



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**CIVIL CASE (O.S.) No.97 OF 2013**

**IN THE MATTER OF LAND PARCEL NO.KISUMU/WATHOREGO/774**

**AND**

**IN THE MATTER OF AFFECTING THE RIGHTS OF THE HEIRS TO THE**

**ESTATE OF JACTON ALANDO ALANDO**

**AND**

**IN THE MATTER OF ASCERTAINING THE HEIRS OF JACTON ALANDO ALANDO**

**IN THE MATTER OF ORDER 37 RULE 1 OF THE CIVIL PROCEDURE RULES**

**BETWEEN**

**MARYAM OBONDO OTIENO.....1<sup>ST</sup> PLAINTIFF**

**PAMELA AIENO OPONDO.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**JAEL OSIRO OPONDO.....DEFENDANT**

**JUDGMENT**

1. **Maryam Obondo Otieno** and **Pamela Otieno Opondo**, hereinafter referred to as 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff, filed the originating summons dated 2<sup>nd</sup> March 2013 against **Joel Osiro Opondo**, the Defendant, for the following orders;

“ 1. A declaration that the registration of **Jacton Alando Alando** and **Francis Edward Opondo** as joint proprietors of L.R. No. Kisumu/Wathorego/774 created a trust for themselves and their brothers **Maurice Obondo Otieno**.

2. That the heirs of the above named **Jacton Alando Alando**, **Francis Edward Opondo** and **Maurice Obondo Otieno** are entitled to claim a share of L.R. No.Kisumu/Wathongo/774.

3. A declaration that the registration of the Defendant as the proprietor of L.R.

**No.Kisumu/Wathorego/774 was based on an illegality, therefore void and an order for cancellation of the said registration to issue.**

**4. The District Land Registrar to rectify the register to reflect the cancellation and reinstatement of the names of the deceased Jacton Alando Alando and Francis Edward Opondo or Jacton Alando only.**

**5. The Defendant to bear the costs of this suit.”**

2. The Defendant was served with the originating summons on the 7<sup>th</sup> October 2013 as confirmed in the affidavit of service of **James Odhiambo Obondi** sworn on 15<sup>th</sup> July 2014 and has not filed any replying papers. The court gave directions on 23<sup>rd</sup> May 2016 that the written submissions be filed. The Plaintiffs' counsel filed their written submissions dated 5<sup>th</sup> July 2016 whose contents are as summarized hereinbelow;

a. That the suit land was the family **land of Johana Otieno Ojango** who died before land adjudication. That the said **Johana Otieno Ojango** was survived by three sons namely **Francis Opondo Otieno** who was the husband to 2<sup>nd</sup> Plaintiff and Defendant, **Maurice Obondo Otieno**, husband to 1<sup>st</sup> Plaintiff and **Jacton Alando Alando** who was unmarried.

b. That during land adjudication, **Maurice Obondo Otieno** was away in Mandera where he was a Civil Servant and it was agreed that the land be registered in the names of his two brothers as trustees for him.

c. That after the death of the three brothers, the 1<sup>st</sup> Plaintiff approached the Defendant as the 1<sup>st</sup> widow of the eldest brother in law to commence the process of taking out the grant of letters of administration for the estate of **Jacton Alando Alando** and discovered that the Defendant had already transferred the land to her names without complying with the Law of Succession Act chapter 160 of Laws of Kenya.

d. That the registration of the Land in the Defendant's name did not meet the requirements of **Section 37 of the Land Registration Act No.3 of 2012**. That the Defendant hold title to the land as trustee for the Plaintiffs in terms of **Section 28 of the Land Registration Act** as held in the case of **Jason Gitimu Wangara –V- Martin Munene Wangara & 13 others**, Kerugoya ELC NO.278 of 2013.

e. That the registration of the Defendant with the suit land did not confer good title to her.

f. That the registration of the Defendant with the land occurred on 24<sup>th</sup> October 2012 but was backdated to 12<sup>th</sup> June 2000 in the register by which date **Jacton Alando Alando** was alive. That the Defendant had intended to show that the said Jacton Alando Alando had transferred the land to her but that was not true as in a case filed by Defendant against one **Robert Otieno Agenyo** being Kisumu **ELC No.52 of 2013** for trespass, the Defendant had averred in her pleadings, which is attached to the supporting affidavit herein, that she was a widow to one of the registered proprietors. That if the Defendant had been registered as the proprietor of the suit land on 12<sup>th</sup> June 2000, then the certificate of official search she obtained in 2012 and her pleadings in Kisumu **ELC No.52 of 2013** should have reflected that.

g. That the attached certificate of official search of 16<sup>th</sup> July 2012 shows the land was registered in the names of **Francis Opondo Otieno and Jacton Alando Alando** and therefore the transfer of the suit land to the Defendant's names must have occurred long after their death.

h. That the title in the names of Defendant should be cancelled so that the land can revert back to the names of **Francis Opondo Otieno and Jacton Alando Alando** to enable the parties move the

court in accordance with the Law of succession Act.

3. The issues for determination are as follows:

- a. Whether the suit land was ancestral land of the family of **Johana Otieno Ojango**, deceased.
- b. Whether the said Johana Otieno Ojango was survived by **Francis Opondo Otieno, Maurice Opondo Otieno and Jacton Alando Alando**.
- c. Whether Francis Opondo Otieno and Jacton Alando Alando were registered with the suit land after adjudication as trustees for Maurice Obondo Otieno.
- d. Whether the Defendant obtained registration of the suit land before or after the death of **Francis Opondo Otieno and Jacton Alando Alando**. That if the registration was after their death whether her registration was in accordance with the provisions of the Law of Succession Act.
- e. Whether the orders/prayers sought should be granted.
- f. Who pays the costs.

4. The court has considered the ground on the originating summons, evidence in form of supporting affidavits and the annexures thereto, written submissions by counsel and come to the following conclusion:

- a. That indeed the Land parcel **Kisumu/Wathorego/774**, that was registered in the names of **Francis Opondo Otieno and Jacton Alando Alando** after adjudication, was previously the ancestral land of the family of the late **Johana Otieno Ojango**. That the late Johana Otieno Ojango had died before land adjudication and had been survived by three sons **namely Francis Opondo Otieno, Maurice Opondo Otieno and Jacton Alando Alando**, who are all now deceased.
- b. That the late Maurice Obondo Otieno was not included in the title to the suit land as he was away in Mandera where he worked as a Civil Servant. That the registration of the suit land in the names of **Francis Opondo Otieno and Jacton Alando Alando** was as trustee of themselves and their middle brother **Maurice Obondo Otieno** even though not so indicated in the register in accordance with **Section 28** of the Land Registration Act which provides that the registration with a title to land is subject to certain overriding interests which includes customary trusts. That position is clearly restated by Hon. Olao J, in **Jason Gitimu Wangara –V- Martin Munene Wangari & 13 others in Kerogoya ELC No.278 of 2013**.
- c. That the three brothers have since died on the dates shown against their names hereinbelow from the details gathered from the copies of their certificates of deaths herein attached:
  - Francis Opondo Otieno - 28<sup>th</sup>.7.1996.
  - - Maurice Obondo Otieno - 24.10.2004
  - Jacton Alando Alando - 29.3.2002

That the Defendant and 2<sup>nd</sup> Plaintiff are the 1<sup>st</sup> and 2<sup>nd</sup> widows to Francis Opondo Otieno while the 1<sup>st</sup> Plaintiff is the widow to Maurice Obondo Otieno while Jacton Alando Alando was single by the time they died.

d. That as confirmed in the certificate of official search dated 16<sup>th</sup> July 2012 that was used by the Defendant as part of her documents in Kisumu **ELC NO.52 of 2012**, the land was by then still registered

in the names of **Francis Opondo Otieno and Jacton Alando Otieno** who had got so registered on 29<sup>th</sup> November 1994. That the subsequent transfer of the title to the Defendant's name said to have been done on 12<sup>th</sup> June 2000 and title issued and again reissued on 15<sup>th</sup> June 2012 as reflected on the copy of the register issued on 24<sup>th</sup> October 2012 that indicates that the card was reconstructed on 15<sup>th</sup> August 2012 cannot be a reflection of transactions done in accordance with the Law of Succession Act. The entries are therefore unprocedural, irregular and therefore null and void.

That the Defendant was given notice that the title she hold over the suit land is under challenge when she was served with the suit papers and chose not to come to court and defend it. That the Defendant, as the current registered proprietor had a duty to come to court and defend her registration with the title if she believed and knew it was procedurally obtained.[See the case of **Munyu Maina –V- Hiram Gathina Maina** [2013] eKRL where the court held:

**“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 interests which would be noted in the register.”**

That in the absence of any such defence of the title by the Defendant, the Plaintiffs evidence that she got so registered through fraud, and without adherence to the Law of Succession Act provisions remains unchallenged.

g. That the Plaintiffs have established their case against the Defendant on all the issues raised on a balance of probabilities. That however, the Plaintiffs have not established that they had before filing this suit served the Defendant with a demand notice and will therefore meet their costs.

5. That having found as above, the court issues the following orders;

a. That the registration of **Francis Edward Opondo Otieno alias Francis Obondo Otieno and Jeckton Alando Otieno alias Jacton Alando Alando**, both now deceased, as joint proprietors of parcel **Kisumu/Wathorego/774** was in trust for themselves and their middle brother **Maurice Obondo Otieno**, also deceased.

b. That the registration of **Jael Osiro Opondo**, the Defendant, as proprietor of land parcel **Kisumu/Wathorego/774** was illegally and unprocedurally done without following the provisions of the Law of Succession Act Chapter 160 Laws of Kenya., and therefore null and void. That the Land Registrar is hereby directed to rectify the register for land parcel **Kisumu/Wathorego/774** by deleting the names of **Jael Osiro Opondo** as proprietor and revert its ownership to the names of **Francis Edward Opondo Otieno and Jecton Alando Otieno** (both deceased) to enable the interested heirs move to the succession court in accordance with the provisions of the Law of Succession Act.

c. That the Plaintiffs do meet their own costs in the suit.

It is so ordered.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**DATED AND DELIVERED THIS 11<sup>TH</sup> DAY OF OCTOBER 2016**

In presence of;

Plaintiffs            Absent  
Defendant            Absent  
Counsel               Mr Achira for Opondo for Plaintiff

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**11/10/2016**

**11/10/2016**

**S.M. Kibunja J.**

**Oyugi court assistant**

**Parties absent**

**Mr Achira for Mrs Opondo for the Plaintiff.**

**Court: Judgment dated and delivered in presence of Mr Achira for Mrs. Opondo for Plaintiff.**