



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

LAND CASE NO. 14 OF 2019 (O.S)

IN THE MATTER OF REGISTERED LAND ACT CAP 300(REPEALED)

IN THE MATTER OF SECTIONS 26 AND 61 OF THE LAND REGISTRATION ACT, NO. 3 OF 2012

AND

IN THE MATTER OF THE LAW OF SUCCESSION ACT, CAP 160

AND

IN THE MATTER OF PARCEL OF LAND NO. KISUMU/KOGONY/1931

BETWEEN

JOSEPH ONDU NYANGIRI.....APPLICANT/PLAINTIFF

V

MONICAH AUMA ODENY.....1ST RESPONDENT/DEFENDANT

MARK ODORO SEDA.....2ND RESPONDENT/DEFENDANT

JUDGMENT

By an Originating Summons dated 6th May 2019 the applicant herein Joseph Andu Nyangiri sued the respondents Monica Auma Odeny and Mark Odoro Seda seeking for the determination of the following questions:

- a) Whether the transfer of land parcel No. **KISUMU/KOGONY/1931** was first registered in the name of Nyangiri Ndia (deceased), and if so, whether the transfer of the same to Mark Odoro Seda (the 2nd respondent) was made without a grant of Letters of Administration to the deceased's estate and further whether the registration of the same in the name of the 1st respondent/defendant was obtained illegally, unprocedurally and through a corrupt scheme and its therefore null and void.
- b) Whether the register for the said land parcel No. **KISUMU/KOGONY/1931** should be rectified by cancelling the registration of the 1st respondent/defendant as proprietor thereof and by restoring and registering the said parcel of land in the name of Nyangiri Ndia(deceased) pending succession.
- c) Whether the costs of this summons should be provided for and be paid by the respondents/defendants.

Counsel agreed to adopt the affidavit evidence of the parties and canvass the originating summons by way of written submissions which were duly filed.

APPLICANT'S CASE

The grounds in support of the summons are that the Applicant/Plaintiff and the 2nd respondent are sons of the late Nyangiri Ndia who died on the 14th February 1982 and he was the registered owner of the parcel of land known as **KISUMU/KOGONY/1931**.

It was the applicant's evidence that the said parcel of land could only have been registered in the 2nd defendant's after obtaining grant of letters of administration as the same had been part of the deceased property. That the registration and transfer of the title to the 2nd defendant and subsequently to the 1st defendant was obtained fraudulently and hence this court should determine the question.

The applicant further averred in the supporting affidavit that the 2nd defendant had applied for grant of letters of administration vide Kisumu High Court Succession Cause No.110 of 1990, in which the suit property was not included as an asset of the deceased. He stated that the letters of administration have not yet been confirmed to date.

It was the applicant's averment that the suit parcel of land was transferred to the 2nd defendant on the 30th April 2015 and later transferred to the 1st defendant on 3rd June 2016 which transfer could only have been done through transmission if he had the grant as provided for under Section 61 of the Land Registration Act 2012.

The applicant also testified that the suit land had neither been administered nor distributed as part of the deceased estate hence the transfer of the suit land to the 1st and the 2nd respondents was obtained, illegally, unprocedurally and through corrupt means therefore null and void. Further that the 1st respondent was summoned by County Land Registrar vide a letter dated 1st August 2018 directing her to surrender the title deed held by her but has not headed the direction. The applicant therefore urged the court to grant the orders as prayed.

RESPONDENT'S CASE

The 2nd respondent and two other persons namely Alex Nyagar Dianga and Joseph Otogo Nyangiri replied to the Originating summons. It was Alex Nyagar Dianga's response that the suit land belonged to their grandfather Akako Gumba who gave it to their mother Leunida Seda Nyangiri who subsequently gave it to Mark Odoro Seda, the 2nd respondent herein.

The 2nd respondent Mark Odoro Seda deponed that the suit land was registered in the name of Nyangiri Ndia to hold in trust for Peter Owinga (the 2nd wife's house), and he never distributed the same to his sons.

The respondent further stated that he was not aware that the suit land was part of the succession of the estate of the deceased and he did not include it as one of the assets. That in 1996, his mother authorized him to build on the parcel of land where he has been residing for the last 24 years. He therefore urged the court to dismiss the applicant's case with costs.

Joseph Otogo Nyangiri one of the witnesses deponed in a replying affidavit that the suit land was given to Mark Odoro the 2nd respondent which was approved by family members including the applicant herein. That the suit land belonged to the late Peter Owinga who was his brother.

The 1st respondent Monica Auma Odeny's replying affidavit was not on record

PLAINTIFF SUBMISSIONS.

Counsel for the applicant submitted that the 2nd respondent had transferred the suit parcel to his name in the absence of the grant of letters of administration and that the said parcel of land did not form part of the assets listed in the succession Cause of the estate of the deceased.

Mr Moses Orengo counsel for the applicant submitted that the grant had not yet been confirmed as provided by section 71 of the Law of Succession Act, Cap 160 and therefore the 2nd respondent could not use it to distribute any capital assets which constituted the estate.

Section 55 of the same Act provides that: "*No grant of representation, whether or not limited in terms, shall confer power to distribute any capital assets constituting a net estate or to make any division or property, unless and until the grant has been confirmed as provided by section 71*".

Counsel relied on Section 80 (2) of the Law of Succession Act provides that: "*A grant of letters of administration, with or without the will annexed, shall take effect only as from the date of the grant.*"

Mr Orengo cited the provisions of section 82 (b) of the Law of Succession Act which provides that "*no immovable property shall be sold before confirmation of the grant*" hence the transfer of the suit land to the 2nd respondent was irregular, illegal and therefore null and void and the same should be cancelled.

Counsel relied on the case of **Adan Abdirahani Hassan & 2 others v Registrar of Titles, Ministry of Lands & 2 others [2013] eKLR** where Angote J held that:

"Article 40 of the current Constitution, just like section 75 of the repealed Constitution protects the right to own property. This Article should however be read together with the provisions of Article 40(6) which excludes the protection of property which has been found to have been unlawfully acquired. This requirement recognizes the fact that the Constitution protects certain values such as human rights, social justice and integrity amongst others. These national values require that before one can be protected by the Constitution, he must show that he has followed the due process in acquiring that which he wants to be protected."

Counsel further submitted on the provisions of section 80 of the Land Registration Act which provides "*that Subject to sub section (2) the court may order the rectification the register by directing that the registration be cancelled or amended if it is satisfied that any registration*

was obtained, made or omitted by fraud or mistake.”

Further that a title deed may be impeached and the register rectified “if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme” as was held in the case of *Elijah Makeri Nyangwira Vs Stephen Mungai Njuguna & another (2013) e K.L.R.* Counsel urged the court to find that the title was procured unprocedurally hence should be cancelled.

Counsel also cited the case of *Joyce Nyanchama Kalya & another v David Malakwen Terer & another [2017] eKLR*, where the court held that a transfer without a grant of letters of administration is unprocedural and illegal therefore amounts to intermeddling of the estate of the deceased contrary to Section 45 of the law of Succession Act.

Mr Orengo further submitted that the 2nd respondent had been sued in respect of parcel No. KISUMU/DAGO/631 in KISUMU ELC NO. 40 OF 2013 (OS) whereby the court found that the transfer of the suit property from the deceased name to the 2nd respondent’s name was illegal null and void therefore nullified.

Counsel therefore urged the court to find that the applicant had proved his case against the respondents.

1ST & 2ND RESPONDENT’S SUBMISSIONS

Counsel submitted that the 1st respondent is a bonafide purchaser having purchased the suit land from the 2nd respondent after exercising due diligence and therefore urged the court to refer this matter to alternative dispute resolution such as arbitration.

Mr Onyango counsel for the respondents submitted that the suit is time barred as the applicant was aware that the suit land was not listed among the assets of the estate of Nyangiri Ndia.

Counsel cited the case of *Wairimu Mburu v Chege Thaiya [2019] eKLR* quoting the case of *Adnam v Earl of Sandwich (1877) 2QB 485* where the court held that:

“The legitimate object of all statutes of limitation is in no doubt to quiet long continued possession, but they all rest upon the broad and intelligible principles that persons, who have at some anterior time been rightfully entitled to land or other property or money, have, by default and neglect on their part to assert their rights, slept upon them for a long time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity to which they have in some sense been tacit parties.”

Counsel therefore urged the court to dismiss the case of refer to arbitration.

ANALYSIS AND DETERMINATION.

The issues for determination in this suit are as to whether the transfer of land parcel No. KISUMU/KOGONY/1931 to Mark Odoro Seda, the 2nd respondent was made without a grant of Letters of Administration to the deceased’s estate, whether the registration in the name of the 1st respondent was obtained illegally, unprocedurally through a corrupt scheme and therefore null and void, whether the register of land parcel No. KISUMU/KOGONY/1931 should be rectified by cancelling the registration of the 1st respondent as proprietor thereof and by restoring and registering the parcel of land in the name of Nyangiri Ndia(deceased) pending succession and who should pay costs.

It is not in dispute that the applicant and the 2nd respondent are brothers and it is further not in dispute that the suit land was registered in the name of late Nyangiri Ndia as per the annexed copy of a title deed which entry is indicated as 3rd February 1992.

From the evidence on record it shows that the 2nd respondent transferred the suit land to his name purportedly vide transmission pursuant to Succession Cause No 110 of 1990 but from the list of assets the only parcel of land that was listed was KISUMU /DAGO/631. The suit parcel of land KISUMU/KOGONY/1931 was not listed for purposes of succession and distribution.

The Deputy Registrar of the High Court in Kisumu wrote a letter dated 11th October 2018 and copied to the County Land Registrar confirming that the P&A form 5 drawn and filed by Mark Odoro Seda on 25th July 1990 only reflected parcel No. KISUMU/DAGO/631 and that parcel No. KISUMU/KOGONY/1931 was not listed.

This in effect shows that this parcel was transferred without legal authority hence the transfer was null and void. The 2nd respondent’s subsequent transfer to the 1st respondent therefore must suffer the same fate having been done illegally or fraudulently.

Section 45 of the 5 of the Law of Succession Act provides as follows:-

(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall—

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

The 2nd respondent flouted the above provisions of the law and intermeddled with the estate of the deceased without first applying for and obtaining a grant of letters of administration.

In the case of **Amos Odhiambo Olang & 2 others v Joseph Otiende Othula & 6 others [2017] eKLR**, where Kibunja J declared that title deeds obtained without a grant of letters of administration as irregular, unlawful and therefore null and void. The 2nd respondent's transfer of the suit parcel of land in his name and the subsequent transfer to the 1st respondent's without a grant of letters of administration offends the provisions of the law and is therefore null and void. It is suspect how the Land Registrar transferred the suit land vide transmission yet the suit land was not part of the assets listed for administration by transmission. The 1st respondent can therefore not benefit from the principle of bona fide purchaser for value without notice as the 2nd respondent did not have capacity to pass the property in the suit land.

Section 55 of the Law of Succession Act stipulates that:-

“No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets constituting a net estate, or to make any division of property unless and until the grant has been confirmed as provided by section 71.”

The 2nd respondent admitted in his replying affidavit at paragraph 15 that he did not know that the suit land KISUMU/KOGONY/1931 was part of the estate of NYANGIRI NDIA and that is why he did not include it in the list of assets and further that he thought that it belonged to his mother LEUNIDA SEDA. This admission is indicative of the fact that the 2nd respondent did not follow the laid down procedures of transfer of a deceased person's property.

The 2nd respondent had been sued in respect of parcel No. KISUMU/DAGO/631 in KISUMU ELC NO. 40 OF 2013 (OS) whereby the court found that the transfer of the suit property from the deceased name to the 2nd defendant's name was illegal therefore nullified.

Section 26 of the Land Registration Act, Act No.3 of 2012 provide as follows:

The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

This section applies in this case as the transfer was done unprocedurally. The court has powers to impeach such fraudulent and unprocedural transactions.

Section 80 (1) of the Land Registration Act, 2012 provides thus:-

80 (1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained made or omitted by fraud or mistake.

The court is empowered under this section to order for rectification of the register by directing that any registration be cancelled or amended if it is satisfied that there was an error, mistake or fraud.

I have considered the pleadings, the submissions by counsel and find that the applicant has proved his case and therefore enter judgment in his favour and order the rectification of the register to revert to the deceased name NYANGIRI NDIA pending succession. The respondents to pay costs of the suit.

DATED and DELIVERED at ELDORET this 6th DAY OF JANUARY, 2021

(DR) M. A. ODENY

JUDGE