



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

CELC CASE NO.213 OF 2015

JACOB NYAKWA OJWANG.....PLAINTIFF

VERSUS

MERCY ONYANGO OHINGO.....1ST DEFENDANT

PAUL ODUOL ONALO.....2ND DEFENDANT

THE DISTRICT LAND REGISTRAR, KISUMU.....3RD DEFENDANT

JUDGMENT

1. **Jacob Nyakwa Ojwang**, the plaintiff filed this suit against **Mercy Onyango Ohingo, Paul Oduol Onalo, the District Land Registrar Kisumu**, hereinafter referred to as the 1st to 3rd Defendant respectively, seeking for:

- a) Cancellation of the transfer of land parcel **Kisumu/Kanyakwar/415** to the 1st and 2nd Defendant.
- b) A declaration that the suit land sold by the 1st Defendant to the 2nd Defendants contains a portion of land which the Plaintiff is entitled to.
- c) A permanent injunction restraining the Defendants from selling the Plaintiff's portion in the suit land.
- d) That the Plaintiff's portion of land in the suit land be transferred to him by the Defendants.

2. The affidavit of service by Henry Odera Osango, sworn on the 15th September 2015 indicates that the 1st and 2nd defendants were served on the 31st August 2015 and 26th August 2015 respectively, and that both declined to acknowledge receipt. It further confirms that the 3rd Defendant was served on the 15th September 2015 and duly acknowledged receipt. Mr Kimanga advocate represented the Plaintiff in this case.

3. The Plaintiff testified as PW1. His case is that land parcel **Kisumu/Kanyakwar/415** was first registered on 23rd February 1983 in the name of his father, Ojwang Okut. That his father died and the Plaintiff filed a succession cause for his estate and the grant was confirmed. That he was living away from home and when he returned he found that one James Ohingo Onyango had bought one acre of land from the suit land from his father. That however the said James Ohingo took advantage of the age of **Ojwang Okut** and had fraudulently transferred the whole land to his name on the 16th July 1987 instead of one acre. That the Plaintiff filed a land dispute Tribunal case No.4 of 2011 against the said James

Ohingo, who however died before the case could be determined. That his widow, (1st Defendant), replaced him in the case and the award was read in her presence and adopted by the lower court which ordered that the 1st Defendant to take only one acre from the suit land and return the rest of the land to the Plaintiff. That subsequently they obtained the land Control board consent and had a surveyor prepare the mutation form. Later the Plaintiff found the 1st Defendant had transferred the land to the 2nd Defendant even though he had filed a restriction on the title.

4. The following are the issues for determination:

- a) Whether the late Ojwang Okut had sold one acre or the whole of **Kisumu/Kanyakwar/415** to the Late **James Ohingo Onyango**.
- b) Whether the transfer of the said land to the name of the 1st Defendant was fraudulent.
- c) Whether the Plaintiff has locus to claim the said land in his names against the Defendants.
- d) Whether the claim is statute barred.

5. The court has carefully considered the pleadings filed by the Plaintiff, the oral and documentary evidence availed by PW1 and come to the following conclusions;

- a) That though the Plaintiff's pleadings and oral the evidence he gave indicates that his late father **Ojwang Okut** had sold only one acre out of **Kisumu/Kanyakwar/415**, which is indicated to be 0.6 hectares to the late James Ohingo Onyango, he did not avail documentary evidence of the sale transactions from which the court could verify his claim. The Plaintiff's oral evidence was that at the time of the sale transaction, he was staying away from home and only found the sale transaction, between his father and James Ohingo had been completed. That it follows that as the Plaintiff was not present during the discussions leading to the sale agreement and transfer, it was incumbent upon him to avail evidence to confirm his contention that the sale was for only one acre and not the whole parcel that was transferred to James Ohingo Onyango, but he failed to do so. That the Plaintiff did not disclose the date of death of his late father. That the copy of certificate of confirmation of a grant issued in Kisumu H. C. Succession Cause No.320 of 2010 does not contain the date of death of **Ojwang Okut** as date of death would be in the grant, which was not exhibited. The best evidence would be the certificate of death that was also not availed. That the court cannot therefore know who between Ojwang Okut and James Ohingo Onyango died before the other.
- b) That the above notwithstanding the copy of the register for land parcel **Kisumu/Kanyakwar/415** confirms that James Ohingo Onyango became the registered proprietor of the suit land on 16th July 1987 at entry number 2. That the last entry is number 4 of 18th February 2011 on the filing of restriction. That though the Plaintiff claimed that the said James Ohingo Onyango is now deceased, there was no evidence availed of his death and the date of death. The Plaintiff did not also avail evidence to confirm that the 1st Defendant is the administrator of the estate of James Ohingo Onyango.
- c) That further to the finding in (c) above, under the provision of **Sections 7** of Limitation of Actions Act **Chapter 22** of Laws of Kenya, a claim for recovery of land has to be made before the expiry of 12 years. That any person seeking to recover the land from James Ohingo Onyango had to file his/her claim on or before 15th July 1999, when the period of 12 years lapsed. That therefore any claim to recover the suit land by Ojwang Okut, the Plaintiff herein or anybody else with beneficial interests based on their relationship with Ojwang Okut has equally lapsed. That the tribunal case No.84 of 2011 and this suit were both filed several years after the 12 years had lapsed and therefore statute barred.
- d) That even though no copy of the tribunal proceedings and award were availed to the court, the copy of the decree issued on 24th November 2011 and order of 20th July 2015 in **Kisumu C.M.**

Land case No.84 of 2011 clearly shows that the tribunal's award was to confer title of registered land to the Plaintiff which under **Section 3(1)** of the Land Disputes Tribunal Act No.18 of 1990 (repealed) was ultra vires its jurisdiction. The award and other process to execute it were therefore null and void ab initio and cannot be the basis of the Plaintiff's claim over the suit land in this or other subsequent court action.

e) That the plaintiff has not availed any documentary evidence to prove that the suit land has been transferred to the name of the 2nd Defendant and if so when. That the court cannot therefore issue orders against a title said to be hold by the 2nd Defendant without proof that he indeed hold that title in his name.

f) That the Plaintiff has also not availed evidence to proof the particulars of fraud set out at paragraph 21 of the plaint against any of the Defendants and has therefore failed to discharge his legal duty of proof.

6. That even though none of the Defendants entered appearance and or filed defence in this suit, the Plaintiff obligation to prove his case against the defendants on a balance of probabilities remained and the court finds that he has failed to discharge it. The Plaintiff's case is therefore dismissed with no orders as to costs.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 30TH DAY OF **NOVEMBER** 2016

In presence of;

Plaintiff	Absent
Defendants	Absent
Counsel	M/S Nyadhiela for Kimanga for the Plaintiff

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

30/11/2016

30/11/2016

S.M. Kibunja Judge

M/S Nyadiela for Kimanga for the Plaintiff

Court: The judgment dated and delivered in open court in the presence of M/S Nyadieli for Kimanga for the Plaintiff.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

30/11/2016