



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. CASE NO. 148 OF 2015**

**CHARLES M M ONDIEKI.....PLAINTIFF**

**VERSUS**

**J N KAHURA.....1<sup>ST</sup> DEFENDANT**

**ZAKARIA MWAGHADI.....2<sup>ND</sup> DEFENDANT**

**B O F ODONGO.....3<sup>RD</sup> DEFENDANT**

**EDWIN J MURUKA.....4<sup>TH</sup> DEFENDANT**

**KENNETH ADUDA.....5<sup>TH</sup> DEFENDANT**

**J M ABERE.....6<sup>TH</sup> DEFENDANT**

**EVA MUNGA.....7<sup>TH</sup> DEFENDANT**

**PATRICK KULOBA.....8<sup>TH</sup> DEFENDANT**

**JAIRUS OMBUL.....9<sup>TH</sup> DEFENDANT**

**KENYA INDUSTRIAL RESEARCH & DEVELOPMENT INSTITUTE (KIRDI)....10<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. In the Complaint dated 14<sup>th</sup> May, 2015, the Plaintiff averred that the 1<sup>st</sup> to 9<sup>th</sup> Defendants were registered jointly as tenants in common in equal shares over land known as L.R. No. 12715/681; that pursuant to the provisions of Section 23 of the Registration of Titles Act (*repealed*), the Grant that was issued constituted and continues to constitute conclusive evidence that he is the absolute owner of the said land as a tenant in common and in equal share and that he is entitled to quiet possession and enjoyment of the same.

2. The Plaintiff averred that they agreed that the 1<sup>st</sup> Defendant should be the custodian of the original title document on behalf of all the tenants in common pending the sub-division of the suit property and registration thereof and that the 1<sup>st</sup> to 9<sup>th</sup> Defendants have been unable to agree on the mode of distribution of the suit property despite his concerted efforts to complete the sub-division of the suit property.

3. According to the Plaintiff, the Defendants have commenced the sub-division and construction of the suit property without involving him and that the 1<sup>st</sup> to 9<sup>th</sup> Defendants have distributed amongst themselves prime parcels of land.

4. The Plaintiff is seeking for the following orders:

*a) An order that the Defendants jointly and severally be strictly enjoined and restrained whether by themselves their servants, agents or otherwise howsoever from alienating, constructing or continuing with the construction of any structures and/or in any way whatsoever interfering with the Plaintiff's quiet possession and equitable fractional share over all that piece of property Known as L.R. No. 12715/681 Grant Number I.R No. 47931 issued under the Registration of Titles Act, Cap 281.*

b) *Sub-division and equitable partition of the suit property L.R. No. 12715/681 Grant Number I.R No. 47931 in terms of the Registration status of the property.*

c) *Consequent to the grant of prayer (a) and (b) above, resurvey of the suit property L.R. No. 12715/681 Grant Number I.R No. 47931 and allocation of an equitable 1/10<sup>th</sup> share of the said suit property to the Plaintiff.*

d) *Costs of this suit.*

e) *Interest on (c) above.*

f) *Any other further relief this Honourable Court may deem fit and just to grant in the circumstances.*

5. Although the 1<sup>st</sup> to the 9<sup>th</sup> Defendants entered appearance through their advocate, they did not file a Defence. The 10<sup>th</sup> Defendant filed a Defence in which it averred that it is not registered as a tenant of the subject suit and has never entered into any Sale Agreement hereof and that it is, therefore, wrongly joined as a party to these proceedings.

6. The 10<sup>th</sup> Defendant averred that it only facilitated the purchase of the subject property by its employees and as a facilitator, its role became extinct after the successful purchase of the suit property; that it only advanced credit to its employees who are now the current joint tenants to purchase the subject property and that it recovered the purchase price from each tenant's salary through monthly deductions and cannot take liability for any subsequent disagreements among the parties.

7. The 10<sup>th</sup> Defendant further stated that the suit is time barred and should be struck out and that the suit raises no cause of action against it as exhibited in the prayers sought by the Plaintiff herein.

8. The Plaintiff, PW1, informed the court that the 1<sup>st</sup> to 9<sup>th</sup> Defendants were his colleagues at the 10<sup>th</sup> Defendant's work place; that the 10<sup>th</sup> Defendant supervised the purchase of the suit property by the 1<sup>st</sup> to 9<sup>th</sup> Defendants jointly and that it is the 10<sup>th</sup> Defendant that financed the purchase of the suit property by the 1<sup>st</sup> to 9<sup>th</sup> Defendants.

9. It was the evidence of PW1 that on 22<sup>nd</sup> October, 1997, they were registered as tenants in common for land L.R. No. 12715/681; that they appointed the 1<sup>st</sup> Defendant to be the custodian of the original title document and that the Defendants have agreed on the mode of sharing the suit property. The Plaintiff produced in evidence various documents including the copy of the title for L.R. No. 127/681 (*the suit property*). The Defendants did not testify in this matter.

10. The Plaintiff's advocate submitted that the title to the suit property was issued on the 22<sup>nd</sup> day of October, 1997 indicating that the Plaintiff and the 1<sup>st</sup> to 9<sup>th</sup> Defendants were tenants in common in equal shares; that the 10<sup>th</sup> Defendant sourced, negotiated and signed the transfer document on behalf of the ten Co-owners of the suit land and that the 10<sup>th</sup> Defendant further facilitated the issuance of the Title Deed as demonstrated in the various correspondences.

11. The Plaintiff's advocate submitted that the Plaintiff owns ½ an acre of the suit property as per the title and the letter by the 10<sup>th</sup> Defendant; that the Grant issued under Section 23 of the Registration of Titles Act is conclusive evidence that the Plaintiff was and is an absolute and indefeasible co-owner of the suit property as a tenant in common in equal shares and that the Plaintiff is entitled to his equitable portion of the suit land after sub-division.

12. It was submitted that the 10<sup>th</sup> Defendant appointed a Surveyor who did a shoddy/substandard surveying work by not making a physical visit to the site to take the position of the power lines into consideration; that all the members, except the Plaintiff, who attended the balloting got equitable plots; that the remaining plots were under the electric power lines and that the Plaintiff was to pick his plot from the land under the power lines.

13. Although the 1<sup>st</sup> to the 9<sup>th</sup> Defendants were served with the Plaint and Summons, they neither filed a Defence nor testified. Their advocate however filed submissions. Counsel submitted that although the Grant shows that it is the ten parties who were registered as proprietors of the suit land, the said proprietors were to hold the land in trust for seventeen members; that each member was to get ¼ of an acre upon sub-division of the suit land and that the Plaintiff is guilty of laches as the suit was filed long after the requisite period had lapsed.

14. The 10<sup>th</sup> Defendant's counsel submitted that the 10<sup>th</sup> Defendant did not participate in the Sale Agreement as a party; that there is no causal link between the Plaintiff and the 10<sup>th</sup> Defendant and that no reasonable cause of action has been established by the Plaintiff and thus the claim against the 10<sup>th</sup> Defendant should be struck out.

15. It was submitted that the transfer document executed on the 9<sup>th</sup> October, 1997 alongside the title document registered on 22<sup>nd</sup> October, 1997 clearly outlines the ten (10) registered owners as tenants in common in equal shares; that it is uncontested that the suit property was purchased and the parties therein voluntarily agreed on the mode of apportionment of the various sub-divided parcels and that it is evident that the Plaintiff has all along been aware of the mode of distribution of the said property.

16. The evidence before this court shows that in 1997, while still an employee of the 10<sup>th</sup> Defendant, the Plaintiff together with the 1<sup>st</sup> to 9<sup>th</sup> Defendants (*fellow employees*) purchased property known as L.R. No. 12715/681 Grant Number I.R No. 47931 situated in Athi River Township in Machakos County (*the suit property*).

17. According to the uncontroverted evidence of the Plaintiff, it is the 10<sup>th</sup> Defendant who sourced for the property, negotiated the purchase price and deducted monies from the ten employees' wages. After the purchase of the suit property, the Grant was finally issued to the Plaintiff and the 1<sup>st</sup> to the 9<sup>th</sup> Defendants as tenants in common in equal shares of 1/10<sup>th</sup> each.

18. According to the uncontroverted evidence of the Plaintiff, it was unanimously agreed that the 1<sup>st</sup> Defendant be the custodian of the said title pending sub-division of the suit property in 1997, balloting was conducted in the absence of the Plaintiff and the latter was allocated a portion under Kenya power lines.

19. It is the Plaintiff's case that no proper survey has been done on the suit property and as a result, he has not been able to get his individual title. Furthermore, it was his evidence that the land allocated to him as per the balloting is under Kenya power lines which has been in existence since 1970s.

20. I have perused the Grant in respect to L.R. No. 12715/681 measuring 2.024 Ha (*approximately 5 acres*). The said title was issued pursuant to the provisions of the repealed Registration of Titles Act to Syokimau Farm Limited which transferred the land to Muathe Mbalya and Mutuku Mbalya as tenants in common in equal shares. The two Mbalyas transferred the suit land to the Plaintiff and the 1<sup>st</sup> to 9<sup>th</sup> Defendants as tenants in common in equal shares on 22<sup>nd</sup> October, 1997 for Kshs. 1,500,000.

21. From the title, it is the Plaintiff and the 1<sup>st</sup> to 9<sup>th</sup> Defendants who are the absolute proprietors of the land in equal shares, and not anyone else. The Plaintiff's share in the said land is protected by Section 23(1) of the Registration of Titles Act (*repealed*) which provides as follows:

*“The Certificate of Title issued by the Registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”*

22. A tenancy in common is one of the three types of concurrent estates, which is an estate that has shared ownership, in which each owner owns a share of the property. The other two types of ownership of land are “a joint tenancy” and “a tenancy by the entirety.”

23. Considering that all the ten proprietors of the suit property are entitled to equal shares of the land, the sub-division of the suit land into ten portions should take into account the nature of the land, with a view of allocating each member land that falls within what is considered to be “good portions” and the portions falling under the power lines.

24. Even where the apportionment of the land is done through balloting, the sub-division of the land should be done fairly so that one does not feel that he has lost by balloting for land which might not have much economic value.

25. In the circumstances, and considering that the purported surveying of the suit property did not take into consideration the nature of the land to enable all the parties get a fair and just portion of 1/10 of their share, and in the absence of evidence of the Defendants controverting the Plaintiff's evidence, it is my finding that the Plaintiff has proved his case on a balance of probabilities.

26. For those reasons, I allow the Plaintiff's Plaint as follows:

***a) The Defendants be and are hereby restrained whether by themselves their servants, agents or otherwise howsoever from alienating, constructing or continuing with the construction of any structures and/or in any way whatsoever interfering with the Plaintiff's quiet possession and equitable fractional share over all that piece of property Known as L.R. No. 12715/681 Grant Number I.R No.47931 issued under the Registration of Titles Act.***

***b) Sub-division, resurvey and equitable partition of the suit property L.R. No. 12715/681 Grant Number I.R No. 47931 in terms of the Registration status of the property to be undertaken by the Plaintiff and the Defendants or their appointed Surveyors jointly and allocation of an equitable 1/10<sup>th</sup> share of the said suit property to the Plaintiff to be done.***

***c) Costs of this suit to be borne by the 1<sup>st</sup> to 9<sup>th</sup> Defendants.***

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 29<sup>TH</sup> DAY OF JANUARY, 2021.**

**O.A. ANGOTE**

**JUDGE**