



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KISUMU
ELC CASE NO.78 OF 2014

STEPHEN OKOTH OTIENO.....1ST PLAINTIFF
FREDRICK OYUNGO MADANDA.....2ND PLAINTIFF
JOHN OYUNGO MADANDA.....3RD PLAINTIFF

VERSUS

SOSPETER OOKO.....DEFENDANT

JUDGMENT

1. **Stephen Okoth Otieno, Fredrick Oyungo Madanda and John Oyungo Madanda**, herein after referred to as 1st to 3rd Plaintiff respectively, sued **Sospeter Ooko**, the Defendant, seeking for a declaration that the Defendant’s registration as proprietor of **South Gem/Gombe/145 and 176** was in trust for the Plaintiffs, and that the suit parcels be subdivide equally between the Plaintiffs and Defendant plus costs. The Plaintiffs avers that they are brothers to the Defendant as they are all children of one **Joel Madanda**. They further aver that the suit lands were ancestral lands and during adjudication they were registered with their eldest brother, the Defendant, on directions of their father who was ailing.

2. The Defendant was served with the summons and hearing notices but did not enter appearance or file defence. The formal proof took place on 3rd February 2015 when the 1st Plaintiff testified as PW1. He testified that the three Plaintiffs and the Defendant were all sons of **Joel Maganda** who died in 1983. That during land adjudication in 1973, their father directed that his two ancestral lands be registered in the names of his eldest son, the Defendant. That the Defendant was so registered as Trustee for his siblings but after the death of their father, he has been causing problems and hence this case. That the Defendant and 3rd Plaintiff had a different mother each while 1st and 2nd Plaintiffs are from one mother. That the Plaintiffs had lodged a claim against the Defendant with the Land Disputes Tribunal and were successful. PW1 produced copies of the parcels green cards and Land Disputes Tribunal proceedings as exhibits.

3. The Plaintiffs were represented by Mrs Opondo advocate who at the close of the Plaintiff’s case filed written submission dated 22nd July 2016. The counsel submitted that the Defendant is holding the title to the suit land in trust under **Section 28** of the Land Registration Act, 2012 and referred to the case of **Joseph Gitimu Wangara –V- Martin Munene Wangara & 13 others Kerugoya ELC No.278 of 2013**.

4. The following are the issues for the court’s determination;

a. Whether the Defendant was registered with the suit land as absolute owner or trustee for the

Plaintiffs.

b. Who should meet the costs.

5. The court has carefully considered the pleadings filed, the evidence adduced by PW1, submissions by counsel and concluded as follows;

a. That the unrebutted evidence of PW1 clearly shows that the Plaintiffs and the Defendant are all sons of Joel Maganda and his three wives. That the said Joel Maganda, died in 1983 and was buried on land parcel **South Gem/Gombe/145** where the Plaintiffs have portions of land that they use and reside on.

b. That the Plaintiffs and one John Otieno Madanda had lodged **Land case No.50 of 2006** with Siaya Land Disputes Tribunal against the Defendant over similar issues to those in this case. That the Tribunal award was that the Defendant and the said **John Otieno Madanda** share land parcel **South Gem/Gombe/176** while the Plaintiffs herein were to share **South Gem/Gombe/145**. That even though the court was not informed whether the award was adopted and executed, the award appears to be beyond the powers of the Tribunal which was limited under **Section 3(1)** of the Land Disputes Tribunal **Act No.18** of 1990 which was later repealed under **Section 31** of the Environment and Land Court Act **No. 19 of 2011**, and therefore null and void.

c. That **John Otieno Madanda** who was one of the claimants in the Tribunal case is not a party in this suit. That the Plaintiffs herein have not disclosed how his interests would be taken care of if their prayer for the two parcels of land was granted that they be shared equally between them and the Defendant.

d. That while the provisions of **Section 26** of the Land Registration Act No.3 of 2012 confers absolute ownership of the land to the registered proprietor subject only to the challenge on the base of among others, fraud, to which the registered proprietor is a party to, such registration is subject to the overriding interests, including customary trust, as provided for in **Section 28 (b)** of the said Act. That the decisions in **Mumo –V- Makau** (2004) IKLR 13 (C.A) **Kanyi –V- Muthiora** (1984) KLR 712 (C.A.) and **Mukangu –V- Mbui** (2004) 2 KLR 256 cited in **Joson Gitimu Wangara –V- Martin Munene Wangara & others** Kerugoya ELC 278 of 2013 confirms that position.

e. That the evidence adduced by PW1 clearly shows that the origin of the two parcels of land that were registered with the Defendant after adjudication was ancestral.

That all the sons of **Joel Maganda**, who includes the Plaintiffs, John Otieno and the Defendant used the lands as of right during the lifetime of their father, Joel Maganda. That when problems started with Defendant taking over the portions of land the brothers had been using, the matter would be handled by the local administration and elders whose conclusions have been captured or referred to in the proceedings before the Tribunal. That the matter finally landed before the Siaya

Land Disputes Tribunal and possibly on the realization that the Tribunal was not the correct forum to decide on the issue of title to, and ownership of registered land, that this suit was filed. That from the foregoing the court agrees with the Plaintiffs that the registration of the two parcels of land with the Defendant after adjudication was as trustee for himself and his four brothers.

f. That the acreage of the two parcels are shown in the green cards as follows:

i. South Gem/ Gombe/176 – 2.6 hectares.

ii. South Gem/Gombe/145 – 3.4 hectares.

That all the five sons of Joel Maganda have equal entitlement to their family's ancestral lands.

6. That flowing from the foregoing, the court finds that the Plaintiffs have established their case against the Defendant on a balance of probabilities and enters judgment for them as follows:

a. That a declaration is hereby issued that the registration of the Defendant as proprietor of land parcels **South Gem/Gombe/145** and **176** is a trustee for himself and his four brothers, who includes the Plaintiffs herein, in equal shares.

b. That the parties herein are directed to seek consensus on how to share the two parcels of land and take the necessary steps to actualize it in 90 (ninety) days.

c. That liberty to apply is granted in case of failure to reach a consensus.

d. No orders as to costs.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 23RD DAY OF NOVEMBER 2016

In presence of;

Plaintiffs PRESENT

Defendant ABSENT

Counsel M/S Opondo for the Plaintiffs

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

23/11/2016

23/11/2016

S.M. Kibunja J

Oyugi court Assistant

Plaintiffs present

M/S Opondo for Plaintiffs

Court: Judgment dated and delivered in open court in presence of the Plaintiffs and M/S Opondo for the Plaintiffs.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

23/11/2016