



Omondi v Ushirika Flats Company Unlimited & another; Harambee Sacco Savings Society (Formally known as Harambee Cooperative Savings Society) (Interested Party) (Environment and Land Miscellaneous Application E046 of 2021) [2022] KEELC 13837 (KLR) (23 September 2022) (Judgment)

Neutral citation: [2022] KEELC 13837 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E046 OF 2021
JO MBOYA, J
SEPTEMBER 23, 2022

BETWEEN

JOHN BAYLON PIUS OMONDI APPLICANT

AND

USHIRIKA FLATS COMPANY UNLIMITED 1ST RESPONDENT

CHIEF LAND REGISTRAR 2ND RESPONDENT

AND

**HARAMBEE SACCO SAVINGS SOCIETY (FORMALLY KNOWN AS
HARAMBEE COOPERATIVE SAVINGS SOCIETY) INTERESTED PARTY**

JUDGMENT

B ackground

1. Vide the amended originating summons dated the December 9, 2021, the applicant herein has approached the court seeking for the following reliefs;
 - i. Spent.
 - ii. The 2nd respondent be directed to register the transfer and/or process the title documents with respect to the suit property title number Nairobi/Block 104/515 Flat Block G Door 5 in favor of the applicant.
 - iii. In the alternative to prayer 2, the deputy registrar of this honourable court be directed to execute all necessary documents and transfer instruments on behalf of Ushirika flats Company



Unlimited (the 1st respondent) in relation to the transfer of the property title number Nairobi/Block 104/515 Flat Block G Door 5 to the plaintiff.

- iv. This honourable court be pleased to issue any other orders it deems necessary and just.
- v. The costs of this application be provided for.
2. The originating summons herein is premised on the various grounds that are enumerated in the body thereof and same is further supported by the affidavit of the plaintiff herein sworn on the December 9, 2021.
3. Following the filing of the subject originating summons, same was duly served upon the respondents and the interested party herein. However, despite having been duly served with the originating summons, only the interested party entered appearance and filed a replying affidavit.
4. Nevertheless, the respondents herein neither entered appearance nor filed any responses and hence, the originating summons has not been controverted on the part of the respondents.

Deposition by the parties:

a. Plaintiff's case

5. Vide supporting affidavit sworn on the December 9, 2021, the deponent has averred that same is the duly appointed and constituted legal administrator of the estate of one Austin Paul Odhiambo Omondi, now deceased. For clarity, the deponent has clarified that same procured and obtained grant of letters of administration and thus same is authorized and/or mandated to act on behalf of the deceased.
6. Further, the deponent has averred that the deceased herein entered into a sale agreement with the interested party and which agreement was dated the December 31, 1993, whereupon the interested party covenanted to and indeed sold to the deceased, a house standing on LR No Nairobi/Block 104/273.
7. Pursuant to the foregoing, the deponent has added that upon the execution and entry into the said agreement in respect of the mother title, a sub-lease was duly prepared and executed between the sub-lessor, namely, Ushirika Flats Company Ltd and the deceased.
8. Subsequently, it has been contended that the sub-lease that was created and which was to be transferred to and in favor of the deceased, related to and was in respect of LR No Nairobi/Block 104/519. However, the deponent has added that before the sub-lease could be transferred and registered in the name of the deceased, the deceased passed on.
9. The deponent has also averred that upon the death of the deceased, same proceeded to and took out grant of letters of administration over and in respect of the estate of the deceased.
10. Upon being granted and/or issued with the grant of letters of administration, the deponent herein has averred that same commenced the process of transferring the various assets of the deceased, inter-alia, the sub-lease in respect of LR No Nairobi/Block 104/519.
11. Be that as it may, the deponent has added that whilst in the course of effecting the various transfers, pertaining to and/or concerning the estate of the deceased, same was advised that the suit property herein could not be acted upon on the basis of the grant of letters of administration.



12. On the other hand, the deponent has also stated that same was advised that the suit property herein having not been transferred and registered in the name of the deceased, it was incumbent upon the deponent to file a suitable court case and thereafter procure an appropriate order.
13. To this end, the deponent has stated that same was therefore enjoined to and indeed sought for legal advise from his advocates on record.
14. Owing to the foregoing, the deponent has testified that same thereafter proceeded to and filed the subject suit, with a view to procuring and or obtaining appropriate orders to compel the respondent to facilitate the transfer and registration of the suit property into his name.
15. Nevertheless, despite the filing and service of the originating summons, the deponent has contended that the respondents have remained adamant and non-committal.
16. In view of the foregoing, the deponent has thus sought that the honourable court be pleased to issue and grant the reliefs sought on the face of the subject originating summons.

Submissions by the parties:

17. On behalf of the plaintiff, counsel submitted that the plaintiff herein was duly appointed and constituted as the legal administrator of the estate of the deceased. Consequently, it was pointed out that by virtue of being the legal administrator of the estate of the deceased, the plaintiff herein is duly mandated to act for and or on behalf of the deceased.
18. Secondly, counsel added that the deceased had entered into a sub-lease over and in respect of LR No Nairobi/Block 104/519 with Ushiririka Flats Ltd, whereby same undertook to transfer and register the suit property to and in favor of the deceased.
19. Nevertheless, counsel contended that prior to and or on before the transfer and registration was effected, the deceased herein passed on. In this regard, it has been stated that the intended transfer was therefore not effected in favor of the deceased.
20. Notwithstanding the foregoing, counsel has submitted that by virtue of being the duly appointed legal administrator of the estate of the deceased, the plaintiff herein is therefore entitled to the transfer of the suit property in his name, to hold for himself and on behalf of the other beneficiaries of the estate of the deceased.
21. In a nutshell, counsel for the plaintiff added that unless the suit property, is transferred and registered in the name of the legal administrator, the estate of the deceased would be deprived of the benefits attendant to and arising from the suit property. Consequently, counsel implored the honourable court to proceed and grant the orders sought.
22. On her part, the interested party herein confirmed that indeed same entered into and executed a sale agreement over and in respect of a portion of LR No Nairobi/Block 104/273, Flat No C Block G, Door G5 with the deceased and the sale agreement was duly executed by the parties.
23. It was further conceded that after the entry into and execution of the sale agreement, the interested party herein caused the flats to be transferred to the 1st respondent, who ultimately executed a sublease with the deceased.
24. Based on the forgoing, it is the submission of the interested party that the person who currently holds the title over and in respect of the sublease for LR No Nairobi/Block 104/519 is the 1st respondent and hence it is same who ought to effect the transfer of the suit property to and in favor of the plaintiff.



Issues for determination:

25. Having reviewed the amended originating summons, the affidavit in support thereof and the documents filed therewith; and having considered the submissions made by the parties, the following issues do arise and are thus germane for determination;
- i. Whether the plaintiff is the duly constituted legal administrator of the estate of the deceased and if so, whether same is seized of the capacity to act on behalf of the deceased.
 - ii. Whether the orders sought over and in respect of the suit property ought to be granted.

Analysis and determination :

Issue number 1 whether the plaintiff is the duly constituted legal administrator of the estate of the deceased and if so, whether same is seized of the capacity to act on behalf of the deceased.

26. The plaintiff herein has contended that upon the death of one Austin Paul Odhiambo Omondi, same filed and or lodged succession proceedings vide Kisumu HCC No 20 of 1997, whereby same sought to be issued with the requisite grant of letters of administration.
27. Subsequently, the plaintiff has contended that the court proceeded to and processed the succession documents, culminating into the eventual issuance of the grant of letters of administration. For clarity, the grant of letters of administration was issued on the July 27, 1998.
28. On the other hand, the plaintiff added that upon the issuance of the grant of letters of administration, same thereafter applied for and obtained the requisite certificate of confirmation of grant. In this regard, it was clarified that the certificate of confirmation of grant was issued on the October 23, 2009.
29. Suffice it to point out, that upon the issuance of the certificate of confirmation of grant, the plaintiff herein was duly constituted as the lawful administrator of the estate and same was similarly conferred with the mandate to hold all and any properties which were hitherto registered in the name of the deceased.
30. To the extent that the plaintiff has since been issued with the grant of letters of administration, it is therefore settled that same is by law authorized to procure and obtain transfer and registration of any property that belonged to the deceased or which ought to have been transferred and registered in the name of the deceased.
31. In the premises, I find and hold that the plaintiff herein is seized and or possessed of the requisite capacity to procure and cause the subject property to be transferred to and registered in his name.
32. To this end, it is imperative to take cognizance of the provisions of section 82 of the [Law of Succession Act](#), Cap 160 Laws of Kenya, which provides as hereunder;

82. Powers of personal representatives

Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers-

- (a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;
- (b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:



Provided that-

- (i) any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and
- (ii) no immovable property shall be sold before confirmation of the grant;
- (c) to assent, at any time after confirmation of the grant, to the vesting of a specific legacy in the legatee thereof;
- (d) to appropriate, at any time after confirmation of the grant, any of the assets vested in them in the actual condition or state of investment thereof at the time of appropriation in or towards satisfaction of any legacy bequeathed by the deceased or any other interest or share in his estate, whether or not the subject of a continuing trust, as to them may seem just and reasonable to them according to the respective rights of the persons interested in the estate of the deceased, and for that purpose to ascertain and fix (with the assistance of a duly qualified valuer, where necessary) the value of the respective assets and liabilities of such estate, and to make any transfer which may be requisite for giving effect to such appropriation:

Provided that, except so far as otherwise expressly provided by any will-

- (i) no appropriation shall be made so as to affect adversely any specific legacy;
- (ii) no appropriation shall be made for the benefit of a person absolutely and beneficially entitled in possession without his consent, nor for the purpose of a continuing trust without the consent of either the trustees thereof (not being the personal representatives themselves) or the person for the time being entitled to the income thereof, unless the person whose consent is so required is a minor or of unsound mind, in which case consent on his behalf by his parent or guardian (if any) or by the manager of his estate (if any) or by the court shall be required.

33. In a nutshell, I find and hold that the plaintiff herein has the requisite legal capacity to commence, mount and or maintain the subject proceedings on behalf of the estate of the deceased.

34. Additionally, I also find and hold that upon the confirmation of the grant, the plaintiff is entitled to the transfer and registration of the suit property in his name, albeit to hold same on trust for himself and the other beneficiaries of the estate of the deceased, subject to the terms of the certificate of confirmation of grant

Issue number 2 whether the orders sought over and in respect of the suit property ought to be granted.

35. During his lifetime, the deceased herein entered into and executed a lawful sublease over and in respect of LR No Nairobi/Block 104/519, Flat G Door 5, with the 1ST respondent herein. In this regard, the lease was crafted, signed and executed by all the concerned parties.

36. Pursuant to the duly executed sublease, it behooved the 1st respondent herein to facilitate the transfer and registration of the deceased as a sublease, particular as concerns the named house, which had been duly sold to and in favor of the deceased.



37. Nevertheless, prior to and or before the named house falling in within the suit property could be transferred and registered in the name of the deceased, same passed on and hence the intended transfer and registration was halted.
38. Be that as it may, it is important to note that the deceased had fully paid all the requisite consideration pertaining to and/or concerning the named house. Consequently, the ownership rights over and in respect of the named house had accrued to and in favor of the deceased.
39. Given the foregoing, the legal administrator of the estate of the deceased, who now acts on behalf of the deceased, is therefore legally entitled and authorized to partake of the named house falling within the suit property, which by law belonged to the estate of the deceased.
40. In view of the foregoing, it is therefore appropriate to direct the 1st respondent herein to facilitate the transfer and registration of the named house, that is, Flat Block G Door 5, on LR No Nairobi/Block 104/519 to the Plaintiff herein, in fulfilment of the obligations underlined at the foot of the leased agreement which was duly executed and engrossed between the parties.
41. In a nutshell, there is no gainsaying that the plaintiff herein is lawfully entitled to the transfer and registration of the designated house, situate to the suit property to himself.

Final disposition:

42. Having addressed and/or dealt with the itemized issues, which were highlighted in the body of the judgment herein, it is imperative to observe and state that the plaintiff herein has indeed established that same is entitled to the reliefs sought vide the originating summons.
43. In the premises, I find and hold that the subject suit is meritorious and same be and is hereby allowed.
44. Consequently and in the premises, I enter judgment in favor of the plaintiff as hereunder;
 - i. The 1st defendant herein be and is hereby ordered to execute the relevant transfer of lease over and in respect of Nairobi/Block 104/519, Flat Block G Door 5 and thereafter cause same to be transferred and registered in the name of the plaintiff herein.
 - ii. The execution of the requisite transfer of lease, details in terms of clause (i) hereof, shall be carried out and or undertaken by the 1st defendant within 30 days from the date of the judgment.
 - iii. In default the 2nd defendant herein, be and is hereby directed to facilitate the transfer and registration and/or otherwise entry of the plaintiff's name onto the register as the lawful proprietor of Flat Block G Door 5 .
 - iv. In the event that the 2nd defendant is unable to effectuate the transfer of Nairobi/Block 104/519, house No Flat Block G Door 5 , without a duly executed transfer of lease, the deputy registrar of this honourable court shall proceed and execute the requisite transfer of lease and the incidental documents, to facilitate the effective transfer and registration of Nairobi/Block 104/519, Flat Block G Door 5 in favor of the plaintiff.
 - v. Each party shall bear own costs.
45. It so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2022.

OGUTTU MBOYA



JUDGE

In the Presence of;

Kevin Court Assistant

Mrs Effie Omondi for the Plaintiff.

Mrs Aisha for the Interested Party.

No appearance for the Defendants

