



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC MISC. APPLICATION NO 141 OF 2019

IN THE MATTER OF AN APPLICATION FOR MANDAMUS

AND

IN THE MATTER OF AN APPLICATION BY SAMUEL WAMUTU WAIGANJO TO APPLY FOR AN ORDER OF MANDAMUS

AND

IN THE MATTER OF REGISTRATION OF TITLES ACT CAP 281 (REPEALED) OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE LAND ACT NO 12 OF 2012 OF THE LAWS OF KENYA

AND

IN THE MATTER OF LAND REGISTRATION ACT NO 3 OF 2012 OF THE LAWS OF KENYA

AND

IN THE MATTER OF GOVERNMENT PROCEEDINGS ACT, CAP 40, LAWS OF KENYA

BETWEEN

SAMUEL WAMUTU WAIGANJO.....APPLICANT

VERSUS

CHIEF LAND REGISTRAR NAIROBI.....RESPONDENT

RULING

1. This Is The Chamber Summons Dated 30th August 2019, Brought Under Order 53, Rule 1(2) Of The Civil Procedure Rules And All Other Enabling Powers And Provisions Of Law.

2. It Seeks Orders:-

1. That The Applicant Samuel Wamutu Waiganjo, Be Granted Leave To Apply For An Order Of Mandamus Directed To The Respondent, The Chief Land Registrar To Rectify The Error/Omission On The Certificate Of Title LR NO 1441/10.

2. That The Applicant, Samuel Wamutu Waiganjo, Be Granted Leave To Apply For An Order Of Mandamus Directed To The Respondent, The Chief Land Registrar To Register The Death Certificate In Respect Of Eddah Wangui Waiganjo And/Or Register The Applicant As The Sole Proprietor Of LR NO 1441/10.

3. That The Costs Of This Application Be Costs In The Cause.

3. The Grounds Are On The Face Of The Application And Are:-

1. That The Respondent Has Refused To Register Death Certificate Of A Joint Tenant On Title Number LR NO 1441/10.

2. That The Respondent Has Refused To Rectify His Error And/Or Omission On Certificate Of Title On LR NO 1441/10.

3. That The Respondent Has Refused To Register The Applicant As Sole Proprietor Of LR NO 1441/10 Without His Going Through A Succession Process.

4. The Application Is Supported By The Affidavit Of Samuel Wamutu Waiganjo, The Applicant Herein, Sworn On The 30th September 2019.

5. Upon Being Served With The Application The Honourable Attorney General Entered Appearance For The Respondent On The 3rd September 2019 Though Oscar M. Eredi, Deputy Chief State Counsel. The Respondent However Neglected To File A Response To The Application Despite Being Given 14 Days To File A Response On The 19th February 2020.

6. On The 19th February 2020, The Court With The Consent Of The Parties Directed That The Application Be Canvassed By Way Of Written Submissions.

7. The Applicant's Submissions Are Dated 9th July 2021. The Respondent Did Not File Any Submissions.

8. It Is The Applicant's Case That He And Eddah Wangui Waiganjo Are Joint Tenants In LR NO 10041/10 Nairobi. Eddah Wangui Waiganjo Has Passed On, She Died Intestate.

9. It Is Further The Applicant's Case That He Forwarded The Certificate Of Death And Deed Of Rectification To The Chief Land Registrar But The Registrar Declined To Rectify, Prompting This Application.

10. The Application Is Not Opposed. The Issue For Determination Is Whether The Same Is Merited.

11. **Section 79** Of The Land Registration Act, 2012 Provides That:-

“(1) The Registrar May Rectify The Register Or Any Instrument Presented For Registration In The Following Cases—

A) In Formal Matters And In The Case Of Errors Or Omissions Not Materially Affecting The Interests Of Any Proprietor;

B) In Any Case And At Any Time With The Consent Of All Affected Parties; Or

C) If Upon Resurvey, A Dimension Or Area Shown In The Register Is Found To Be Incorrect, In Such Case The Registrar Shall First Give Notice In Writing To All Persons With An Interest In The Rectification Of The Parcel. (2) Notwithstanding Subsection (1), The Registrar May Rectify Or Direct The Rectification Of A Register Or Document Where The Document In Question Has Been Obtained By Fraud.

(3) Upon Proof Of The Change Of The Name Or Address Of Any Proprietor, The Registrar Shall, On The Written Application Of The Proprietor, Make An Entry In The Register To Record The Change.

(4) The Commission May By Regulations Prescribe The Guidelines That The Registrar Shall Follow Before Rectifying Or Directing Rectification Under Subsection (2) And Without Prejudice To The Generality Of The Foregoing, The Regulations May Provide For—

A) The Process Of Investigation Including Notification Of Affected Parties;

B) Hearing Of The Matters Raised; And

C) The Criteria To Be Followed In Coming Up With The Decision.”

Section 80 Of The Land Registration Act, 2012 Provides That:-

“(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.

(2) The Register Shall Not Be Rectified To Affect The Title Of A Proprietor Who Is In Possession And Had Acquired The Land, Lease Or Charge For Valuable Consideration, Unless The Proprietor Had Knowledge Of The Omission, Fraud Or Mistake In Consequence Of Which The Rectification Is Sought, Or Caused Such Omission, Fraud Or Mistake Or Substantially Contributed To It By Any Act, Neglect Or Default.”

12. It Is The Applicant's Case That He And Late Eddah Wangui Waiganjo Were Joint Owners Of The Suit Property. In The Case Of Isabel Chelang'at Vs Samuel Tiro Rotich & 5 Others [2018] Eklr It Was Held That:-

“A Joint Tenant Imparts To Owners, With Respect To All Other Persons Than Themselves, The Properties Of One Single Owner. Although As Between Themselves Joint Tenants Have Separate Rights, As Against Everyone Else They Are In The Position Of Single Owner. Joint Tenancy Carries With The Right Of Survivorship And “Four Unities”. The Right Of Survivorship (Jus Accrescendi) Means That When One Joint Owner Dies, His Interest In The Land Passes Onto The Surviving Joint Tenant. A Joint Tenant Cannot Pass Under Will Or Intestacy Of A Joint Tenant So Long As There Is A Surviving Joint Tenant As The Right Of Survivorship Take Precedence. The Four Unities That Must Be Present In A Joint Tenancy Are:-

(I) The Unity Of Possession.

(Ii) The Unity Of Interest.

(Iii) The Unity Of Titles.

(Iv) The Unity Of Time.

Tenancy In Common On The Hand Is Different From Joint Tenancy In Common, The Two Or More Holders Hold The Property In Equal Undivided Shares. Each Tenant Has A Direct Share In The Property Which Has Not Yet Been Divided Among Co-Tenants. In Other Words, They Have Separate Interests Only That It Remains Undivided And They Hold The Interest Together. The Largest Factor That Interests Only That It Remained Undivided And They Hold The Interests Together. The Largest Factor That Distinguishes A Joint Tenancy From A Tenancy In Common Is The Absence Of The Doctrine Of Survivorship In The Latter. The Share Of One Tenant Is Not Affected By The Death Of One Of The Co-Owners. The Share Of Deceased, Devolves Not To The Other Co-Owner, But To The Estate Of The Deceased Co-Owner. Although The Four Unities Required For A Joint-Tenancy May Be Present, Only One, The Unity Of Possession Is Essential”.

I Am Guided By The Above Authority In Finding That The Applicant Deserves The Orders Sought.

13. I Find Merit In This Application And Grant The Orders Sought Namely: -

(A) That An Order Mandamus Is Hereby Issued To Compel The Chief Land Registrar Rectify The Errors And/Or Omissions On The Certificate Of Title 10041/10 And Register The Death Certificate Against LR NO 10041/10 And/Or Register The Applicant As The Proprietor Of LR NO 10041/10 Without The Need For The Applicant To Go Through Succession Proceedings.

(B) That Each Party Will Bear Own Costs.

It Is So Ordered.

Dated, Signed And Delivered In Nairobi On This 18th Day Of November 2021.

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L. KOMINGOI

JUDGE

In The Presence Of:-

No Appearance For The Applicant

No Appearance For The Respondent

Steve - Court Assistant