



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
ELC CASE NO.57 OF 2015

**GODFREY ZABLON DIFUU (Suing as the Admin to the estate of
LUKHISI OGANDOPLAINTIFF**

VERSUS

SABASTIAN MALINGU1ST DEFENDANT

ORIFA MALINGU2ND DEFENDANT

J U D G M E N T

1. The Plaintiff herein – **GODFREY ZABLON DIFUU** – filed this suit here against the Defendants on 5/6/2015 vide a plaint dated 4/6/2015. He did so as the administrator of the estate of the his late grandfather **LUKHISI OGANDO** who, together with the late father of the Defendants – **LUCAS MALINGU** – are said to have owned land parcel No.**BUNYALA/BULEMIA/850**.

2. The Plaintiff's father died first, leaving the Defendants father as the living registered owner of the land. According to the Plaintiff, the Defendants father unlawfully subdivided the land into 3 portions – **BUNYALA/BULEMIA/3643**, **BUNYALA/BULEMIA/3644** and **BUNYALA/BULEMIA/3645**. The sizes of the resultant parcels were 5.734Ha, 0.202Ha and 0.26Ha respectively.

3. The Plaintiff's position is that he is entitled to half of land parcel No.850. He pleaded that the subdivisions done were illegal and that fresh subdivision be done dividing the land into two equal halves, one of which should be his.

4. The crucial prayer for consideration at this stage is for cancellation of the subdivisions and for fresh subdivision of parcel No.850 into two equal portions. The Plaintiff wants to be registered as owner of one portion while the Defendants are left to own the other portion. He Plaintiff is also asking for costs. There is also a prayer for injunction but that one is a misplaced prayer. It is meant to run until the suit is heard and determined. The suit is now already heard and this judgment itself is its determination. The prayer as formulated therefore is useless for the period ahead.

5. The Defendants filed their defence on 6/7/2015. The Plaintiff's claim was denied.

6. This matter was heard on 27/7/2016 and 8/11/2016. The Plaintiff testified as PW1 and reiterated that he wants half share of land parcel No.850. That is the share that his late grandfather was entitled to. He wants that share for himself and the other members of his family. During cross-examination, the Plaintiff reiterated that the land was originally owned by his grandfather together with the Defendants father; that his grandfather died first leaving the Defendants father; that the subdivision was carried out by

Defendants late father together with the Defendants; and that he was unaware whether the Defendants had letters of administration for their late father's estate.

7. It emerged also that there are one (100) people living on that land but the Plaintiff only felt suited against the Defendants. The land parcels that resulted from sub divisions were said to be owned as follows:-

- Parcel No.3643 – LUCAS MALINGU and LUKHISI ONGANDO

- Parcel No.3644 – ROSELINDA ATIENO

- Parcel No.3645 – Andriano Anjala

8. PW2 was THOMAS BWIRE NAVONO. He said he knew the original owners of the land as they were his cousins. His evidence shows that there are very many people on the land. Many of them were brought there by the Defendants father.

9. The first Defendant testified as DW1. He also said that there are many other people living on the land. He said too that he and the 2nd Defendant do not have letters of administration over the estate of their late father.

10. At the end of hearing, both sides filed written submissions. The Plaintiffs submissions were filed on 30/11/2016. It was emphasized that the Plaintiff is entitled to half share of the land. Doubts were also expressed in the submissions as to whether the subdivisions were done when the Defendants father was alive. The Court was asked to grant the prayers sought.

11. The Defendants submissions were filed on 21/11/2016. It was pointed out that it was not shown that it is the Defendants who carried out subdivisions. The Defendants took the position that it is their father who carried out the subdivisions. It was then submitted that for them to be sued it needed to be shown that they are the legal representatives of the estate of their late father. The Court was asked to dismiss the case.

12. I have considered the suit as filed, the evidence tendered by both sides, and the rival submissions. This is the scenario that presents itself: Land parcel No.850 is already subdivided into 3 parcels. None of the parcels is shown to be owned by the Defendants. The owners of the parcels have not been enjoined in this suit. And there are very many other people living on the land. It is in light of this that I will make my decision.

13. In the Plaintiff's submissions it was stated that the Defendants are sued in their personal capacities. This is obviously asserted in order to obviate the need for the Plaintiff to prove that the Defendants are the legal representatives of their late father's estate. The Plaintiff can not run away from obvious facts. He is being dodgy on this issue but he can't escape it.

14. By his own pleading (para 5 of the plaint) the late father of the Defendant is the one who caused subdivision of parcel No.850. By his own statement dated 4/6/2015 (para 4), the Plaintiff reiterated this fact. But while testifying here on 27/7/2016, the Plaintiff's position had become somewhat obscure. First he was not sure whether the subdivision was done when the Plaintiff's father was alive and second, still in the same evidence, the subdivision was done by the Defendants late father together with the Defendants themselves. And much later in the submissions doubts were expressed as to whether the Defendants father carried out the subdivision.

15. This is what is called double-speak and it issues from the mouth of a liar. The fact of the matter is that parcel No.850 ceased to exist when it was subdivided. None of the resulting subdivisions is in the name of the Defendants. It is clear that it is the Defendants late father who carried out the sub-division. The Plaintiff obviously needed to show that the Defendants re the legal representatives of their late father. He has failed this test and he can't run away from it by trying to obfuscate issues.

16. I have observed that there are other people on the land. The Plaintiff himself mentioned this during hearing. His witness said it too. It also came out that none of the parcels resulting from subdivision is registered in the Defendants names. Question is: Can we interfere with these parcels without hearing their registered owners? The answer to this is No. And can we order re-subdivision of the land without considering the possible rights of so many other people said to be on the land? The answer to this is No also.

17. The position that emerges is that this suit is a non-starter. There are necessary legal preliminaries that the Plaintiff needed to ascertain before instituting it but these were ignored or disregarded. The factual foundations of the suit are also wanting. If one looks at the pleadings it looks like it is only the Defendant and the Plaintiff's families who are on the land. It only emerges later that there are many other people on the land who ought to have been enjoined in the suit for effective adjudication. It follows then that even if the orders sought were granted, one would be sure to see as multiplicity of suits, courtesy of the Plaintiff's limited or narrow view of the situation.

18. The upshot? This suit is inevitably for dismissal and I hereby dismiss it with costs.

A.K. KANIARU

J U D G E

DATED AND DELIVERED ON 26TH DAY OF JANUARY 2017

IN THE PRESENCE OF:

PLAINTIFF- PRESENT

1ST DEFENDANT- PRESENT

2ND DEFENDANT- PRESENT

J U D G E