



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL CASE NO. 204 OF 2009

MICHAEL OCHIENG MBUYA.....PLAINTIFF

-VERSUS-

JACOB OJWANG OJWANGDEFENDANT

JUDGMENT

The matter before court is for formal proof. It relates to property **L. R. NO. NORTH UGENYA/UYUNDO/337**. The plaintiff **MICHAEL OCHIENG MBUYA** moved the court by way of a plaint against the defendant **JACOB OJWANG**. The plaintiff contents that the property subject matter was initially registered in the name of his grandfather one **TITUS ADA MBUYA** (deceased) and the defendant's father one **JOANESS OJWANG** (deceased). That upon the plaintiff's grandfather's death the defendant's father maliciously and fraudulently registered the whole parcel in his name. The plaintiff seeks for judgment as against the defendant as follows:-

- a) **A mandatory order declaring the plaintiff as the absolute owner of ½ share of land known as NORTH UGENYA/UYUNDO/337 and anyone occupying the suit land to vacate forthwith.**
- b) **A mandatory order directing the defendant to surrender the title document for land NO. NORTH UGENYA/UYUNDO/337 to the plaintiff to enable him obtain the title for his share of the suit land.**
- c) **Costs and interest.**

The defendant was served with the summons. He failed to enter appearance. He did not file defence either. On the 4th of February, 2010 judgment was entered against the defendant.

On the 2nd of March, 2010 the Advocate for the plaintiff drew up issues for determination as follows:-

- 1. Whether the late Titus Ada Mbuya and late JOANES OGWANG/father tot eh defendant were the first registered owner of Plot. NORTH UGENYA/UYANDO/337 when they owned ½ undivided share of the suit land.**
- 2. Whether JOANNES MBUYA (father to the defendant maliciously and fraudulently registered the whole of the land**

NO. NORTH/UGENYA/337 in his sole name without considering the interest of defendant of late ADA MBUYA who should have inherited ½ share of sit land initially owned by ADA MBUYA.

3. Whether the defendant registered the suit land in his name in complete disregard of the dependants of the late ADA MBUYA.

4. Whether the defendant took over the ½ share interest of land owned by ADA MBUYA without the consent of the defendant to the deceased.

5. Whether defendant posed as the sole beneficiary of the estate of the late MBUYA and subsequently acquired his ½ share of the suit land.

6. Whether the defendant took over and registered the land owned by the plaintiff grandfather in his name without following the procedure laid down in law.

7. Whether the defendant obtained and registered the land owned by ADA MBUYA without securing letter of administration.

8. Whether the defendant conspired to remove the name of the 1st registered owner of suit land from the registration record in complete disregard of the previous of RLA.

9. Whether the defendant misled the land registrar and transferred the land owned by the deceased in disregard of the transmission rules.

10. Whether the court has jurisdiction to hear and determined the suit.

11. Whether there is a previous suit in court between parties herein regarding the same matter.

12. Whether the plaintiff served the defendant with a notice to vacate the ½ share of the suit land.

The plaintiff was the sole witness in the formal proof. It was his evidence that he was the son of **BENEDICT MBUYA ADA**. His grandfather was **TITUS ADA MBUYA (deceased)**. The plaintiff obtained grant of letters of administration to the estate of his grandfather on 30th December, 2009. It was his evidence that in 1970 his grandfather was first registered as owner of the property and later in 1973 the property was sub-divided and his grandfather **TITUS ADA** and his brother **JOANES OJWANG** each got registered as owner of ½ shares. He testified further that in 1988 without consulting the plaintiff the defendant further sub-divided Parcel number **UGENYA/UYUNDO/337** into Parcel number **UGENYA/UYUNDO/585** and **UGENYA/UYUNDO/586**. Parcel number **UGENYA/UYUNDO/585** was registered in the defendant's name. Parcel number **586** is in the name of **ELMONDO OTIENDE** who is not a family member.

The plaintiff stated that his family members totaling 20 do not have a place to stay and he now seeks a share of his family in Parcel number **UGENYA/UYUNDO/585** currently registered in the name of **JOANES OJWANG**. He also sought for costs of the suit.

Evidence on record shows that on the 6th April, 1970 the plaintiff's grandfather **ADA MBUYA** and **JOHANES OJWANG** his brother were registered as the owners of the undivided land subject matter being **NORTH UGENYA/UYUNDO/337** measuring approximately 9.6 hectares. The land was later sub-divided into two halves and remained in the two names. **JOANES OJWANG** died in 1988. In 1998 the green card shows that there was succession and on 25th May, 1999 the

property subdivided into parcel number 585 & 586.

From the evidence on record Parcel number **UGENYA/UYUNDO/586** may have been sold to a third party so that what remains of 337 is parcel number **UGENYA/UYUNDO/585** in the name of the defendant's father. The plaintiff brought this suit for and on behalf of the estate of his grandfather.

The court finds that the defendant sub-divided property **L. R. NORTH UGENYA/UYUNDO/337** in total disregard of the interest and share of the family of **TITUS ADA MBUYA (deceased)** who owned half of the same. He sub-divided the same into Parcel no. **Parcel number UGENYA/UYUNDO/585** and 586 disposing of 586. The plaintiff is entitled on behalf of his grandfather's family to $\frac{1}{2}$ shares of **Parcel number UGENYA/UYUNDO/337**. I accordingly enter judgment for the plaintiff as follows:-

a) A declaration that the plaintiff being the administrator of the estate of TITUS ADA MBUYA is the absolute owner of property 585 being a portion of 337 and holds the same for and on behalf of the beneficiaries of the estate of TITUS ADA MBUYA.

b) An order directing the defendant to surrender title number UGENYA/MBUYA/585 being a portion of 337 to the plaintiff.

c) An order directing the District Land Registrar to register the plaintiff in terms of (a) above.

d) Costs and interest.

DATED AND DELIVERED IN KISUMU ON 11.02.2011.

ALI-ARONI

JUDGE

In the presence of:

..... for the plaintiff

..... for the defendant