



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO.681 OF 2015 JUDGMENT

ZACHARY OMONDI ODONGO.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK..... 1ST DEFENDANT

JOASH ONYANGO NYIERO 2ND DEFENDANT

JUDGMENT

1. **Zachary Omondi Odongo**, the Plaintiff, filed this suit against **Kenya Commercial Bank Limited and Joash Onyango Nyiero**, the 1st and 2nd Defendant respectively, through the plaint dated 27th September 2011 seeking for the following prayers;

- " a) A declaration that the 1st Defendant's exercise of its statutory power of sale is illegal and unjustified.
- b) A declaration that the Defendant did not confer upon the 2nd Defendant any legal title to the suit property.
- c) A declaration that the suit property is still part of the estate of the deceased registered owner.
- d) An order compelling or authorizing the land registrar, Siaya District to rectify, title to **South Ugenya/Yiro/1671** by replacing the name of the 2nd Defendant with that of the late **Albert Odongo Odhuno**.
- e) Mesne profits
- f) Costs of this suit.
- g) Any other remedy the court may deem fit to grant."

The Plaintiff avers that he is the administrator of the estate of **Albert Odongo Odhuno**, who was the registered proprietor of **South Ugenya/Yiro/1671**. He further averred that the said deceased had charged the said land with 1st Defendant and that by the time the deceased died on 7th May 1995, he had cleared his financial obligations secured on the charged property with 1st Defendant. The Plaintiff further averred that on the 8th September 2010, the 1st Defendant fraudulently transferred the charged property to the 2nd Defendant. The Plaintiff set out the particulars of fraud attributed to both Defendants at paragraph 8 of the plaint as follows:

PARTICULARS OF FRAUD ON THE PART OF THE 1ST DEFENDANT;

- a) Transferring the property of a deceased person without grant of letters of administration.
- b) Purporting to exercise a statutory power of sale where such right has not arisen.
- c) Failing to discharge the property charged being **South Ugenya/Yiro/1671** after the chargor had repaid the loan.
- d) Failing to inform the administrator in the intended administration of the transaction(s) involving the subject property.

PARTICULARS OF FRAUD ON THE PART OF THE 2ND DEFENDANT:

- a) Purporting to have bought the suit property from the 1st Defendant for the sum of Kshs85,000/=.
- b) Purporting to have entered into the sale agreement for the purchase of the suit property from the late registered owner.
- c) Intermeddling in the estate of a deceased person.

2. The 2nd Defendant opposed the suit through the statement of defence dated 25th October 2011 in which he among others averred as follows;

- a) That the Plaintiff lacks capacity to file this suit.
- b) That the late **Albert Odongo Odhuno** had sold the suit property to him under agreement dated 12th October 1993.
- c) That the late **Albert Odongo Odhuno** signed the transfer documents in his favour on 31st January 1994 and obtained the land control board consent.
- d) That the 1st Defendant released the title deed after he paid additional charges of Kshs.8305/60.
- e) That the transfer of land to him was done by the late **Albert Odongo Odhuno** before he died.

3 The 1st Defendant also opposed the Plaintiff's claim through their statement of defence dated 29th November 2013 in which they averred to the following among others;

- a) That **Albert Odongo Odhuno** had charged **South Ugenya/Yiro/1671** to secure repayment of a loan but disputed that the chargor had cleared the loan by the time of his death on 7th May 1995.
- b) That they did not receive the Plaintiff's letter dated 21st April 2009.
- c) That they retained the title to the said land on account of outstanding debt.
- d) They denied that they fraudulently transferred the suit land to the 2nd Defendant on 8th September 2010.

4. That Plaintiff testified as PW!. It is his case that he is a son to **Albert Odongo Odhuno** who died on 7th May 1995. That the said Albert had in 1990 charged his land parcel **South Ugenya/Yiro/1671** to secure a loan of Sh.20,000 with 1st Defendant which he later cleared before his death. That the 1st Defendant retained the title and subsequently transferred it to the 2nd Defendant without involving him as the administrator of the deceased chargor's estate in 2010. The Plaintiff further testified that he

applied for grant ad litem in Kisumu H.C.P & A Cause **No.123 of 2011** and produced a copy thereof issued on 12th July 2011. That he subsequently applied for a full grant in Kisumu H.C. Succession Cause **No.649 of 2011** which was granted on 23rd December 2011. The Plaintiff produced a copy of the grant issued on 8th February 2012 and certificate of confirmation issued on 16th October 2014 as exhibits. The Plaintiff prayed that the transfer of land to the 2nd Defendant be revoked and the land returned to his late father's name to enable him complete the administration of his late father's estate.

5. The 1st Defendant did not call any witnesses.

6. The 2nd Defendant testified as DW1 and told the court that he entered into a land sale agreement with his cousin, the late **Albert Odongo Odhuno**, to buy land parcel **South Ugenya/Yiro/ 1671** after the 1st Defendant advertised to auction it for failing to service the loan. The 2nd Defendant produced a copy of the sale agreement and auctioneer's notice as exhibits. He told the court that the chargor used part of the purchase price he paid him to clear the outstanding loan of Shs.15685/=. That after completing the payment of the purchase price, their advocate drew the transfer form which they both executed. That the late **Albert** applied and obtained the land control board consent. The 2nd Defendant further produced the copies of the transfer form, application for consent and letter of consent as exhibits. The 2nd Defendant testified that when they presented the documents to the 1st Defendant, the bank demanded payments of extra expenses, including the auctioneers fees all totaling Shs.8305/60 before they could discharge the title and release it. The 2nd Defendant added that as Albert and him had not agreed who would meet those expenses, they did not pursue the matter any further at that time. Then the chargor died in 1995 and the 2nd Defendant decided to pay the expenses demanded by 1st Defendant to have the title deed released. He paid Kshs.8306/= to the 1st Defendant on 24th May 2010 and was given the original title deed, discharge of charge and transfer form by chargee duly executed. He produced copies as exhibits. He then presented the documents to the lands office and the land was transferred to his names after making the requisite payments. The 2nd Defendant denied that there was fraud in the transaction between him and the late **Albert** or in having the land transferred to his names.

7. The written submissions dated 29th March 2016, 25th April 2016 and 16th May 2016 were filed by counsel for the plaintiff, 2nd and 1st Defendants respectively.

8. The main issues for the courts determinations are as follows:

- a) When the statutory power of sale over the transaction between the late **Albert Odongo Odhuno** and the 1st Defendant arose.
- b) Whether the 1st Defendant exercised its power of sale on land parcel **South Ugenya/Yiro/1671** and if so when.
- c) Whether the transfer of the suit land by the 1st Defendant to the 2d Defendant in 2010 was in furtherance of the 1st Defendant's power of sale.
- d) Whether the 2nd Defendant title to the suit land was obtained fraudulently and if so, whether it should be impugned and revoked.
- e) Which of the orders sought should issue.
- f) Who pays the costs.

9. The court has carefully considered the pleadings by all parties, the oral evidence by PW1 and DW1, the written rival submissions by counsel and come to the following determinations;

- a) That **Albert Odongo Odhuno**, the then registered proprietor of land parcel **South Ugenya/Yiro/1671**, charged that land with 1st Defendant, which was entered in the register on 11th October 1990, to secure a loan facility of Kshs20,000/=.

b) That from the pleadings by both the Plaintiff and Defendants and the evidence adduced by both PW1 and DW1, the chargor fell into arrears and the 1st Defendant commenced the process to realise the security in 1993 and issued notices. That according to PW1 who was then reportedly a minor, the chargor had another loan facility with 1st Defendant in respect of which he had charged parcel of land **South Ugenya/Yiro/1613** which was also in arrears. That the chargor entered into an arrangement with 1st Defendant whereby the title for parcel 1613 was released to him for subdivision to parcels **1743** and **1744**. The chargor reportedly sold parcel **1744**, and retained parcel **1743** in his names. That parcel 1743 is still part of his estate and appears in the schedule of properties to be transmitted under the certificate of confirmation of grant issued on 16th October 2014 in Kisumu H.C. Succession Cause **No.649 of 2011**.

That according to the Plaintiff, the chargor paid all the outstanding loans that had been secured with the charge on both land parcel **1613** and **1671**. That the 1st Defendant did not discharge parcel **1671**. That the Plaintiff did not however offer any documentary evidence to confirm his contention that the chargor had cleared the two loans including the one secured with parcel **1671**. The contention by the Plaintiff was disputed by the 1st Defendant in their pleadings which position is supported by the 2nd Defendant. The 2nd defendant told the court that the chargor, who was his cousin, visited him at his place of work in 1993 and requested him to buy parcel **1671** so as to pay off the liability to the 1st Defendant.

c) That considering that the Plaintiff was a minor in the 1993 and that he has no documentary evidence or other independent witness to support his contention that the chargor had paid the loan secured with the charge on parcel **1671**, and in view of the fact that the title was not released and discharge of charge issued by the 1st Defendant, the court finds that contention by the Plaintiff to be unreliable. That unlike the Plaintiff, the 2nd Defendant has produced a copy of a land sale agreement between him and **Albert Odongo Odhuno**, the chargor, for sale of **South Ugenya/Yiro/1671** at Kshs.85,000/=. The 2nd Defendant explained how he paid the purchase price. The Plaintiff and the 2nd Defendant testified that before coming to court they had discussed the said sale agreement. Both the Plaintiff and 2nd Defendant confirmed that the Plaintiff's family had offered to refund the 2nd Defendant the Kshs.85,000/= plus interest of Sh.20,000/= but that the 2nd Defendant had demanded Sh.2,000,000/ so as to give up his claim over the land. The copies of the minutes of meetings containing the details of the offer made were produced as exhibit. The court finds the fact that the Plaintiff and his family had expressed their preparedness to refund the purchase price and interest of Sh.20,000/= to the 2nd Defendant goes to show that the Plaintiff was convinced that the 2nd Defendant and **Albert Odongo Odhuno** had indeed entered into the sale agreement for land parcel **South Ugenya/Yiro/1671** and that the 2nd Defendant had fully paid the purchase price during the life time of the vendor, the late **Albert Odongo Odhuno**.

d) That the copy of the auctioneer's notices produced by 2nd Defendant confirms that the said land was to be auctioned on the 28th October 1993. That even though the 1st Defendant did not avail a copy of the statutory notice that had been served on the chargor, **Albert Odongo Odhuno**, the fact that the said chargor did not challenge the intended auction in court can only be taken as a confirmation that the 1st Defendant had issued and served all the requisite notices and that their power of sale had arisen. That the only person who could have disputed that fact was the chargor who reportedly died on 7th May 1995, without doing so.

e) That the evidence by 2nd Defendant that part of the purchase price that he paid **Albert Odongo Odhuno** was used to offset the outstanding loan is not only plausible but believable. This is because it offers the only explanation as to why the auctioneers detailed by the 1st Defendant to auction the property did not proceed with the auction. The plaintiff has not offered any other evidence to rebut that of the 2nd Defendant and his contention that the chargor had paid the two loans using the proceeds of the sale of the parcel **1744**,

subdivided from parcel **1613**, cannot be verified.

f) That though the court agrees with the 2nd Defendant that the loan arrears was paid with part of the purchase price he paid to **Albert Odongo Odhuno**, there is no evidence to confirm that their sale agreement had the blessings of the 1st Defendant. This is because, had the 1st Defendant been involved in the transaction, then it would have at least required the payments of the purchase price to be channeled through their offices and would have released the title documents and discharged the charge after full payment. The fact that the 1st Defendant declined to release the said documents to enable the 2nd Defendant register the transfer, even after the chargor had obtained the Land control board consent and signed the transfer forms, is an indication that they were not privy to the sale agreement.

g) That the transfer of the land by the 1st Defendant to the 2nd defendant made on 8th September 2010 cannot be said to be in furtherance to the 1st Defendant exercise of power of sale commenced in 1993 as no sale took place that time.

h) That after the chargor regularized his loan account in the year 1993 with 1st Defendant some Kshs,8305/60 was left outstanding. The chargor died before that amount could be cleared. That there is no evidence to show that the 1st Defendant had issued any demand notices after 1993 on the payment of that amount to the chargor in his lifetime nor was any such notices served through the chargor's postal address as would have been expected. That had such notices have been issued and served the 1st Defendant would have at least availed copies to the court. That the 1st Defendant has never exercised their power of sale under the charge to completion after abandoning the auction commenced in the year 1993.

i) That the transfer of the charged land to the names of the 2nd Defendant by the 1st Defendant was not pursuant to the 1st Defendant power of sale as no sale, conducted and sanctioned by the 1st Defendant, had taken place in 2010. The 1st Defendant did not therefore pass good title to the 2nd Defendant. The title held by the 2nd Defendant was therefore acquired without following the due procedure under the law.

That in accordance with **Section 26 (1)** of the Land registration Act. No.3 of 2012, the 2nd Defendant's title to the suit land is hereby impugned.

j) That the title to the suit land should be returned or reverted to the names of **Albert Odongo Odhuno**, deceased. That the 2nd Defendant may elect, to among others to pursue his interest over the suit land with the administrator of the deceased's estate as he never had the transfer forms allegedly signed by the late **Albert Odongo Odhuno** registered.

10. That flowing from the foregoing, the court finds that the Plaintiff has established his case against both Defendants on a balance of probabilities and enter judgment in his favour in terms of prayer's (a) to (d) with costs.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 29TH DAY OF JUNE 2016

In presence of;

Plaintiff Absent

Defendants 2nd Defendant present

Counsel Mr Mbuthia for Opiyo for Plaintiff

Mrs Onyango and Mr Obiero Mr. Oriero for 1st and 2nd Defendants respectively.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

29/6/2016

29th June 2016

S.M. Kibunja J.

2nd Defendant present

M. Oriero for 2nd Defendant

Mrs. Onyango for 1st Defendant

Mr. Mbuthia for Opiyo for Plaintiff

Court: Judgment read and dated in open court in presence of the 2nd Defendant, Mr. Mbuthia for Opiyo for Plaintiff, Mrs Onyango and Mr. Oriero for 1st and 2nd Defendants respectively.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

29/6/2016