



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**ELC CASE NO. 555 OF 2015**

**RHODA AMOLLO OGONDA (Suing as the Administratrix Ad Litem of the  
Estate of Joyce Adhiambo Ogonda).....PLAINTIFF**

**VERSUS**

**JOHN ONYANGO NYAGOL.....1<sup>ST</sup> DEFENDANT**

**COUNTY LAND REGISTRAR – KISUMU.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

Rhoda Amollo Ogonda acting as the administratrix of the estate of Joyce Adhiambo Ogonda has brought this suit against John Onyango Nyagol and the Kisumu Land Registrar claiming that the 1<sup>st</sup> Defendant was fraudulently registered as the proprietor of the suit land LR. NO. KISUMU/CHIGA/2399.

The Plaintiff prayed for orders that a **permanent injunction restraining the Defendants and each of them whether by themselves, servants, agents or otherwise, their employees, servants and/or agents from entering upon, fencing, selling, Disposing of, developing using, possessing, remaining on, cultivating, weeding, harvesting from, or any other activity whatsoever or in any other way interfering with title LR. NO. KISUMU/CHIGA/2399.**

**The plaintiff further prayed for cancellation of title held by the 1<sup>st</sup> Defendant and rectification of the register to reinstate the name of the deceased, Joyce Adhiambo Ogonda. Finally, the plaintiff prayed for costs of this suit, interest thereon and any other relief the court will deem fit and just to grant.**

The 1<sup>st</sup> Defendant filed a defence stating that the title deed was legally and lawfully duly obtained by him He states that the title was transferred from the deceased's name to him in a legal and lawful manner when he was alive. The import of the defence is that the deceased sold the suit land to the defendant and duly executed the transfer.

When the matter came up for hearing on 18/5/2019, PW1 George Nyangweso, the Land Registrar Kisumu County, the keeper of land records testified that the suit land was initially registered in the names of Maruru Maruru and the 2<sup>nd</sup> entry made on 30/9/1991 was in respect of Joyce Adhiambo Ogonda and title deed was issued. There was a transfer to John Onyango Nyagol on 20/11/2009. Thereafter a restriction was registered by the Land Registrar by virtue of a complaint by Rhoda Amollo Ogonda.

According to the Land Registrar there are no records on how the land was transferred from Joyce Adhiambo Ogonda to the 1<sup>st</sup> Defendant. There is no evidence of transmission. The Registrar states that on 2/8/2010, the certificate of official search showed that the land belonged to Joyce Adhiambo Ogonda and it beats logic that it had been transferred to John Onyango Nyagol on 20/11/2009.

On cross examination by Council for Plaintiff and 1<sup>st</sup> Defendant he states that it is evident that by 2/8/2010 the deceased Joyce Adhiambo was the owner of the property but it is strange that the same was transferred to the 1<sup>st</sup> Defendant on 20/11/2009.

PW2, Rhoda Amollo Ogonda states that Joyce Adhiambo Ogonda was her mother who died in February 2020 and owned the suit land at her death and that a search on 2/8/2020 indicated that the deceased was the owner of the property. In February 2011 we found that the property had been registered in the names of the 1<sup>st</sup> Defendant. She produced the death certificate.

DW1 Mary Atieno Nyagol states that the 1<sup>st</sup> Defendant is her husband and that the husband purchased the property from the deceased Joyce Adhiambo Ogonda at consideration of Kshs. 70,000 and the latter gave the former the title deed. They went to the Land Registrar and

registered the suit land in the husband's name in November 2009.

On cross examination, she states that there was a sale agreement and a transfer form signed on 20/11/2009. She is not aware that her husband used form R-7. She states that the transfer form was signed in the recreation park near the law courts. There was no advocate. The Land Control Board meeting was in December.

DW2, Francis Okuta states that Stephen Nyagol bought the land from Joyce Adhiambo Ogonda. It is not clear whether Stephen Nyagol is the same as John Onyango Nyagol. On cross examination, he states that he witnessed the sale agreement but again withdraws the statement and confirms that he did not witness the sale agreement. He confirms that the deceased Joyce Adhiambo died in 2020. He was not there when the two parties met the Land Control Board.

I have considered the evidence on record and the rival submissions and do find that there is no sale agreement between the late Joyce Adhiambo Ogonda and John Onyango Nyagol the 1<sup>st</sup> defendant herein. By virtue of Section 3 (3) of the Law of Contract Act, Cap 23 Laws of Kenya and consequently the suit is unsustainable. Section 3(3) of the Law of Contract Act provides; -

**“No suit shall be brought upon a contract for the disposition of an interest in land unless:-**

**(a) The contract upon which the suit is found-**

**(i) Is in writing**

**(ii) Is signed by all the parties thereto; and**

**(b) The signature of each party signing has been attested by a witness who is present when the contract was signed by such party.”**

This provision came into force in June 2002 and amended and replaced the previous Section 3 of the Law of Contract Act which had provided as follows:-

**“No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof is in writing and is signed by the party to be charged or by some person authorized by him to sign it.**

**Provided that such suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of the contract:-**

**(i) Has in part performance of the contract taken possession of the property or any part thereof; or**

**(ii) Being already in possession continues in possession in part performance of the contract and has done some other act in furtherance of the contract.”**

In the case of **Patrick Tarzan Matu & Another –vs- Nassim Shariff Abdulla & 2 Others [2009] eKLR Azangalala, J.** (as he then was) struck out the plaintiffs case where he found the contract relied upon was in contravention of Section 3(3) of the Law of Contract Act and declined to entertain the claim for damages for breach of the contract. Inter alia he stated:-

**“...The applicant in this case has satisfied me that there is no agreement between her and the plaintiffs in terms of the provisions of Section 3(3) of the Law of Contract Act which the plaintiffs can enforce against her. The plaintiffs are urging the view that their claim for damages for breach of the contract of sale is sound. With respect, that view cannot be correct. The claims are made pursuant to an agreement that is contra statute or at the very least does not comply with the law. So, the very foundation of their claim is untenable.”**

In the case of **Silverbird Kenya Limited –vs- Junction Ltd & 3 Others [2013] eKLR** before justice Mutunga, an application had been made by the 1<sup>st</sup> defendant to strike out the plaintiff's suit on the ground that the lease on which it was anchored had not been signed in contravention of Section 3(3) of the Law of Act. In the suit, the judge stated inter alia: -

**“...In my view it matters not that the plaintiff had been let into possession of the premises if the contract pursuant to which the plaintiff was granted possession was not validated in accordance with the law. The letter of 19<sup>th</sup> August 2009 in my view does not satisfy the requirements of Section 3(3) of the Law of Contract Act to be the foundation of the plaintiff's claim against the defendants. Section 3(3) of the Law of Contract Act is indeed couched in mandatory terms and does infact divest the court of jurisdiction in instances where there is no compliance as in the instant case. In the circumstances and by reason of the Law of Contract Act, the plaintiff's suit must fail for being in contravention of Section 3(3) of the Law of Contract Act, Cap 23 Laws**

The transfer was allegedly by way of transmission and yet the proprietor of the land was alive. This is clear evidence of illegality and therefore the transaction can't be sanctified by court. Though there is payment of some money, it is not clear the basis of such payments.

The evidence of the County Land Registrar Kisumu Mr. Nyangweso is clear that there was no instrument of transfer but transmission (R-7) is

normally used to transmit the property of a deceased person and yet proprietor of the land was still alive. The upshot of the above is that the plaintiff succeeds and I do grant a **permanent injunction restraining the Defendants and each of them whether by themselves, servants, agents or otherwise, their employees, servants and/or agents from entering upon, fencing, selling, Disposing of, developing using, Possessing, remaining on, cultivating, weeding, harvesting from, or any other activity whatsoever or in any other way interfering with title LR. NO. KISUMU/CHIGA/2399.**

**Moreover, I do order cancellation of title held by the 1<sup>st</sup> Defendant and rectification of the register to reinstate the name of the deceased, JOYCE ADHIAMBO OGONDA. Finally, I do order costs of this suit, interest thereon to be paid to the plaintiff by the 1<sup>st</sup> defendant.**

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 3<sup>RD</sup> DAY OF SEPTEMBER, 2021**

**ANTONY OMBWAYO**

**JUDGE**

*This Judgement has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2019.*

**ANTONY OMBWAYO**

**JUDGE**