

- names of the Plaintiffs and Defendant with each holding or being entitled to a quarter share.
4. The Plaintiffs disputed that the suit land belonged to the Defendant and that the Defendant is the one who had given them a place to settle.
 5. That the land should be shared equally between the four registered proprietors.
 6. That the suit land was part of the Plaintiffs' grandfather's land which had been shared among his six sons with Defendant and his brother Cared Eloo getting South Teso/Apokor/26 which they later sold. That the suit land, South Teso/Apokor/21 was their father's share.
 7. The Plaintiffs denied that they had participated in the meeting of 18th May, 2001 in which it was resolved that they get five (5) acres of the suit land.

SUMMARY OF DEFENDANT'S EVIDENCE.

1. That the Plaintiffs are sons of the Defendant's brother and that they had their own land. He however stated that he is ready to give the Plaintiff's 5 ½ or 6 acres of land as agreed on 18th May, 2001.
2. That the Plaintiffs' father did not have land in Kenya as his land was in Uganda.
3. That when the Plaintiffs' father died, he accommodated the Plaintiffs' on the suit land.
4. That he was in the process of sharing the suit land when he discovered that the Plaintiffs names appeared in the suit Land's register.
5. That the inclusion of the Plaintiffs names in the suit lands register was done without his consent.

AGREED ISSUES.

1. Whether or not the Defendant is the sole owner of land parcel South Teso/Apokor/21 notwithstanding that the same is jointly registered.
2. Whether or not the said land is held in common and each of the proprietors entitled to a ¼ share thereof.
3. Whether or not the Plaintiffs' suit is res judicata.
4. Whether or not the Plaintiffs' entitlement is only 5.0 acres.
5. Whether or not land parcel South Teso/Apokor/21 should be partitioned amongst the proprietors.
6. Whether there was any agreement made on 18th May, 2001 and if so its legal validity.
7. What are the appropriate orders as to costs.

CONCLUSIONS.

1. That the Plaintiffs are sons to the Defendant's brother who died in 1958 before land adjudication.
2. That upon the death of the Plaintiffs' father, their mother was inherited by the Defendant with whom they got one child who later died.
3. That the Plaintiffs and the Defendant were registered as proprietors of land parcel South Teso/Apokor/21 measuring 6.4 hectares on 1st August, 1972. This was a first registration after land adjudication. The registration of the land at that time was under regime of the Registered Land Act, Chapter 300 of Kenya (now repealed) and section 27 (a) of the said Act set out the interests conferred on the registration as follows:

- “ 27. ***Subject to this Act –***
- a. ***the registration of a person as the proprietor of land shall vest in that person the absolute ownership of the land together with all rights and privileges belonging or appurtenant thereto;***”
 - b.”

That provision has been retained in the Land Registration Act 2012 under section 24 in the same words. Therefore contrary to the claim by the Defendant that it was him that welcomed the Plaintiffs on the suit land, the Plaintiffs were on the suit land by dint of being joint registered proprietors of the land with rights and privileges equal to those of the Defendant.

4. That though the Defendant claimed he did not know how the Plaintiff got registered as joint owners of the suit land, and that he only got to know about it when he commenced the process to share the suit land, he has not taken any steps to date to have the suit land register rectified to remove the names of the Plaintiffs. The Defendant could have moved the court for rectification as provided for under section 143 (1) of the Registered Land Act, Chapter 300 of Laws of Kenya (now repealed) which stated;

“ 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.

(2).....”.

The provision of this section has been saved under section 80 (1) of the Land Registration Act 2012 in the following words;

“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.”

(2).....”

The Defendant has not included a counter claim against the Plaintiffs in his filed defence and has not offered any evidence to confirm his claim that the Plaintiffs names were included in the suit land’s register by fraud or mistake to warrant rectification orders.

5. That the copy of the register for Land parcel South Teso/Apokor/21 produced by the Plaintiffs indicates on the proprietorship section that the land was registered on 1st August, 1972 in the names of **WENZELAU OCHOU, ETIANG AMAIYA, WAWIRE AMAIYA and ODENYO AMAIYA**. It further identified the interest of each of the four registered proprietors as a quarter (1/4) share. The Defendant did not dispute or challenge the authenticity of the copy of the register only saying he had not been aware about the Plaintiffs inclusion in the register until much later. As indicted earlier, the Defendant has not taken any steps to challenge the Plaintiffs’ registration as joint owners of the suit land. The most he appears to have done is what is evidenced in the uncertified copy of a handwritten agreement dated 18th May, 2001 to the effect that the Plaintiffs would get five acres and he retains nine acres. Though the agreement contains identity card numbers of the Plaintiffs, the Defendant indicated that the Plaintiffs declined to accept the five acres of the suit land offered under the agreement. The Plaintiffs have disowned the agreement and said though their identity card numbers are in it, they did not attend the meeting where the agreement was made. They further pointed out that they did not sign the agreement. The document cannot therefore be taken to be an agreement between Plaintiffs and Defendant when Plaintiffs did not participate in its deliberations and agree on its contents. It is important to note that neither the author of the document nor any of the witness that were said to be present were availed to confirm its genuineness.
6. That the agreement dated 18th May, 2001 cannot be the basis of taking away the Plaintiffs’ rights and privileges of a registered proprietor which are conferred by the law. Those rights and privileges can only be taken or varied in accordance with the law or by the Plaintiffs voluntarily giving them up and not in any other way.
7. That this court is obligated under section 26 (1) of the Land Registration Act 2012 to take the person or persons named in the certificate of title of South Teso/Apokor/21 as the absolute and indefeasible owners of the said land. The section provides that a registered owner’s title is not ‘ Subject to challenge, except –

“26 (1)

- 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.*”

No evidence has been availed to establish any of the said grounds against the Plaintiffs.

8. That the copy of the register produced by the Plaintiffs for South Teso/Apokor/21 indicated that the share of each of the four named proprietors as a quarter (1/4) share. The four registered proprietors therefore were proprietors in common. This is as required under section 91 (3) of the Land Registration Act, 2012 which is similar to section 101 (1) of the Registered Land Act Chapter 300 of Laws of Kenya (now repealed). The Plaintiffs and Defendant as proprietors in common of the suit land have to agree on the dealing of their land as required under section 91 (6) of the Land Registration Act 2012 which states;

“ (6) 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.”

It was therefore contrary to the spirit of the law for the Defendant to have attempted to share the suit land to persons who are not tenants in common without obtaining the consents of the Plaintiffs as the other tenants in common to the suit land.

9. That the Plaintiffs desire to have their tenancy in common on the suit land being wound up by sharing the suit land equally has been opposed by the Defendant who insist that he is entitled to a larger share contrary to the provisions of the law as shown above. It was therefore in order for the Plaintiffs to have moved the court for appropriate orders as the Defendant had unreasonably withheld his consent and holding them into ransom by demanding that they accept a lesser share as set out in the so called agreement of 18th May, 2001. The Plaintiffs were entitled to decline the lesser share.

10. That for the reasons set out above and considering the close relationship between the Plaintiffs and Defendant each should bear his own costs. The court therefore enters judgment for the Plaintiffs against the Defendant in the following terms;

- a. That the Plaintiffs and Defendant are proprietors in common with each being entitled to a quarter (1/4) share of South Teso/Apokor/21.
- b. That the Plaintiffs and Defendant are to subdivide the suit land South Teso/Apokor/21 into four equal parcels and transfer to each one of them one parcel.
- c. That in case any of the tenants in common declines to execute any of the documents required to carry out the exercise in (b) above, the Deputy Registrar of this court to sign for such tenant in common.
- d. That Plaintiffs and Defendant to share equally the costs involved to carry out the exercise in (b) above.
- e. That each party to bear his own costs of this suit.

It is so ordered.

S.M. KIBUNJA,

JUDGE.

DATED AND DELIVERED ON 12TH DAY OF NOVEMBER, 2014.

IN THE PRESENCE OF;...P.I.P.....1ST PLAINTIFF

P.I.P.....2ND PLAINTIFF

P.I.P.....3RD PLAINTIFF

P.I.P.....DEFENDANT.

Mr. Jumba for Murunga for Plaintiffs and M/S. Maloba for Defendant.

JUDGE.