



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT SIAYA

ELC CASE NO. 10 OF 2021

JULIUS OMONDI ODENY (Suing as the ADMINISTRATOR

of the Estate of WALTER ODENY AGINA [deceased]..1ST PLAINTIFF

ELIAS AGINA ODENY.....2ND PLAINTIFF

VERSUS

JOHN OHANGA.....1ST DEFENDANT

NICHOLAS AMUKOWA.....2ND DEFENDANT

MAURICE AGINA GUMBA.....3RD DEFENDANT

SIMEON OKWARO.....4TH DEFENDANT

SAM NYAWALO.....5TH DEFENDANT

JUDGEMENT

Introduction

1. By way of a plaint dated 15/02/2013, the plaintiffs filed suit against the defendants claiming that the 1st defendant who is a joint owner of land parcel number EAST GEM/RAMULA/473 **[the suit property]** together with Walter Odeny Agina and Benard Lweya had with the assistance of the 3rd, 4th and 5th defendant sold a portion of the suit property to the 2nd defendant. They contended the sale was undertaken without issuance of Grant of Letters of Administration of the Estates of Walter Odeny Agina and Benard Lweya who were since deceased. They prayed for a declaration that the sale of the suit property by the 1st defendant to the 2nd defendant was illegal and for a permanent injunction to issue.

2. The defendant filed a defence dated 5/06/2013 in which they denied the plaintiffs' assertions and contended that the Letters of Administration obtained by the plaintiffs on behalf of the Estate of Walter Odeny Agina were obtained by means of fraud because it concealed material facts. They asserted that the plaintiff's pleadings were incompetent, frivolous, misconceived, vexatious and should be struck out.

The plaintiff's case and evidence

3. The plaintiffs' case is contained in their plaint, witness statements, documents produced as "**P Exh "1", "2", "3", and "5"** and oral evidence tendered in court during the hearing.

4. The 1st plaintiff and 1st defendant are brothers and sons to Walter Odeny Agina while the 2nd plaintiff is a grandson of Walter Odeny Agina.

5. In summary, it was the plaintiffs' case that the 1st defendant together with the 3rd, 4th and 5th defendants had purportedly sold the suit property to the 2nd defendant by unlawful means and that they intended to evict the plaintiffs and dependants of Walter Odeny Agina from the suit property.

6. The 1st plaintiff testified as **PW 1**. He testified that the suit property was registered in the name of his father Walter Odeny Agina

[deceased] and his brothers; Bernard Lwenya [deceased] and 1st defendant. He asserted that apart from one sibling who used to live in a place called Asembo, himself and 5 other siblings or their heirs lived on the suit property. He testified that the 1st defendant had sold a portion of the 2nd plaintiff's portion of land in the suit property to the 2nd defendant. He stated that a subdivision exercise and the act of planting trees on the suit property was evidence of a sale between the 1st and 2nd defendant. He contended that the 3rd to 5th defendant were witnesses to the sale. On cross examination, he asserted that some of his siblings owned other parcels of land that were distinct from the suit property.

7. The 2nd plaintiff testified as **"PW 2"**. He testified that Walter Odeny Agina was his grandfather and he had allocated to him a portion of land of the suit property and that the 1st defendant had sold this portion to the 2nd defendant. He testified that the 2nd, 3rd and 5th defendants were unknown to him while the 4th defendant was his area chief. He averred that he was neither present during the purported sale between the 1st and 2nd defendant nor did he see a sale agreement. He averred, that the suit property did not indicate the shares owned by the respective registered owners.

8. The plaintiffs led evidence by Nicholas Odhiambo Sogo [**PW 3**], Julius Okello Nyando [**PW 4**], Caroline Anyango Ouma [**PW 5**] and Leonard Rakuru [**PW 6**]. **"PW 3"** who was an area chief testified that he at one time assisted the family of Walter Odeny Agina in distributing the suit property amongst family members including the 2nd plaintiff. **"PW 4"** testified that he and the 1st defendant owned the suit property. **"PW 5"** testified that she lives on the suit property and that she came to know of the sale of a portion of the suit property when the 1st defendant brought purchasers and a surveyor to the suit property. **"PW 6"** testified that all the 5 sons of Walter Odeny Agina owned a portion of the suit property and that the 2nd plaintiff never settled on the land. He contended that the suit property was registered in the name of Walter Odeny Agina.

The defendants' case and evidence

9. The defendant's case is contained in their defence, joint witness statement, documents produced as **"P Exh 1", "2", "3, and "4"** and oral evidence tendered in court during the hearing.

10. The 1st defendant testified as **DW 1**. It was his testimony that the 1st plaintiff, his brother Ainea Odeny and the family of his brother Bernard Lweya Odeny were in occupation of the suit property. He contended that in 1976, his father Walter registered the suit property in three names; his [1st defendant's], Walter's and Bernard's.

11. His father had other parcels of land which he had registered in the names of his other sons; land parcel number **EAST GEM/URANGA 170** was registered in the name of the 1st plaintiff, land parcel number **EAST GEM/URANGA 531** was registered in the name of Abeneya Ouma Odeny, land parcel number **EAST GEM/URANGA 471** was registered in the name of George Nyangena. He produced as **"P Exh 1-4"** "green cards" as evidence of this. He testified he had neither sold the suit property nor undertaken succession proceedings on behalf of the estates of his father and Bernard Lweya Odeny and that the 2nd and 5th defendants were his in-laws and not purchasers.

12. He stated the 1st plaintiff had refused to vacate the suit property and move to his own parcel of land. He testified that his deceased siblings were buried on the suit property because culturally, they had not built on their own individual parcels of land. He contended that though he prepared a witness statement, the one filed in court contained a signature that was not his.

13. The 3rd defendant testified as **DW 2**. He testified that the 1st defendant is his clansman and he had no interest in the suit property. He stated he had neither recorded nor signed a witness statement.

14. The defendants led evidence by John Odongo Lwenya [**DW 3**] who was the son of Bernard Lweya. He testified that the suit property belonged to the 1st defendant and his deceased father and that his other uncles including the 1st plaintiff had their own parcels of land. He stated that the 1st defendant had never sold the suit property to anyone. He stated that the estate of his father had not been succeeded.

Plaintiff's submissions

15. The plaintiffs filed their written submissions dated 10/11/2021 in which they identified two issues for determination. The 1st issue was whether it was illegal to sell the property of a deceased person without a confirmed grant. On this, it was their testimony that the 1st defendant sold a portion of the suit property belonging to the 2nd plaintiff to the 2nd defendant who was a stranger to the estate of Walter Odeny Agina. They contended that the defendants' actions were illegal and amounted to interfering with the estate of a deceased person which was contrary to the provisions of **Section 45 (1) and 82 (b) (ii) of the Law of Succession Act**. They relied on the authority of **Jane Kagige Geoffrey & Another vs Wallace Ileri Njeru & 2 Others (2016) eKLR**.

16. The 2nd issue was whether the plaintiffs were entitled to injunctive orders pending the issuance of Letters of Administration to the estate of Walter Odeny Agina. They contended that they had made a case for the grant of the orders sought.

Defendants submissions

17. The defendants filed written submissions dated 29/11/2021. They narrowed their submissions to two issues that they identified for determination. The first issue was whether the 1st defendant had connived with the other defendants to appropriate the suit property to them. On this issue, they submitted that the plaintiffs had not adduced evidence that the 1st defendant had sold a portion of the suit property to the 2nd defendant and in any case, the court could not grant an injunction on an anticipated sale, if at all there was one. Further, they submitted that this court did not have jurisdiction to issue injunction in a matter that was purely a probate matter. On this issue, they placed reliance on

the case of **Article 162(2)(b) of the Constitution, Section 107 of the Evidence Act and Owners of the Motor Vessel “Vessel S” vs Caltex Oil (Kenya) Ltd [1989] eKLR.**

18. The 2nd issue was whether the plaintiffs were entitled to the reliefs sought. On this issue, they submitted that the defendants had produced evidence to demonstrate that all the sons of Walter Odeny Agina were each allocated a parcel of land and it was the intent of Walter Odeny Agina to ensure that each of his sons was provided for. They contended that plaintiffs intended to disinherit the 1st defendant. They urged the court to dismiss the suit with costs to the defendants.

Analysis and determination

19. I have considered the pleadings together with the parties’ respective submissions and evidence tendered together with the relevant legal frameworks and jurisprudence. The following are the key issues falling for determination: (i) Whether this court has jurisdiction to hear and determine the suit (ii) Whether the 1st defendant unlawfully dealt with the suit property and, (iii) Whether the plaintiffs are entitled to the orders sought in the plaint and, (iv) what order should be made on costs. I will sequentially make pronouncements on these four issues.

20. On the 1st issue, **Article 162 (2) (b) of the Constitution of Kenya 2010** has clothed this court with jurisdiction to hear and determine disputes relating to the environment and the use and occupation of and title to land.

This is buttressed by **Section 4 of the Environment and Land Court Act** which established the Environment and Land Court.

21. A case by case analysis of the facts of each case has to be considered in determining which court has jurisdiction and the predominance principle as elucidated in the case of **Suzanne Achieng Butler & 4 others vs Redhill Heights Investments Limited & another [2016] eKLR** has to be applied in making such a determination. The court in this case stated as follows on the issue of concurrent jurisdiction of the high court and courts of equal status;

“...When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test...”

22. From the evidence tendered in court, the main issue revolved around the sale of a portion of the suit property by the 1st defendant to the 2nd defendant. The plaintiffs have prayed for a declaration that the decision of the 1st defendant to sell the suit property without a Grant of Letters of Administration was illegal and for a permanent injunction restraining the Defendants, their employees, workers and agents from trespassing, partitioning, constructing, disposing, alienating and charging in any way the suit property. These issues squarely lie within the jurisdiction of this court.

23. On the 2nd issue, the evidence produced as **“P Exh 4” and “D Exh 4”**, shows that the suit property was registered in the name of the 1st Defendant, Walter Omondi Odeny [deceased], and Benard Lweya[deceased] as joint tenants.

24. From the pleadings, testimony and submissions, both parties have proceeded with this suit as if the suit property was a tenancy in common and not a joint tenancy. **The Land Act**, defines joint tenancy is defined as;

“a form of concurrent ownership of land where two or more persons each possess the land simultaneously and have undivided interest in the land under which upon the death of one owner it is transferred to the surviving owner or owners.”

25. According to **Halsbury Law of England Fifth Edition, 2012 Volume 87**, where land is granted to two or more persons for the same estate and where there are no words in the title document indicating that the registered owners hold separate interests, then that parcel of land is held as a joint tenancy.

26. Four main features mark this type of ownership: (1) the joint tenants own an individual interest in the property as a whole; each share is equal, and no one joint tenant can ever have a larger share. (2) the estates of the joint tenants are vested (meaning fixed and unalterable by any condition) for exactly the same period of time in this case, the tenant’s lifetime. (3) the joint tenants hold their property under the same title. (4) the joint tenants all enjoy the same rights until one of them dies. Under the right of survivorship, the death of one joint tenant automatically transfers the remainder of the property in equal parts to the survivors (*jus accrescendi*). When only one tenant is left alive (as is the case in this instance), he or she receives the entire estate. If the joint tenants mutually agree to sell the property, they must equally divide the proceeds of the sale.

27. **Halsbury Law of England Fifth Edition, 2012 Volume 87, page 162** states that the nature of joint tenants is that each joint tenant has an identical interest in the whole land and every part of it. The title of each arises by the same act. The interest of each is the same in extent, nature and duration.

28. Several features distinguish a joint tenancy from a tenancy in common. A tenant in common may have a larger share of property than the other tenants. The tenant is also free to dispose of his or her share without the restrictive conditions placed on a joint tenancy. In a tenancy in common, no other tenant in common is entitled to receive a share of the property upon a tenant in common’s death; instead, the property goes to the deceased’s heirs.

29. **Section 60 of the Land Registration Act** does not require a joint tenant to obtain Grant of Letters of Administration of the estate of a deceased joint tenant before he can deal with such a property. This section of law provides that upon the death of a joint tenant, the Land Registrar shall, upon proof of the death, cancel the name of the deceased tenant from the register by registering the death certificate. It

therefore follows, that upon the demise of Walter Omondi Odeny and the Benard Lweya the property solely devolved upon the 1st defendant as the sole proprietor and he was subject to the provisions of Section 60 of the Land Registration Act, free to exercise all rights that appertain to a sole proprietor including selling the suit property.

30. On the 2nd issue, it is trite law that he who asserts must prove. This adage was enunciated in the Court of Appeal decision of **Jennifer Nyambura Kamau vs Humphrey Mbaka Nandi NYR CA Civil Appeal No. 342 of 2010[2013] eKLR** as follows;

“We have considered the rival submissions on this point and state that section 107 and 109 of the Evidence Act places the evidential burden upon the appellant to prove that the signature on these forms belong to the Respondent. Section 107 of the Evidence Act provides that “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the Evidence Act provides, the burden lies on that person who would fail if no evidence at all were given on either side.

31. During their testimony the plaintiffs testified that the 1st defendant sold a portion of the suit property to the 2nd defendant. Even if this property was a tenancy in common, which it is not, the plaintiffs did not produce a Sale Agreement to discharge prove that such a sale took place. Looking at **“P Exh 4” and “D Exh 4”** the suit property is still registered in the names of the three joint owners and it has not been transferred to any person including the 2nd defendant.

It is the finding of this court on this issue that the plaintiffs have not proved that the 1st defendant sold a portion of the suit property to the 2nd defendant.

32. The court having come its findings on issues (i) and (ii), it therefore follows that the plaintiffs are not entitled to the orders sought in the plaint and in the absence of special circumstances, the general principle that costs follow the event will apply meaning the plaintiffs shall bear the costs of the suit.

33. Ultimately, the court finds that the plaintiffs have failed to prove their case against the defendants to the standard required by the law. The orders sought are declined and the plaintiff shall bear the costs of the suit.

JUDGMENT DELIVERED VIRTUALLY.

DATED, SIGNED AND DELIVERED THIS 10TH DAY OF FEBRUARY 2022

In the presence of:

M/S Mwangi for the Plaintiff.

M/S Nabifo holding brief for Mr Madialo

Court Assistant: Ishmael

HON. A. Y. KOROSS

JUDGE

10/2/2022