



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ELC NO. 132 OF 2016

(formerly CMCC 179 OF 2010)

ESTHER NANGUNDA TERRA.....PLAINTIFF

VERSUS

EDWARD SYATA OKELLO.....DEFENDANT

JUDGEMENT

1. The dispute before me is between close family members. The Plaintiff – **ESTHER NANGUNDA TERRA** – is a sister in law to the Defendant – **EDWARD SYATA OKELO**. The Defendant was a brother to the Plaintiff's late husband – **DAVID OKELO MAJALE**. The dispute relates to Land parcel NO L.R. No SAMIA/BUDONGO/1288, which is now subdivided into L.R NOS. SAMIA/BUDONGO/2353 and 2354. Before subdivision, land parcel No 1288 ("disputed Land" hereafter) was registered in the name of the Plaintiff's late husband. When the Plaintiff's husband died, the Plaintiff and her step-son – **VIVIAN WEST SYATA MAJALE** – obtained the requisite grant of probate letters from court and became the legal representatives of his estate. The disputed land was one of the properties of the estate and there is not much of a dispute that a portion of it was held by the deceased in trust for the Defendant.

2. This suit was initially filed in the lower court as PMCC NO 179 of 2010. It later found its way here and the plaint was amended and filed on 13th February, 2018. In the amended plaint, the Defendant is accused of unilaterally subdividing the disputed land and allocating himself a portion which should not have been part of the 28 acres that he was entitled to. The Plaintiff wants that portion excised from the Defendant's land and is ready to have the Defendant compensated with a portion of similar size elsewhere. The portion the Plaintiff is accused of appropriating to himself was allegedly meant for the larger family of the late family patriarch, one Reverend Saulo Okelo. The Defendant himself is included in that arrangement.

3. The following prayers are made by the Plaintiff:

(a) A permanent injunction against the defendant, his servants, agents, surveyors, and/or any other person acting under his instructions, restraining him and/or them from purporting to subdivide, demarcate, transfer, alienate L.R NO SAMIA/BUDONGO/1288, 2354 or any portion thereof.

B(i) An order that the Land Registrar and surveyor demarcate the area comprising the homestead of the deceased, and the graves of all family members and the family shrine and give it a distinct L.R number in the names of the plaintiff and the defendant.

B (ii) That should the area comprising the homestead, graves and shrine be comprised in the defendant's title L.R NO SAMIA/BUDONGO/2353, then he be compensated by giving him commensurate acreage from L.R SAMIA/BUDONGO/2354.

B (iii) That should the defendant be unwilling to sign any forms to facilitate the subdivision and/or transfer, the Deputy Registrar of the Court be empowered to sign in his stead.

(b) Costs of this suit, the subdivision, and transfer be met by the defendant.

4. The Defendant filed an amended defence on 9th March, 2018. His earlier defence in response to the suit had been filed on 16th February, 2012. In the amended defence, the Defendant pleaded, inter alia, that the Plaintiff had earlier filed a Succession Cause in which she recognized his interest in the disputed land; that he didn't unilaterally cause subdivision of the disputed land; that there was no agreement to set aside a portion of land as alleged by the Plaintiff; and that this parcel of land does not include any special portion that was allegedly meant to be set aside. The court was asked to dismiss the Plaintiff's case with costs.

5. This court started hearing the matter on 2nd October, 2017. The Plaintiff testified as PW1. The Plaintiff's evidence made reference to a meeting where it was agreed that a portion of land, called "common land" in her evidence, be set aside for all members of the family. Her

wish is captured thus: “We agreed that the compound where we have built became common land for all members of the family.” She then made her position clear as follows “Let the Defendant still get his 28 acres from the land but leave 3 ½ acres from the land. Yes, that land can be available to give to the Defendant.”

6. PW2 was Geoffrey Okelo Majale, a step-son to the Plaintiff. His evidence is clear that the disputants in this matter and the other members of the family had actually agreed on how to share out the disputed land. The Defendant was to get 28 acres. But the agreement as to where the 28 acres would be had not been reached. The Defendant decided alone where his 28 acres would be. When the surveyor came and did his job, the Defendant’s chosen portion happened to include even the portion agreed to be set aside for all family members. Like PW1, it is clear that PW2 is not disputing the Defendant’s entitlement to 28 acres. The dispute only relates to where the 28 acres should be. PW3 was the last witness called by the Plaintiff’s side. He is a step-son to the Plaintiff and also a co-administrator of the estate of the late husband of the Plaintiff. His evidence is generally like that of the Plaintiff and he was also agreed that the Defendant can be compensated with a portion of similar size as the one the Plaintiff is seeking to excise from his land.

7. The Defendant himself testified as DW1 on 13th May, 2019. He adopted as his evidence his written statement dated 6th April, 2018. In the statement, the Defendant deposed, inter alia, that the Plaintiff’s late husband was his biological brother and, as the land was family land, the Defendant was ideally entitled to half of it but he accepted the 28 acres offered to him. He called a surveyor, he deposed, who excised for him the 28 acres, leaving 40 acres for the others. The subdivision done was said to have followed the dictates of the Succession Cause filed by the Plaintiff and her stepson. He said he has a customary entitlement to the portion being claimed as he is the last born in the family.

8. After hearing, both sides filed written submissions. The Plaintiff’s submissions were filed on 20th June, 2019. He submitted, inter alia, that the Defendant unilaterally caused subdivision of the disputed land and created for himself land parcel NO SAMIA/BUDONGO/2353 with boundaries that went contrary to a decision made at a family meeting held on 25th December, 2004. And the resolution required that a portion of land be set aside to accommodate the graves of Defendant’s parents, a church, a mausoleum, and some other things. The Defendant was not being left out in the arrangement as the portion was to be registered in the names of the Plaintiff, her co-administrator and the Defendant himself. The Plaintiff expressed willingness to have the Defendant compensated with a portion of equal size elsewhere. The Defendant was faulted for calling the surveyor yet he was not one of the administrators of the deceased’s estate.

9. The court was said to have a responsibility “*to promote harmony and peaceful co-existence between family members...*”

10. The Defendant’s submissions were filed on 18th June, 2019. According to the Defendant, he was never a co-administrator of the estate of the deceased and he therefore had no fiduciary relationship with its legal representatives as alleged. The Plaintiff was also faulted for not giving the particulars of the alleged fiduciary relationship. The Defendant reiterated that he had already been awarded the 28 acres and submitted that the portion sought to be excised should continue being part of his land as he is the last born in the family and therefore customarily entitled to keep the portion. Further, the defendant averred that the portion being sought should have been included in the succession proceedings but was not.

11. I have considered the pleadings, evidence, and submission. I find it well shown that the legal representatives of the estate of the late husband of the Plaintiff were the Plaintiff herself and her stepson – **VIVIAN WEST SYATA MAJALE**. Vivian seems to have taken the place of the other wife of the deceased. That wife is evidently also deceased. The Defendant was only one of the beneficiaries. It is plain to me that the duty to distribute the estate of the late **DAVID OKELLO MAJALE** was not vested in the Defendant. It was instead the responsibility of the legal representatives. And the distribution would entail determining the size and physical location of what each beneficiary was entitled to. It was not the Defendant’s business to do so.

12. It is reasonably clear that the Plaintiff had given the Defendant title to the disputed land earlier when their relationship was still fine. Armed with that title, the Defendant decided to initiate the process of registering himself as owner of the portion decreed as his in the Succession proceedings. He was honest regarding the size of the portion but one cannot say the same regarding the location or physical position of the land. And what he did clearly amounted to usurping the role which in law was reserved for the legal representatives only. He couldn’t legally subdivide the land alone. When he embarked on the process of subdividing the disputed land and transferring part of it to himself, the Defendant was illegally distributing the estate of a deceased estate to himself. Only administrators or executors can do that in law.

13. It is not difficult to appreciate the wrongfulness of the Defendant’s action. A look at the confirmed Grant issued in the Succession Cause shows that the beneficiaries are quite a number. What would happen if each of the beneficiaries called a surveyor in his own time and without involving the others? It seems clear to me that the more well-heeled ones among the beneficiaries would take the choicest parts of the land, leaving the others to do the best they can with the poorer parts. And this is what the Defendant precisely did by appropriating the disputed portion for himself. A practice like that should not be allowed. It imperils peace and causes hatred.

14. Much as the Defendant would like the court to believe that no meeting ever decided that a special portion be set aside, credible evidence shows clearly that there was such a meeting and the issue was discussed and agreed upon. The minutes availed show the Defendant storming out of the meeting. That is something that happened way back in the year 2004. The registration of the Defendant as owner of the land he now owns came much later. In a more specific way, the meeting took place on 25th December, 2004. A look at the copy of the Defendant’s title (DEX NO 12) shows it was issued on 18th March, 2010. The consent given by the area Land Control Board to subdivide the land is dated 3rd February, 2010.

15. The proposal to have a portion set aside as proposed by the Defendant and other family members is a plausible one in my view. The Defendant himself is not being left out. He is proposed as one of those who are to be registered as joint owners, of course on behalf of the others. He is not set to lose anything; he will be compensated. The other family members have as much a stake in what is comprised in the proposed special portion as the Defendant himself. And the dictates of fairness show that they should not be locked out.

16. The Defendant is trying to hide behind a custom – by alleging that he is the last born and therefore entitled to the land- to legitimize what

is glaring unfairness to the other members of the family. If the court allows him to have his way, it will be giving legitimacy to his greed and/or selfishness at the expense of the interests and/or happiness of the others.

17. The Defendant is not an administrator of the estate of the late David Okello Majale. And, having no order at all from a court of law to deal in the disputed land as he did, it is clear to me that his action of subdividing the disputed land and allocating himself the choicest part of it was wrong right from the beginning. The custom he is trying to invoke cannot be allowed to stand in the way of fairness. Besides, his very own parents, who originally owned the disputed land, seem to have been people who were not beholden too much to customs. They seem to have embraced Christianity, or Modernity if you like, in the better part of their earthly existence. One can be sure that they would abhor a custom that would negate fairness or deny others their rights.

18. In contrast, the Plaintiff and the other family members seem to be very fair to the Defendant. They seem ready to accept the subdivision that he did, wrongful though it was. All they want is a portion set aside for the common and larger interest of all family members. They are ready to compensate the Defendant with a portion of equal size. But the Defendant would prefer that this court recognizes his interest and disregard the interests of the others. No way. The interests of the others must hold sway. The Plaintiff represents those interests. The court agrees with her. She is not selfish. She is mindful of the others.

19. The court has made its position known. Its finding therefore is that the Plaintiff's suit has merits. The suit is therefore allowed in terms of prayers (a) B (i), B (ii), B(iii) on the amended plaint. But I need to clarify that the prayer for permanent injunction as asked for is not granted because the things it seeks to restrain have already taken place and therefore overtaken by events. The more feasible prayers are B(i), B(ii) and B(iii), which I have already granted.

20. The Plaintiff is also awarded prayer (b) as asked for in the amended plaint.

Dated and signed at Kericho this 10th day of March, 2020.

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A. K. KANIARU

JUDGE

Dated, signed and delivered at Busia this 10th day of March, 2020.

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ANN OMOLO

JUDGE