



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC 730 OF 2015

FORMERLY HCCC NO. 171 OF 2010

FREDRICK JUMA AHIJA

SAUL OTIENO AHIJA (Suing as the

administrator of the estate of

the late OWINO AHIJA NYAGOL..... PLAINTIFF

VERSUS

JASON OYOLA OPENDA.....1ST DEFENDANT

DISTRICT LANDS REGISTRAR –BONDO.....2ND DEFENDANT

ATTORNEY GENERAL.....3RD DEFENDANT

JUDGEMENT

Fredrick Juma Ahija, Saul Otieno Ahija, suing as administrators of the estate of the late Owino Ahija Nyagol have come to this court against Jason Oyola Openda who is the registered owner of all that parcel of land known as South Sakwa/Migwena/897 measuring about 15.5Ha.

The plaintiffs aver that there was a previous suit KSM HCC NO. 293 OF 1996 filed by the 1st defendant (Jason Oyola Openda – vs- Owino Nyagol Ahija & Another) which was dismissed for want of prosecution.

Further there was Kisumu HCC NO. 176 OF 1996 (between the same parties) which was consolidated with the matter above referred.

The cause of action arose in the suit parcels within the Jurisdiction of this honourable Court.

The Plaintiff prays for a declaration that that land parcel No. SOUTH SAKWA/MIGWENA/897 was illegally transferred to the 1st defendant and an order do issue cancelling the 1st defendant title the registrar be rectified and the plaintiff be given half portion of SOUTH SAKWA/MIGWENA/897.

Lastly, a permanent injunction do issue restraining the 1st defendant his agents, servants or anybody claim through him from interfering with the plaintiff peaceful occupation and use of their portion of SOUTH SAKWA/MIGWENA/897 and Costs and interest of this suit.

The defendant in response states that the suit is frivolous, vexatious and otherwise an abuse of the process of the court. He states that the plaintiffs have no locus standi to prosecute the suit. The defendant insists that the plaintiff has exhausted the legal machinery to prosecute the suit.

When the matter came for hearing the plaintiff adopted the statement filed on 9/5/2011 as his evidence in chief.

In a nutshell he is the administrator of the estate of Owino Ahija Nyagol who owned ½ share of the suit land with one Openda Omolo. Unfortunately the land is currently registered in the names of Jonson Ogola Openda son to Openda Omolo

He produced the green card to the land in dispute showing that the first registered owners were his late father and Openda Omoto who was

the father to the 1st defendant. Both are deceased. Openda Omoto died even before the plaintiff was born and it is true that the 1st defendant was right to succeed his late father Openda Omoto.

The plaintiff testified that the 1st defendant was wrongfully registered as the proprietor of the half share that belonged to the plaintiff's father.

The 1st defendant Jonson Ogola Openda testified that his late father Openda Omolo was a co-proprietor, with Owino Ahija Nyagol, of the disputed parcel of land.

The Parcel is South Sakwa/Migwena/897. When he did succession many people were involved but the land belonged to Openda Omolo. Openda Omolo was not related to Owino Nyagol. Openda Omolo was born at South Sakwa. Owino Nyagol was born in North Sakwa. Owino Nyagol entered the land through stealing.

His father died in 1961. The land was registered in 1972. He did succession on his father's portion. The succession cause is H.C. Kisumu number 86 of 1995. For the estate of Owino Nyagol he called his family and cited them. The court ordered that he be issued with a title deed with a green card.

The land Registrar, Siaya issued him with the title deed.

I have considered the pleadings, Evidence and rival submissions by learned counsel and do find that it is a fact the register of suit parcel of land was opened on 24/6/1974 in the South Sakwa Registration Section. The approximate area was 15.5 Ha. The Registration maps sheet was 32.

The register shows that on the 24/6/1974, the parcel of land was registered in the names of Openda Omolo who was then deceased and Owino Nyagol who was also then deceased. As at 1993 the property was still registered in the names of Openda Omolo and Owino Nyagol in half shares each.

On the 30/5/1996 the property was transferred to Jason Omola Openda and Owino Nyagol in half shares. The ½ share that belonged to Openda Omolo was transferred to Jason Owino Openda whilst Owino Nyagol Ahija retained his half share.

On 17/10/2002, the whole parcel of land was registered in the names of Jason Ogola Openda and title deed issued without consideration of the estate of Owino Nyagol Ahija.

I do find that Openda Omolo and Owino Nyagol Ahija were tenants in common in respect of the suit property and therefore the 1st Defendant acquisition of the share of Owino Ahija Nyagol was illegal null and void as the same was supposed to devolve to the legal representative of the estate of Owino Nyagol Ahija and not the 1st Defendant.

The applicable law is **Section 103 (1) of the Registered Land Act Cap 300 laws of Kenya repealed** which provided that where any land, lease or charge is owned in common, each proprietor shall be entitled to an undivided share in the whole, and on the death of a proprietor his share shall be administered as part of his estate.

Subsection (2) provided that no proprietor in common shall deal with his undivided share in favour of any person other than another proprietor in common of the same land, except with the consent in writing of the remaining proprietor or proprietors of the land, but such consent shall not be unreasonably withheld.

Section 91(5) of The Land Registration Act, 2012 No. 3 OF 2012 provides a replica of Sections 103 of the Registered land act Cap 300 laws of Kenya repealed provides that If any land, lease or charge is owned in common, each tenant shall be entitled to an undivided share in the whole and on the death of a tenant, the deceased's share shall be treated as part of their estate.

Section (6) provides that no tenant in common shall deal with their undivided share in favour of any person other than another tenant in common, except with the consent in writing, of the remaining tenants, but such consent shall not be unreasonably withheld. The import of the above is that the title by Openda Omolo and Owino Nyagol Ahija was comprised of "undivided interest" in the property and all had an equal right to use the property, and that there was no right of survivorship when the tenants in common died, upon the death of a tenants in common there was to be a probate of the estate of the deceased tenant to transfer the ownership in the tenancy in common to the legal representative of the estate. This court finds that the the transfer of half share belonging to Owino Nyagol Ahija to the first defendant was unlawful and un-procedural as it was in breach of **Section 103 (1) of the Registered Land Act Cap 300 laws of Kenya repealed** and by extension section 95 (5) of the Land Registration Act 2012.

Section 26 (1) of the Land Registration Act 2012 provides that:

“26. (1) 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.”

I do find the 1st Defendant title was un-procedurally acquired and can't be protected by law.

Article 40 (6) of the Constitution of Kenya provides:

“6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”

Section 143 (1) of Registration Land Act Cap 300 repealed provided:

“143. (1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.”

I do find that the plaintiff has satisfied this court on a balance of probabilities that he is entitled to the orders sought as the 1st defendant obtained title to the property unlawfully.

I do grant a declaration that that land parcel No. SOUTH SAKWA/MIGWENA/897 was illegally transferred to the 1st defendant and do grant an order cancelling the 1st defendant title and do direct that the register be rectified and the plaintiff be given half portion of SOUTH SAKWA/MIGWENA/897.

A permanent injunction is hereby issued restraining the 1st defendant his agents, servants or anybody claim through him from interfering with the plaintiff peaceful occupation and use of their half portion of SOUTH SAKWA/MIGWENA/897. Costs to the Plaintiff.

DATED, DELIVERED and SIGNED THIS 22nd DAY OF MAY, 2020.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

This judgment is hereby delivered to the parties by electronic mail due to the measures restricting court operations due to COVID -19 pandemic and in light of directions issued by the Honourable Chief Justice on 15TH March 2019 and with the consent of the parties.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE