



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Case 64 of 2001**

**VICTOR OTIENO NYADIMO & GEORGE ODERO**

(Suing as the joint administrators of the estate of the late

Charles John Odinga).....**PLAINTIFFS**

**- VERSUS -**

**BARCLAYS BANK OF KENYA LTD .....1<sup>ST</sup> DEFENDANT**

**BONIFACE AWUOR.....2<sup>ND</sup> DEFENDANT**

**MOSES AWUOR.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiffs pray for a declaration that the property known LR No 209/6959/67, a house numbered K21C Jamhuri Estate Nairobi, is part of the estate of Charles John Odinga, deceased. The plaintiffs are the administrators of the estate. There were other prayers in the plaint: A declaration that the charge debt over the suit property had been paid; a declaration that the 1<sup>st</sup> defendant was negligent in releasing the title to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants; general damages and costs.

2. In a synopsis, Victor Otieno Nyadimo, Belinda Agatha Achieng and Brian Joseph Awuor are the biological children of the late Charles John Odinga and Pamela Akinyi Awuor. The suit property was purchased on 13<sup>th</sup> February 1984 and registered jointly in the names of Charles John Odinga and their step mother Monica Akinyi Odinga also deceased. The property had been charged to the 1<sup>st</sup> defendant bank by an instrument of charge dated 13<sup>th</sup> February 1984. At the hearing of the suit, the plaintiffs relied entirely on the written statement dated 24<sup>th</sup> November 2011 and filed in court on 25<sup>th</sup> November 2011. The plaintiffs' case is that since their step mother Monica Akinyi died before their father, the property devolved to their father and is thus part of the estate of Charles John Odinga.

3. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants are the brothers of the late Monica Akinyi Odinga. They are the administrators of her estate by virtue of a grant issued in Nairobi High Court Succession Cause 2067 of 1999. They claim that the suit property was wholly owned and wholly purchased by their sister who was an employee of the 1<sup>st</sup> defendant bank. At the hearing, the defendants wholly relied on the witness statement of Boniface Awuor dated 15<sup>th</sup> March 2012 and filed in court on 19<sup>th</sup> March 2012. The key evidence is that due to strict lending conditions for women by the bank, their sister befriended the late Charles John Odinga who was as a result named as a joint owner in the title. The defendants averred that the late Monica Akinyi paid the deposit for the property and the installments under the charge. The balance of the charge debt was paid by her group life insurance cover. They say the inclusion of Charles

Odinga in the title was not the free act of Monica Odinga. The marriage itself is challenged. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants claimed that their sister was separated from Odinga and was living in the suit property. There was no recognized marriage under customary law. They thus contended that the suit property belongs to the estate of Monica Odinga.

4. I have considered the evidence, pleadings, depositions and the written submissions of the parties. I have formed the following opinion. The key issues arising from the pleadings are as follows;

- (a) Were the deceased Monica Akinyi Odinga and Charles John Odinga registered as joint tenants of the suit property?
- (b) Was the joint registration obtained by duress or coercion?
- (c) Upon the death of Monica Akinyi Odinga, did the property devolve to Charles John Odinga?
- (d) Does the whole or part of the suit property form part of the estate of Monica Akinyi Odinga?
- (e) Are the plaintiffs or the 2<sup>nd</sup> and 3<sup>rd</sup> defendants entitled to their prayers in the plaint and defence and counterclaim respectively?
- (f) Is the 1<sup>st</sup> defendant liable to the plaintiffs for negligence?

5. I have stated that at the hearing, both parties relied entirely on their written statements filed in court. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants' learned counsel did not cross-examine the plaintiffs' witness. He said he had no questions for the witness. When the 2<sup>nd</sup> defendant produced his written statement, the plaintiffs' learned counsel also did not have any questions in cross-examination. The court must then weigh the two conflicting statements in evidence, the documentary evidence and the law to reach at its judgment. The 1<sup>st</sup> defendant did not tender evidence but has filed submissions. The late Monica Akinyi Odinga had prepared a will dated 19<sup>th</sup> March 1998. It appears at page 24 of the plaintiffs' bundle of documents. It does not list the suit property among her assets. It is then clear to me that she conceded that the property was jointly owned and that if she predeceased Charles John Odinga, the property would fall outside her estate. I did not receive cogent evidence on whether or not the two were married. It is pleaded at paragraph 5 of the plaint that the two were married under Luo customary law. Monica Akinyi died on 9<sup>th</sup> April 1998. About 8 months later, John Charles Odinga died on 15<sup>th</sup> December 1998. The suit property was bought way back on 13<sup>th</sup> February 1984 and charged to the bank. The title is in their joint names. I reach the inescapable conclusion that if Monica Akinyi had other views on their joint tenancy, she would have within those 14 years done something about it. There was no legal challenge during her life. If the evidence of the 2<sup>nd</sup> defendant is to be believed, she kept on meeting the installment payments on the mortgage. From a preponderance of the evidence, I am unable to find that they were not married or were not joint tenants of the suit property. The averments by the 2<sup>nd</sup> defendant that the deceased were not married or joint tenants cannot be taken at face value. In any event, that is a matter truly in the realm of the family or succession court. I am alive that the Hon. Justice Kalpana Rawal (as she then was) directed on 24<sup>th</sup> November 2008 that the issues arising in Probate and Administration causes 806 of 1999 and 2067 of 1999 be resolved in the course of this suit. I confine myself to resolution of the present dispute and issues arising from it. From a legal standpoint, parties do not need to be married to be joint tenants of a registered property. So much so that the evidence before me now shows that the deceased Charles John Odinga and Monica Akinyi Odinga were joint tenants of the suit property. The statement in rebuttal by the 2<sup>nd</sup> defendant is without foundation. It is also discredited by the terms of the last will and testament of Monica Akinyi Odinga.

6. I am there fortified by two earlier decisions in this suit. My learned brother Justice Kihara Kariuki (as he then was) dealt with a notice of motion taken out on 13<sup>th</sup> July 2007 by the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant had sought to appoint a receiver over the suit property or for payment of

rent into court. The Judge held as follows on 25<sup>th</sup> April 2008:

*Monica Akinyi Odinga made a Will on the 19<sup>th</sup> March, 1998 under the terms of which she bequeathed her personal and household effects to Charles Oloo Odinga, her husband. She gave the residue of her estate to her mother and her two brothers Moses Awuor and Boniface Otieno. (the Defendants).*

*The suit property was registered in the joint names of John Charles Odinga and Monica Akinyi Odinga as Joint Tenants. Monica Akinyi Odinga predeceased her husband John Charles Odinga. At the date of writing her Will on the 19<sup>th</sup> March, 1998, she was well aware of her interest in the suit property. There is no reference to it in her Will. She must have undertaken and appreciated the legal effort of her joint tenancy between her and her husband. Moses Owuor and Boniface Otieno can in law only take specific bequests given to them by their sister Monica Akinyi Odinga under her Will. It takes quite a bit of ingenuity to turn a whole house into a residue of a deceased's estate.*

7. Again, and still at the interlocutory stage, the Hon. Justice Onyango Otieno (as then was) had this to say on 15<sup>th</sup> May 2001;

*“It is my humble opinion that the applicants, being the administrators of the estate of the late Charles John Odinga who survived Akinyi with whom they were joint tenants of the suit property have a duty in law to ensure that they preserve whatever was left in the estate of the late Charles John Odinga for the benefit of the beneficiaries”.*

8. Although the 2<sup>nd</sup> and 3<sup>rd</sup> defendants stated there was duress or coercion or fraud in having Charles John Odinga registered as a joint tenant, there was paucity of evidence in support. The allegations of fraud in particular called for detailed evidence to reach the threshold of proof. I am well alive to the cardinal precept of the law of evidence that he who alleges must prove it. See Koinange and 13 others Vs Koinange [1986] KLR 23. The standard of proof for fraud is very high approaching but below proof beyond reasonable doubt. See Ratilal Gordhanbhai Patel Vs Lalji Makanji [1957] E A 314, Urmila Mahindra Shah Vs Barclays Bank International and another [1979] KLR 67. It requires proof beyond the usual standard of balance of probabilities in civil cases.

9. In the end, I have found no evidence of coercion, duress or fraud in the registration of the deceased as joint tenants. My answer to the first three issues that I outlined are as follows: The deceased Monica Akinyi Odinga and Charles John Odinga were joint tenants of the suit property; their joint registration was not obtained by duress, coercion or fraud by Charles John Odinga; and that since Monica predeceased the late Charles John Odinga, the property in law and in fact devolved to his estate. It must follow as a corollary that issue number (d) is answered in the negative: the whole or part of the suit property does not form part of the estate of Monica Akinyi Odinga, deceased. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants' counterclaim thus collapses and is dismissed.

10. I will now turn to the claim against the 1<sup>st</sup> defendant bank. The Barclay Trust Investment Services on 10<sup>th</sup> August 1998 (letter at page 3 of plaintiff's bundle) acknowledged that:

*“With regard to the Jamhuri property, this office is aware that the title passes by survivorship to your client, Mr. John Charles Odinga and this has been explained to him”.*

That letter was copied to the 1<sup>st</sup> defendant. The outstanding loan on 16<sup>th</sup> April 1998 was Kshs 114,478.50. On 29<sup>th</sup> November 2001, the 1<sup>st</sup> defendant returned a cheque from the plaintiffs' lawyer of Kshs 20,000 in loan repayment. The 1<sup>st</sup> defendant stated the loan had been fully redeemed from the death benefits of Monica Akinyi. This is evident from documents at pages 8 to 18 of the plaintiffs' bundle. I then find it surprising that the 1<sup>st</sup> defendant released the title document to the wrong party, the defendants. That became the subject of the ruling of Hon. Justice Onyango Otieno (as he then was) of 15<sup>th</sup> May 2001. The Judge ordered the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to deposit the title in court within 3 days. I have found and held that the title property belongs to the estate of John Charles Odinga and should be

released to the plaintiffs as administrators of the estate.

11. Regarding the claim for negligence and damages against the 1<sup>st</sup> defendant the plaintiffs state at paragraph 16 (b) of the statement as follows;

*“The 1<sup>st</sup> defendant should further be ordered to pay general damages to the plaintiffs on account of their reckless and negligent manner in which they handled the title document to the suit property yet they knew that the plaintiffs were the proper parties to be given the title documents. By acting as they did, they exposed the deceased’s estate to possible harm and loss of the entire property”.*

The 1<sup>st</sup> defendant contests the claims of negligence. In my view the above statement of the 1<sup>st</sup> plaintiff falls far below the standard of proof of negligence. There is no proof of breach of a duty of care with resultant damage to the plaintiffs. The onus of proof under sections 3 (4) and 107 (1) of the Evidence Act fell on the plaintiffs. No evidence was also led upon which damages can be assessed. It is also not lost on me that this suit is primarily over the rightful owner of the suit title. The property is intact. Granted those circumstances and that the title is safely in the custody of court, I cannot say the plaintiffs have established a claim for negligence or award of general or aggravated damages. In the result, the plaintiffs’ claim against the 1<sup>st</sup> defendant is dismissed. That answers the issue number (f).

12. In the end, I find that the plaintiffs have proved part of their claim on a balance of probabilities. I dismiss the 2<sup>nd</sup> and 3<sup>rd</sup> defendants’ counterclaim. I dismiss the plaintiffs’ claim against the 1<sup>st</sup> defendant. I enter judgment in favour of the plaintiffs against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants as follows:

a) **THAT** I declare that the property known as LR No 209/6959/67 house number K 21C Jamhuri Estate Nairobi devolves upon and is part of the estate of Charles John Odinga, deceased.

b) **THAT** the 2<sup>nd</sup> and 3<sup>rd</sup> defendants shall release to the plaintiff the title of the said property and if held in this Honourable Court, the Deputy Registrar shall release the said title to the plaintiffs forthwith.

c) The 1<sup>st</sup> defendant shall cause a discharge of charge to the title to be executed and released to the plaintiffs forthwith.

d) In view of the fact that this is a dispute between family members over the estate of the deceased, the order that commends itself to me to grant is that each party shall bear its own costs.

It is so ordered.

**DATED** and **DELIVERED** at **NAIROBI** this 9<sup>th</sup> day of October 2012.

**G.K. KIMONDO**

**JUDGE**

**Judgment read in open court in the presence of**

Mr. P.O. Mungla for the Plaintiffs.

Mr. Echesa Werimo for the 1<sup>st</sup> Defendant.

Mr. S. Adere for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.