



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC CASE NO.14 OF 2007

GEORGE AHUYO OLUOCH.....1ST PLAINTIFF

FANUEL OTIENO OLUOCH.....2ND PLAINTIFF

VITALIS ONGUCHA OLUOCH.....3RD PLAINTIFF

(SUING FOR AND ON BEHALF OF THE ESTATE OF MICHAEL OLUOCH AHUYO)

VERSUS

SIAYA COUNTY COUNCILDEFENDANT

JUDGMENT

1. George Ahuyo Oluch, Fanuel Otieno Oluoch, Vitalis Ongucha Oluoch, suing for and on behalf of the estate of **Michael Oluoch Ahuyo**, hereinafter referred to as 1st to 3rd plaintiffs, sued the **Siaya County Council**, the Defendant, through the plaint dated 12th February 2007 and amended on 26th February 2007 seeking for “a declaration that the subdivision of the plaintiffs land parcel **Siaya/Kochieng B/1028** and creation of **Siaya/Kochieng B/1027** and registration thereof into the name of the defendant was fraudulent, null and void.” They also pray for costs.

The plaintiffs avers that at the completion of the land adjudication process,

Michael Oluoch Ahuyo was registered with land parcel **Siaya/Kochieng/1028** and that after his death, the family remained in possession and control of the said land and have had peaceful, uninterrupted possession, use and control of the land. That on or about 30th January 2007, the Defendant’s officers entered into the said land and indicated that they would subdivide that it into market plots for allocation to members of the public. That on checking with the lands office the Plaintiffs found out that a portion of land had been hived off and a new parcel created and registered as **Siaya/Kochieng B/1027** in the name of the Defendant. The Plaintiffs alleged fraud in the process of creation and registration of parcel **Siaya/Kochieng B/1027** in the name of the Defendant. The particulars of fraud are set out at paragraph 12 of the amended plaint as follows:

- a) Excising the said portion from **Siaya Kochieng B/1028** without the consent of the Plaintiffs.
- b) Causing itself to be registered without the knowledge or consent of the Plaintiff.
- c) Subsiding the Plaintiffs land without the Plaintiffs knowledge or consent.

- d) Having themselves registered without any documentation whatsoever.
- e) Disregarding the decision of the adjudication committee during the adjudication process.
- f) Knowingly taking over the suit parcel without any claim of right.
- g) Compulsorily acquiring the Plaintiffs land without following the due process of law.”

2. The Plaintiffs claim is opposed by the Defendant through their filed statement of defence dated 28th May 2007. The Defendant avers that land parcel Siaya/Kocheing B/1027 was registered with the Defendant on first registration in 1990 and has always been used as a market place by the members of the public. That the Plaintiffs are “**non –suited against** “ the Defendant by failure to enjoin the Registrar of Land. That the suit is time barred by operation of the Limitation of Actions Act and no leave to file it out of time has been obtained.

The suit should be dismissed with costs.

3. The hearing commenced on 25th April 2016 with 3rd Plaintiff testifying as PW1 on his behalf and on behalf of the two other Plaintiffs. He told the court that on completion of the land adjudication process, land parcel **Siaya/Kochieng B/1028** and 1027 were registered in the names of their father Michael Oluoch. Later, when they conducted a search, they found out that land **parcel Kochieng B /20** had been subdivided to create 1027 and 1028 with the former being registered in the name of the Defendant and the latter in their father’s name. That in 1984, the Defendant moved onto land parcel 1027 and started using it as a public utility plot. That their father filed a suit in court but died in 1990 before the case could be determined. Then their older **brother Collins Ochieng** took over the case and died in 1995. That the family then decided that they file this suit and they obtained temporary injunction orders. That the Defendant did not stop using the land and instead, on 21st April 2015 they were evicted and their properties on the plot were damaged. The Plaintiffs prays for a declaration that the subdivisions of their land to create parcel 1027 was null and void and the Defendant’s name should be removed from the register and it be registered in their names instead. During cross examination by the Defendant’s counsel PW1 stated that parcel 1027 has existed since the 1980s. That there exists a market on parcel 1027 with a public road passing in the middle. That the cases commenced by their late father and brother are still pending in court. The Plaintiff conceded that at paragraph 14 of their amended plaint they indicated that there was no previous cases over the suit land.

4. At the closure of the Plaintiffs case, the Defendant counsel also closed the Defendant’s case. The parties were then given time lines to file and serve written submissions. The Plaintiffs filed their written submissions dated 8th July 2016 on the 11th July 2016 while the Defendant’s counsel filed theirs dated 28th July 2016 on the same date. The Plaintiffs filed a reply dated 4th October 2016 to the Defendant’s submission.

5. The court has carefully considered the pleadings by both sides, evidence by the Plaintiff, written submission by both sides and come to the following findings;

- a) That the Plaintiffs are the joint administrators of the estate of **Michael Oluoch Ahuya**, their father, who died on 13h April 1990 by virtue of the Grant issued on 14th January 2005 in Nairobi H.C. Succession Cause No.3462 of 2004.
- b) That though the Plaintiffs case is that land parcel **Siaya/Kocheing B/1027**, the suit land, was excised or hived from land parcel **Siaya/Kochieng B/20**, the certificates of official search for the two parcels issued on 21st February 2013 and 8th January 2007 indicates respectively that the they were registered on the same date, the 26th September 1990; the former in the name of **Michael Oluoch Ahuyo** and the latter in the name of the Defendant. That the size for parcel No.20 is shown as 0.43 hectares while that of parcel 1027 is shown as 0.8 hectares. That the acreage of parcel 1027 in the parcel’s register as confirmed in the certificate official search referred to above

carries with the size reflected in the copy of the adjudication registrar dated 16th November 1982 annexed to the 1st Plaintiff's supplementary affidavit sworn on 18th June 2015. That the documentary evidence detailed above do not in any way confirm the Plaintiff's claim that parcel 1027 and 1028 were subdivisions from parcel 20.

c) That the adjudication objection proceedings the Plaintiffs base their claim to the suit land were not in relation to parcel 1027 but rather parcel 1028. That the letter from the Siaya Land Adjudication Settlement officer dated 9th March 1988, annexed to the supplementary affidavit referred to above, confirms that the decision of the arbitration Board in case No.47 of 1979 which was **between Michael Oluoch Ahuyo –V- Oyugi Ahuyo** over parcel number **1028 Kochieng B** Adjudication Section was executed in 1985 and the land registered with Michael Oluoch Ahuyo. The implementation is further confirmed by the copy of the register for **Siaya/Kocheing B/1028** issued on 8th February 2007, that shows that the land is 1.8 hectares and was also registered on 26th September 1990 in the name of **Michael Oluoch Ahuyo**.

d) That the findings in (b) and (c) confirms that land parcel **Siaya/Kochieng B/20, 2017** and 1028 were all first registered on the same date the 26th September 1990. That the court further finds that **Siaya/Kochieng B/1027** and 1028 are not subdivisions from **Siaya/Kochieng B/20**.

e) That the Plaintiffs have not adduced any evidence, documentary or otherwise, to prove that land parcel **Siaya/Kochieng B/1027** has ever been registered in the name of their deceased father, **Michael Oluch Ahuyo**. That it follows therefore that the land does not form part of the estate of the said **Michael Oluch Ahuyo** and the Plaintiffs therefore do not have any beneficial interest over that land.

f) That land parcel **Siaya/Kochieng B/1027** was on first registration registered with the Defendant and the Plaintiffs have not availed any evidence to support their allegation that the registration was through fraud.

g) That the Plaintiffs admitted that land parcel **Siaya/Kocheing B/1027** has since the 1980s been registered in the Defendant's names and on it has existed a market with plots developed for various persons. That it cannot therefore be true that the Plaintiffs have at the same time been in peaceful, uninterrupted possession of the same land as they allege in the amended plaint. To the contrary it is the Defendant who has been in possession of the said land from the 1890's.

h) That flowing from the findings in (g) above, it follows that the Plaintiffs claim over the suit land based on adverse possession has no merit. That in any case adverse possession does not arise over public land in spite of the time one stays on it with or without interruption as confirmed in various decisions of superior courts including **Mwambu Mbuvi Maingi & 15 others –V- Kenya Education management Institute & Another** {2014} eKLR.

i) That even if the Plaintiffs may have had a genuine claim over the suit land, the recovery efforts would still fail due to the provisions of **Section 7 and 37** of the Limitation of Actions **Act Chapter 22** of Laws of Kenya as a period of over 12 years had lapsed from the 1990, when the Defendant got registered with the land, to 2007 when the suit was filed.

6. That in view of the foregoing the court finds that the Plaintiffs have failed to prove their case against the Defendant on a balance of probabilities and their case is hereby dismissed with costs.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 14TH DAY OF DECEMBER 2016

In presence of;

Plaintiffs Present

Defendant Absent

Counsel None

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

14/12/2016

14/12/2016

S.M. Kibunja Judge

Oyugi court assistant

Plaintiffs present

Court: Judgment dated and delivered in open court in presence of Plaintiffs.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

14/12/2016