



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Ojwang, J.)

CIVIL CASE NO. 61 OF 2010

1. FLORENCE NGAO JEREMIAH

2. CYLINA NITUJI NGAO.....PLAINTIFFS/
APPLICANTS

[Suing as the Administrators of the Estate of Moses Tsuma

Ngao]

-VERSUS-

STEPHEN JEREMIAH MGUTEDEFENDANT/
RESPONDENT

RULING

The applicants came before the Court by Chamber Summons dated **8th March, 2010** and brought under Order **XXXIX**, rules 1 and 9 of the Civil Procedure Rules, and ss.3A and 63 (e) of the Civil Procedure Act (Cap.21, Laws of Kenya). The application carries one substantive prayer:

“That the defendant/respondent either by himself or his servants or agents be stopped by temporary injunction from demolishing the building called Huduma Bar situate at Plot No. Kilifi/Chilulu/515 Kaloleni and from transferring to himself the said plot which the defendant owns with the late Moses Tsuma Ngao pending the hearing and determination of the suit.”

The grounds for the application are, in summary, as follows:

(i) ***the defendant has partially demolished the building called Huduma Bar situate on plot NO. Kilifi/Chilulu/515 Kaloleni which building belongs to the late Moses Tsuma Ngao who was husband and father of, respectively, 1st and 2nd plaintiffs;***

(ii) ***the said plot is owned by the defendant and the late Moses Tsuma Ngao;***

(iii) ***the 1st and 2nd plaintiffs are the Administrators of the intestate estate of the late Moses Tsuma Ngao and entitled to a portion of the assets of the deceased which assets include the said building and the plot, respectively;***

(iv) ***the action of the defendant is aimed at dispossessing the heirs of the deceased of the***

said plot;

(v) *the application herein shall be rendered nugatory if the orders prayed for are not granted;*

(vi) *orders should be granted to preserve the intestate estate of the deceased.*

Florence Ngao Jeremiah, for herself and for her co-administrator, swore a supporting affidavit on **8th March, 2010**. The deponent avers that the late **Moses Tsuma Ngao** was her husband, and 2nd plaintiff's father; that the applicants have jointly obtained letters of administration for the deceased's estate; that part of the said estate is a building known as Huduma Bar, on Plot No. Kilifi/Chilulu/515 situate at Kaloleni which the deceased had co-owned with the defendant; that the defendant has been opposed to her occupying a portion of the said plot, and he had partially demolished the building thereon, with the intention of dispossessing the heirs of the late **Moses Tsuma Ngao** who was his brother, of the plot; that the defendant had in the course of 2006 and 2007, engaged in correspondence that shows him to be intent on appropriating the suit premises, to the exclusion of the deceased's beneficiaries; that on **31st October, 2009** the defendant started demolishing the said building known as Huduma Bar; that the defendant has no right to demolish the said building or to deny the heirs of the late **Moses Tsuma Ngao** a portion of the suit premises.

The defendant swore a replying affidavit on **16th April, 2010**, deposing that the plaintiffs have come to Court without disclosing all the material facts; that he has not partially demolished Huduma Bar; that he had not denied the plaintiffs access to the suit premises; that he had learnt in 1986 that the Agricultural Finance Corporation was selling the suit premises; that he agreed to purchase the suit premises; that the deponent paid the Agricultural Finance Corporation Kshs. 30,000/= and was issued with a receipt for the same; that the General Manager of Agricultural Finance Corporation sent the land certificate for the suit property as well as a transfer form to the branch manager Mombasa, on **18th September, 1986** for onward transmission to the deponent; that the deceased's name was only included in the land certificate after the deponent's instructions to the General Manager of Agricultural Finance Corporation to include that name.

The deponent believes to be true the advice of his counsel, that "since the suit land is jointly owned by the deceased (**Moses Tsuma Ngao**) and myself, the plaintiffs herein cannot purport to have a right to inherit a share of the suit land as I became the sole owner of the whole interest or right in the suit land on the death of my brother". The deponent avers that he has "never ever ...denied the plaintiffs or other heirs of the estate of ...the deceased....access to the suit parcel of land..."

The deponent avers that the confirmed grant of letters of administration in the names of the plaintiffs, dated **13th October, 2004** does not show the suit premises to be part of the estate of the deceased.

The deponent deposed that 1st plaintiff, with all members of her family, had of their own volition, abandoned the properties they owned on the suit land, including the said Huduma Bar, and this building had fallen into "a serious state of disrepair as a result of which the roof and walls fell....and only ruins remained...; and consequently, there was no building to be demolished on **31st October, 2009** as claimed by the plaintiffs."

The deponent averred that the deceased's estate was not without any property, as the deceased, before his death, had purchased a farm at a place known as Mwachigalu, at Kaloleni.

Florence Ngao Jeremiah filed a supplementary affidavit dated **3rd May, 2010**, averring that the said Huduma Bar was still in a good state "when the respondent started to demolish it"; that "the respondent has objected to the family members of the deceased having access to and/or [harvesting] [on the] half portion of the suit property which by law devolves to the heirs of the deceased herein". The deponent averred that the vital fact about the suit property, was that "the property was and remains registered in the names of the respondent and the deceased respectively"

Counsel for the plaintiff, **Mr. Odhiambo** submitted that the plaintiff's claim in the suit is for equal sub-division of the suit property, for a permanent injunction, and for the repair of the building known as Huduma Bar.

Learned counsel submitted that the documentation annexed to the supporting affidavit nowhere specifies that the suit property "is jointly owned and the title...shows that both the defendant and the deceased are the absolute proprietors of the suit property."

Counsel submitted that "it is trite law that where it is not expressly indicated in the transfer/certificate of title/title deed that a parcel of land is jointly owned as is the case herein, then, the same is owned in common, meaning [that] each co-owner has a share in the property".

Counsel urged that the plaintiff's application meets the requirements for the grant of injunction, as set out in the standard-setting case, **Giella v. Cassman Brown** [1973] EA 358; and that making such a grant "will go a long way in preserving the suit property pending the hearing and determination of the suit."

Counsel submitted that the plaintiffs cannot be compensated by way of damages if injunctive orders were not granted, because "a portion of the suit property belongs to the deceased....and the plaintiffs are entitled to the same pursuant to the provisions of the Law of Succession"; and that the contention that 1st plaintiff owns some other parcel of land elsewhere "cannot be used as a ground to disentitle the plaintiffs and the other heirs to the deceased estate".

Learned counsel urged the point of principle in **gender** and **cultural equity**, that —

"the era when in-laws and uncles/[aunts] dispossessed the deceased's [widow] and/or children of [the] deceased's property is long gone, and this.....Court should not allow the defendant herein to dispossess the plaintiffs of part of the deceased's estate, being half-portion of the suit property".

The defendant's counsel, **Mr. Lewa**, began by contesting format –elements in the application, and ended up disputing the submission that the plaintiffs were entitled to injunctive orders, on the basis of the tests in **Giella v. Cassman Brown**.

Mr. Lewa restated the aspect of his client's evidence which showed that "he solely acquired the suit property", but without denying the more legally-significant fact that "it is not disputed that the defendant/respondent and **Moses Tsuma Ngao** (deceased) are the registered owners of the suit land"; in like manner, counsel restated his client's deposition that "the defendant clearly asked for [the deceased] to be registered alongside himself as joint – owners of the suit land", but without detracting from the legally material fact that "it is clear... the suit land herein is jointly owned by the defendant and [the deceased]."

Without any illumination of the claimed "joint-ownership", and notwithstanding that learned counsel **Mr. Odhiambo** had rested the applicant's case on this very point, **Mr. Lewa** wended his way to the conclusion that —

"As a consequence of the suit being jointly owned, it is trite law that the rules of intestacy do not apply to it".

Counsel came to this conclusion without building a relevant fact –basis, and without citing any guiding judicial authority; he went on to assert:

"This means that on the death of Moses Tsuma Ngao..., the defendant/respondent herein became the sole owner of the whole interest in the suit land herein."

There is a reason why such a conclusion by learned counsel, with respect, lacks conviction and may not represent a correct statement of principle. The 1st plaintiff placed evidence before the Court, in the form of a letter by M/S Lewa & Associates Advocates dated **13th April, 2010** and copied to M.S Odhiambo S.E. & Co., Advocates, stating that the defendant had thus enquired of the Kilifi/Kaloleni Land Registrar:

“Kindly but urgently let us know whether the parcel of land herein [L.R No. Kilifi/Chilulu/515] is owned by our client and the late Moses Tsuma Ngao as joint-proprietors or as proprietors in common. Further, just in case the parcel of land is owned by the two as proprietors in common, what are their respective shares in the same?”

Mr. Lewa has not produced before the Court the advice which he is to be taken to have duly received from the said Land Registrar; and learned counsel **Mr. Odhiambo** urges that the failure to lay that answer before the Court, signifies bad faith, and should be construed against the defendant. But learned counsel **Mr. Lewa** went on courageously to submit, against that background of fact, that “the plaintiffs cannot purport to have any interest in the suit land in any way”

Mr. Lewa submitted that the plaintiffs “have failed to demonstrate to the ...Court that they shall suffer loss...if the orders they are seeking are not granted”, and he urged that “the plaintiffs do not stand to suffer loss which cannot be [compensated] by way of damages if [the] orders sought herein are not granted”.

It is common cause that the suit property is registered in the names of the defendant **and** the deceased. The deceased died sometime in 2002 or so and his remains were interred **on the suit premises**, where he had also constructed structures including the said Huduma Bar; he left these structures under the control of his widow and children. What, now, are the rights of the said widow and children, to the deceased’s entitlement to the suit property?

The defendant contends that once the deceased died, his heirs had no further interest in the suit land, because there was **joint –ownership** between only the deceased and the defendant, and so the defendant alone, by virtue of the **benefit of survivorship**, became the owner of the whole property, to the exclusion of the deceased’s heirs.

This, clearly, is a point of **law** in respect of which the defendant in particular should have provided all relevant **facts** in good faith, and buttressed his case with **authority**. A clear statement of the law on this question will dispose of the substance of the contest.

This Court, in the incremental growth of decisional law and equity, gives guidance on the basis of principles; and such principle is to be progressive, in terms of social interests, and in keeping with the directions of human needs.

The **Constitution of Kenya, 2010** in Article 159 (2) (e) provides that —

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles

.....
(e) **the purpose and principles of this Constitution shall be protected and promoted.”**

On the “purposes and principles of the Constitution,” Article 10 provides for “national values and principles of governance,” and the relevant values for the purpose of the instant matter are set out in Article 10 (2) (b):

“human dignity, equity, social justice, inclusiveness, equality, human rights, non - discrimination and protection of the marginalized”

I am not in agreement with learned counsel **Mr. Lewa**, that in this matter, the Court should disregard learned counsel **Mr. Odhiambo**’s invocation of cultural and gender equity. **Equity** will have taken leave, if the deceased’s widow (1st plaintiff) were to be deprived of part of the deceased’s estate, on the basis that such portion of the estate was **jointly** annexed to the defendant’s share, and therefore the defendant must take it all. Similarly, the concept of **joint-ownership** will not be used to advance the unequal cultural situation in which the 1st plaintiff’s in-laws take all the property which she had enjoyed when her husband was alive.

The foregoing principles are to inform this Court's understanding of the functioning of the concepts of ***joint-ownership***, and ***ownership-in-common***.

As it is ownership-in-common, rather than joint-ownership, that leads to more equity and social justice, in a case such as this one, it is to be held that where the symbols of collective ownership are not free of ambiguity, then the Court is to infer ownership-in-common, with each of the individual co-owners having separate individual shares, to devolve in succession with the rest of the estates of such co-owners.

Consequently, I hold that the deceased's share of the suit property shall devolve to his heirs, together with the remainder of his intestate estate.

I allow the plaintiff's application by Chamber Summons of ***8th March, 2010***. The defendant shall bear the plaintiff's costs.

Orders accordingly.

DATED and DELIVERED at MOMBASA this 12th day of November, 2010.

J. B. OJWANG

JUDGE

Coram: ***Ojwang J***

Court Clerk: ***Ibrahim***

For the plaintiffs/applicants: ***Mr. Odhiambo***

For the Defendant/Respondent: ***Mr. Lewa***