Samuel Oturo Aduogo were registered as proprietors of **East Kisumu/Bar/1762** in trust for the Defendant.

b) A mandatory injunction compelling the “Plaintiff, by himself, his agents, servants, employees and or persons claiming under his authority to formally execute all relevant documents, forms, and or deeds transferring all that parcel of land known as East Kisumu/Bar/1762 in favour of and in the name of the Defendant, Jackton Olula Aduogo and in default an order that the Deputy Registrar of the court executes/signs the documents, forms and or deeds accordingly.

c) Costs.

d) Interests on (c) at Court rates.

3. The Defendant’s claim in the counterclaim is opposed by the Plaintiff vide the reply to the Defence and Defence to the counterclaim dated 6<sup>th</sup> November 2014. The Plaintiff avers that the decision of the **Tribunal in case No.7 of 1998** was void and a nullity and there was nothing to adopt and execute through **R.M. MISC. APP. No.2 of 2001**. That the particulars of trust and adverse possession in favour of the Defendant are denied. That the Defendant occupation of the suit land is as a licensee due to blood relationship and that the Defendant’s ancestral lands are Kisumu/Bar 979(1/4 share), Kisumu/Bar/1058 and 1062. The Plaintiff prays that the Defendant’s counterclaim be dismissed with costs.

4. The Plaintiff testified as PW1 and called John Okello Kwaka who testified as PW1. The Defendant testified as DW1. The case for the Plaintiff and Defendant is as summarized hereinbelow;

#### **A: PLAINTIFF’S CASE**

a) That the Plaintiff and his late father were the joint registered proprietors of land parcel Kisumu/Bar/1762, each owning half share, on first registration on 11<sup>th</sup> November 1981. The Plaintiff produced a copy of the Land Certificate issued on 16<sup>th</sup> October 1982 as exhibit.

b) That after his late father, Samuel Oturo Aduogo, died on 26<sup>th</sup> November 2010, he applied for and obtained a grant Ad litem. The Plaintiff thereafter applied to be substituted as the Plaintiff in this suit in place of his late father.

c) That the suit land is a consolidation of several parcels that his late father had bought and nobody had raised any objection during adjudication.

d) That the Defendant had been residing on a portion of the said land even before its registration. That he had nevertheless been asked to vacate from the land but had declined.

e) That on 10<sup>th</sup> April 1997 the Defendant was reported to the police for digging trenches on the land. He was consequently arrested, charged, convicted and fined ksh.10,000/= in default one year imprisonment in Maseno Magistrate’s Court Criminal case No.750 of 1997.

f) That while the criminal case was pending in court, the Defendant lodged a claim over the land in

Winam Land Disputes Tribunal case. That as the Plaintiff's late father had already filed this case on 5<sup>th</sup> January 1999, they asked the Tribunal to stay the case before it but the Tribunal **declined**.

g) That the Tribunal awarded the Defendant a portion of the land. That the Defendant then subdivided the land into parcels Kisumu/Bar/2138 and 2139 and registered the latter with his name.

h) That the Defendant own parcels Kisumu/Bar /1058 and 1052 as confirmed by the certificate of official searches he exhibited in court. That the claim that the suit land was given to the Defendant by virtue of his being the last born is not true.

i) That the exercise of consolidating the parcels bought by his late father and registering them into Kisumu/Bar/1762 was done by the Defendant and his father, (Plaintiff's grandfather), in the absence of the Plaintiff's late father who was then in Uganda. That it was during the same land consolidation and adjudication that the Defendant was registered with his two parcels Kisumu/Bar/1058 and 1062.

j) That the homestead of his grandfather, Zablong, who is the father to the Defendant and the Plaintiff's late father, was on land parcel Kisumu/Bar/1062 and not 1762. That parcel Kisumu/Bar/979 is registered in the name of Zablong, Martin, Defendant and the Plaintiff's late father though currently used by the Defendant only.

k) The Plaintiff produced a copy of the adjudication register for parcel Kisumu/Bar/1762 of 7<sup>th</sup> January 1971 indicating that it was in his late father's name and his only.

l) The Plaintiff was cross examined and he testified that though he agreed that the last born should inherit the land where their late father's homestead (Gunda) were situated, the Defendant's late father's homestead was not on the suit land.

m) The Plaintiff indicated that he was not aware that the Defendant had successfully appealed against the Criminal case conviction.

#### **B: DEFENDANT'S CASE:**

i) That before the death of his father, in 1973 he had subdivided his land between the father of the Plaintiff, Martin Akoth and himself in 1962 by having elders plant boundary marks. That the Plaintiff and his later father were in Uganda during the land adjudication. That when the Defendant later went to the land's office, he found the suit land, which is parcel **1762**, had been registered in the name of the Plaintiff and his late father. The Defendant testified that the Plaintiff's late father was meant to get the lower portion of the land while the upper part had been meant for him.

ii) That the Plaintiff's father lodged a claim against the Defendant before the elders claiming the land he, (Defendant), was living on. That the elders dismissed the Plaintiff's father's claim holding that the Defendant as the last born should remain on the upper part of the land. The matter was taken before the Assistant chief and the chief who declined to grant the Plaintiff father's prayer.

iii) That the Defendant took the matter to the Land District Tribunal who summoned the Plaintiff's father who ignored the first two summons. That when he appeared on the third summons, he asked the Tribunal to stay their proceedings claiming that he had filed another claim at Maseno Law courts. That the Maseno court trespass case was heard and he was defeated. That he appealed before the High Court Kisumu and was successful. That thereafter the Tribunal case was heard with the Plaintiff and his late father participating. That the tribunal awarded him 1 ½ acre of the land as the last born of his late father. That the award was adopted in Winam Magistrate's court Misc. App. No.2 of 2001. That he then had the land parcel 1762 subdivided into parcels 2138 and 2139. The latter parcel was registered in his name while the former was registered with the Plaintiff.

iv) That the Defendant has been in occupation of the suit land since 1969 when it was adjudicated and registered as parcel 1762 and allocated to him by Zablong Aduogo.

v) The Defendant was cross examined by the counsel for the Plaintiff and he conceded that as Zablong had inherited Agnes who is his mother after the death of her husband Apiyo Ndisi, he (Defendant) belongs to the lineage of Apiyo Ndisi and not Zablong. That Apiyo Ndisi was buried on the land above that of Okondo, which is different from parcel 1762. The Defendant confirmed that the Plaintiff's father had bought several parcels of land in that area before the land adjudication, but disputed that those parcels were amalgamated and registered as parcel 1762. The Defendant denied that Apiyo Ndisi's homestead, (Gunda), was on parcel 1062 which was one of the parcels given to him by Zablong.

5. On completion of the evidence hearing on the 13<sup>th</sup> March 2017, Mr. Odeny and Onsongo, learned counsel for the Plaintiff and Defendant respectively, agreed to file and exchange written submissions within 21 days each. The first to file was counsel for the Plaintiff who filed theirs dated 1<sup>st</sup> April 2017 on the 3<sup>rd</sup> April 2017. The Defendant's counsel followed with theirs dated 12<sup>th</sup> April 2017 and filed on the 18<sup>th</sup> April 2017.

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

- a) Whether the registration of the Plaintiff and his late father as proprietors of land parcel Kisumu/Bar/1762 was as absolute owners or trustees.
- b) Whether from the evidence availed by the Defendant, a constructive trust can be inferred over the said land in his favour.
- c) Whether the occupation of the suit land by the Defendant was as a licensee or an adverse possessor and from when.
- d) Whether the issues of the Defendant's entitlement to the suit land has been decided with finality as between the parties herein by a court of competent jurisdiction.
- e) Which of the prayers sought in the Plaintiff's amended plaint and Defendant's counterclaim, if any, should be granted.
- f) Who pays the costs of the suit and or counterclaim.

7. The court has carefully considered the pleadings by both parties, evidence both oral and documentary, submissions by counsel and come to the following conclusions;

a) That from the evidence tendered by the Plaintiff and confirmed by the Defendant, land parcel **East Kisumu/Bar/1762**, the suit land, was after the land consolidation and adjudication process registered in the names of **Samuel Oturo Aduogo and Francis Odhiambo Oturo** on the 11<sup>th</sup> November 1981.

Their registration was a first registration which under the legal regime of the time did not allow to be challenged. [See **Section 143 of The Registered Land Act Chapter 300 of Laws of Kenya (Repealed)**, and related superior courts pronouncements in the case of **Mugogo –V- Sihowa** [1998] eKLR, **Ambale –V- Masolia** [1976] eKLR, **Joseph Gathiba –V- Charles Kingori Gathiba** [2001] eKLR.]

b) That there is no evidence of fraud, misrepresentation or mistake adduced in the process leading to the registration of the suit land in the names of the Plaintiff and his late father. The court was told that by the time the land adjudication and registration took place, the Plaintiff and his late father were in Uganda and that the exercise was carried out by the Defendant and his late father.

The copy of the adjudication book and record for Bar Adjudication Section produced by the Plaintiff clearly shows that **Kisumu/Bar/1762** belonged to **Samuel Oturo Aduogo and Francis Odhiambo Oturu** in equal shares. The adjudication record at paragraphs 9 and 10 are thump stamped and signed by **Alice Oturo wife of Oturo and Gordon Ogundo**. The contents of the two documents and their veracity has not been controverted or challenged except the belated attempt by the Defendant who claimed that the land was to be registered in his name and those of his two brothers. The Defendant did not however avail any documentary evidence or other oral evidence to corroborate his claim. The court also notes that there is no evidence of the Defendant or any other person having challenged the said registration in accordance with **Section 26 and 29 of the land Adjudication Act Chapter 284 of Laws of Kenya**. That it is therefore too late for the Defendant to mount a challenge on the outcome of the process that culminated in the suit land being registered as it was.

c) That though a first registration with land could not be challenged under **Section 143 of the Registered Land Act**, there has been instances where superior courts have declared trust over first registration lands as an overriding interest in accordance with **Section 51 of the Evidence Act Chapter 80 of Laws of Kenya and Section 30 (g) of the Registered Land Act**. [See the Gathiba case above]. That for trusts to be declared where not specifically noted in the register, the one claiming that it exists must avail evidence to prove its existence. The Defendant in this suit has pleaded in his defence and counterclaim that the Plaintiff and his late father were registered with the land as trustees for himself.

That further, when the Defendant testified he stated that the land was ancestral in origin and their father had shown him and his two brothers their respective portions before adjudication. That claim was disputed by the Plaintiff in his reply and defence to the counterclaim and in his testimony. The court has after considering the evidence presented by both sides found that as the Plaintiff and his late father were in Uganda when the land was adjudicated and registered in their names by among others the Defendant and his later father; and the fact that their entitlement at 50% each was noted in the register, their registration was as absolute and indefeasible owners of the land and not as trustees of the Defendant or anybody else. That had there been an intention to have the land shared with the Defendant and others, it would have been so registered as was the case with Land parcel Kisumu/Bar/979 and 743.

d) That as already pointed out above, the suit land was first registered in 1981. The testimony by the Defendant indicates that he did not know that the land had been registered with the Plaintiff and his late father until after visiting the Land Registrar's office. That though the Defendant did not disclose the date or year that he made that discovery, the court will take it to have been in 1997 when the disputes over the suit land started being heard before the elders, local administration and the courts. The Defendant could not therefore had been in adverse possession of the land that he believed was rightfully his until 1997 when he realized otherwise. That from the time the disputes over the land commenced, that is 1997, which is also the time the Defendant got to know that the land was registered with the Plaintiff and his late father, to the time this suit was filed in 1999, a period of more than 12 years had not passed for a claim based on prescription under **Section 17 of Limitation of Auctions Act Chapter 22 of Laws of Kenya** to set in. The defence of adverse possession is not therefore available to the Defendant. The Defendant's claim over the land in his counterclaim on the basis of adverse possession also crumbles. The court accepts the Plaintiff's claim that the Defendant has been living on the land with permission as a blood relative until 1997 when he was asked to vacate and he declined. That marked the start of the various disputes in several forums, including this case.

e) That the decision of Kisumu District Land Tribunal Disputes case No.7 of 1998 awarded the Defendant the portion of land parcel **East Kisumu/Bar 1762** as marked in the attached sketch. The award was also to the effect that the Tribunal would go and plant the boundary of the portion after it (award) was read over to the parties by the court. The Tribunal made two further orders that the land control board issue consent letter for subdivision and transfer to the Defendant and that the court do sign the documents necessary for the land control board consents and transfer. The

Plaintiff's case is that the award was in excess of the tribunal's jurisdiction while the Defendant position is that the Tribunal had jurisdiction, and that its award and the adoption proceedings thereof have not been contested. That therefore the matter having been decided by the Tribunal, and this court not having been moved through an appeal, has no jurisdiction to hear and determine this suit. The court has considered the submission of both counsel on the matter, the documentary and oral evidence availed and provision of **Section 3(1) of the Land Disputes Tribunal Act Chapter 303A of Laws Of Kenya** (Repealed) and found as follows:-

- That the Tribunal powers did not include questions of title to registered land. The suit land had been registered on 11<sup>th</sup> November 1981.
- That the award of the Tribunal had the effect of taking the title of a portion of registered land from the Plaintiff and his late father, and transferring it to the Defendant, which was outside the Tribunal powers.
- That the power of the Tribunal was limited to dispute of a civil nature in the division of, or the determination of boundaries to land including land held in common, a claim to occupy or work land; or trespass to land. That the award of the Tribunal was ultra vires its powers as it involved taking away and conferring title to registered land.

f) That had the Tribunal decision had been within their jurisdiction, and it was not successfully challenged through review, setting aside or appeal, the matter would have been res judicata and in accordance with **Section 7 of the Civil Procedure Act Chapter 21 of Laws of Kenya**, this court would have been without jurisdiction to deal with the matter in its original suit. That the court would have downed its tools as was well captured in the court of Appeal case **Mr Lilian "S" -V- Caltex Oil Kenya Limited** [1989] KLR at page 14.

g) That as shown above the decision adopted in Winam R.M. Court Misc. Appl. Case No.2 of 2001 was made by the Tribunal outside its powers. That the decision was therefore null and void and by the time it was made, this suit was already pending in court having been filed under receipt No.K 449177 of 5<sup>th</sup> January 1999. The proceedings of the Tribunal at paragraph 1 and 2 of Page 1 clearly shows that the tribunal was alerted that the High Court was seized of the dispute but surprisingly it proceeded with the matter before them notwithstanding.

h) That Samuel Oturo Aduogo, the father to the Plaintiff, died on 26<sup>th</sup> November 2010 as confirmed by the certificate of death No.046302 dated 16<sup>th</sup> September 2011. That the Plaintiff then filed Kisumu H.C. Probate and Administration cause No.441 of 2013 and obtained Limited Grant of Letters of Administration Ad Litem dated July 2013. The grant is limited for 90 days for the purpose of filing suit. The Defendant submits that the Grant did not allow the Plaintiff to litigate in this case as it was limited to filing suit only. The court has noted that the Plaintiff moved this court through the application dated 7<sup>th</sup> August 2013 which was filed within the 90 days, to be substituted for the Plaintiff who was his late father. That the application was granted on the 28<sup>th</sup> October 2013. The court finds that after the Plaintiff was substituted for his late father, he effectively became the Plaintiff in the suit with all the rights and responsibilities of a litigant in a suit.

i) That for whatever it is worth, the Kisumu Land Disputes Tribunal case No.7 of 1998, adopted in Winam Resident Magistrates court Misc. App. No.2 of 2001 and all the consequential orders are a nullity and void for being ultra vires the jurisdiction of the Tribunal. That any interest on the suit land based on the said award though otherwise regular, is unlawful and unsustainable. [See Republic -V- Judicial Commission of Inquiry into the **Goldenberg Affair & 3 Others Exparte Mwalulu & 3 Others** [2004] eKLR and **Stephen Kibowen -v- The Chief Magistrates Court Nakuru & 2 Others** C.A.C.A No.211 of 2013].

8. That flowing from the findings above the court hereby makes the following orders;

a) That the Plaintiff has proved his case against the Defendant to the standard required of a balance

of probabilities. That consequently, judgment is hereby entered against the Defendant and in favour of the Plaintiff in terms of prayers (a) to (c) and (e) of the Amended plaint. The Defendant is hereby directed to give the Plaintiff vacant possession of the suit land in 90 (Ninety) days and in default eviction order to issue.

b) That the Defendant has failed to prove his case against the Plaintiff in the counterclaim and the same is dismissed with costs.

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

DATED AND DELIVERED THIS 22<sup>ND</sup> DAY OF NOVEMBER 2017

In presence of;

Plaintiff	Present
Defendant	Present
Counsel	M/S Oketch for Odeny for Plaintiff Mr. Osongo for Defendant

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**22/11/2017**

22/11/2017

S.M. Kibunja Judge

Oyugi court assistant

Parties present

M/S Okech for Odeny for Plaintiff

Mr. Onsongo for Defendant

Court: The judgment dated and delivered in open court in presence of both parties and M/S Oketch for Odeny for Plaintiff and Mr. Onsongo for Defendant.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**22/11/2017**