



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI

ELC CASE NO. 687 OF 2017

ROSE ATIENO OLAWO.....PLAINTIFF

VERSUS

JOSEPH JUMA OLAWO.....1ST DEFENDANT

FRANCIS KAYETE MAKONDO.....2ND DEFENDANT

JUDGMENT

1. By an originating summons dated 9th June 2017 duly filed in court on even date and mounted under Order 37 Rule 1 and 2 of the Civil Procedure Rules, Article 60 of the Constitution of Kenya 2010, the plaintiff namely Rose Atieno Olawo through Omonde Kisera and Company Advocates, has sued the 1st defendant and the 2nd defendant, Joseph Juma Olawo and Francis Kayete Makondo respectively. She is seeking determination of the following questions:

- a) Whether the transfer and registration of LR No. Kanyamkago/Kawere II/1548 (the suit land herein) in the name of the defendants sometimes in the year 2015 or thereabout from the name of Hezron Olawo Awuor who had long died intestate before then and in whose estate no grant of letters of administration have been issued to date, was lawful and valid.
- b) Whether the subdivision of the suit land by the defendants into LR No. 5516, 5517 and 5518 and transfer of the said titles into the defendants' name, 2nd defendant's name and the 1st defendant's name respectively, is lawful and valid without a succession cause having been undertaken.
- c) An order revoking subdivision of the suit land which is the original title number and an order of restoration of the same in the name of the deceased Hezron Olawo Awuor to be dealt with accordingly to the law of succession.
- d) Declaration that the aforesaid dealings of the defendants herein respecting the suit land and the resultant titles amount to intermeddling with the estate of Hezron Olawo Awuor-deceased for which the defendants should be punished as by law required.
- e) Whether the defendants should pay costs of the originating summons.

2. The originating summons is premised on grounds (a) to (e) as set out on its face, the plaintiff's 14-paragraphed supporting affidavit and annexed bundle of documents marked as "RAO1". Briefly, the plaintiff claims inter alia, that she is the surviving widow of the deceased, Hezron Olawo Awuor who had four (4) wives and many children including the 1st defendant. That the deceased died on 5th February 1986 and to date no succession has been undertaken in respect of his estate. That in the year 2016, she wanted to file a succession cause in regard to the estate of the deceased. However, she discovered that the 1st defendant had unilaterally and unlawfully transferred the suit land into his name and consequently subdivided it and transferred the resulting portions namely LR Nos. Kanyamkago/Kawere II/516 and 518 in his own name and LR No. Kanyamkago/Kawere II/517 in the name of the 2nd defendant. That the defendants have disinherited all the beneficiaries of the estate of the deceased as they intermeddle with the same, thus provoking the instant suit.

3. On 5th October 2020, the plaintiff (PW1) relied on the originating summons, and the supporting affidavit in her testimony. She further relied on a copy of certificate of official search of the suit land (PEXhibit 1), Central Kanyamkago chief's letter dated 12th July 2016 (PEXhibit 5) and certificates of official search dated 11th July 2016 in respect of the three (3) subdivisions of the suit land (PEXhibits 2, 3 and 4).

4. The plaintiff did not submit in this suit. After the close of the plaintiff's case, her counsel Mr. Omonde Kisera informed this court that:

"...we do not intend to submit herein."

5. The 1st and 2nd defendants were duly served as revealed in affidavits of service sworn on 16th March 2018 and 27th November 2019 under Order 5 Rule 15 of the Civil Procedure Rules, 2010.

6. Be that as it may, the 1st and 2nd defendants failed and or neglected to file and serve replying affidavits, submissions or any other document in the present suit. Interestingly, they have not offered any explanation thereof.

7. It is trite law that issues for determination in a suit generally flow from either the pleadings or as framed by the parties for the court's determination; see *Galaxy Paints Company Ltd- vs-Falcon Grounds Ltd (2000)2EA 385*.

8. I have duly considered the entire originating summons, the accompanying affidavit and bundle of documents marked as "RAO1" produced as PEXhibits 1a, 1b, 2, 3 and 4 as well as the evidence of PW1 which include the said exhibits. As already observed, the 1st and 2nd defendants did not file any pleadings herein.

9. In view of the foregone, the issues for determination in the instant suit, are as set out in the originating summons. In that regard, the questions at paragraph number one hereinabove are hereby embraced accordingly.

10. On question number one (1), reference is made to grounds (a) and (c) of the originating summons and paragraphs 3 to 9 of the plaintiff's supporting affidavit. PEXhibits (1) and (5) show that the suit land was registered in the name of the deceased. By PEXhibits 2, 3, 4 and 5, the subdivisions thereof are registered in the name of the 1st and 2nd defendants.

11. Regarding question number two (2), I refer to paragraphs 7, 8 and 9 of the supporting affidavit of PW1 alongside ground (c) of the originating summons. Quite clearly, no succession process in respect of the estate of the deceased was carried out. Indeed, PW1 testified inter alia;

"...Hezron Olawo(Deceased). He died in the year 1986...The said subdivisions were done without any succession process. This is the area chief's letter dated 12/7/2016 (PEXhibit 5)".

12. In respect of question number three (3), Section 26(1) of the Land Registration Act, 2016 (2012) under which PEXhibits 2, 3 and 4 were issued, provides for acquisition of certificate of title to land by way of first registration upon transfer or transmission. In light of the testimony of PW1, the subdivisions of the suit land and registration of the same in the name of the 1st defendant and 2nd defendant, call for rectification of the titles under Section 80 of the Land Registration Act, 2016 (2012).

13. As regards question number four (4), I note grounds (d) and (e) of the originating summons, the plaintiff's supporting affidavit and her evidence on record. **Section 45 of the Law of Succession Act Chapter 160 of the Laws of Kenya** prohibits intermeddling of property of deceased person and it is applicable in the present suit.

14. It is settled law that the estate of the deceased person is vested in the legal representative; see *Kothari-vs-Quareshe (1967)EA 364 and Trouistik Union International and another-s- Jane Mbeyu and another (1993)eKLR*.

15. Under **Section 3 of the Law of Succession Act** (supra), the term "personal representative" means the executor or administrator as the case may be, of a deceased person. **Section 2 of the Civil Procedure Act Chapter 21 Laws of Kenya**, also defines the term "**legal representative**". As such, the 1st and 2nd defendants are not such representatives or persons in respect of the estate of the deceased herein.

16. This court accorded the defendants an opportunity to defend the suit as provided for under Articles 48 and 50(1) of the Constitution of Kenya, 2010. I am guided by the Court of Appeal decision in *James Kanyिता Nderitu and another v Marios Philotas Ghikas and another (2016) eKLR accordingly*.

17. I also subscribe to the case of *Kirugi and another v Kabiya and 3 others (1987)KLR 347* where the Court of Appeal observed that the burden is always on the plaintiff to prove his or her case on the balance of probabilities. That such burden is not lessened even if the case was heard by way of formal proof.

18. The instant suit was heard by way of formal proof whereby PW1 gave oral and affidavit evidence in support of her assertion. The evidence is uncontroverted, cogent and quite reliable.

19. To that end, has the plaintiff proved her claim against the 1st and 2nd defendants to the requisite standards? Loudly, the answer is in the affirmative bearing in mind **Sections 107, 108 and 109 of the Evidence Act Chapter 80 Laws of Kenya** and the veracity of the plaintiff's evidence.

20. The upshot is that judgment is hereby entered for the plaintiff against the 1st and 2nd defendants jointly and severally in the following terms;

a) Declaration that the transfer and registration of LR No. Kanyamkago/Kawere II/1548 (the suit land herein) in the name of the defendants sometimes in the year 2015 or thereabout from the name of Hezron Olawo Awuor who had long died intestate before then and in whose estate no grant of letters of administration have been issued to date, was lawful and valid.

b) Declaration that subdivision of the suit land by the defendants into LR No. 5516, 5517 and 5518 and transfer of the said titles into the defendants' name, 2nd defendant's name and the 1st defendant's name respectively, is lawful and valid without a succession

cause having been undertaken.

c) An order revoking subdivision of the suit land which is the original title number and an order of restoration of the same in the name of the deceased Hezron Olawo Awuor to be dealt with accordingly to the law of succession.

d) Declaration that the aforesaid dealings of the defendants herein respecting the suit land and the resultant titles amount to intermeddling with the estate of Hezron Olawo Awuor-deceased for which the defendants should be punished as by law required.

e) The defendants to bear the cost of the originating summons by dint of the **proviso to Section 27 (1) of the Civil Procedure Act Chapter 21 Laws of Kenya.**

DATED, SIGNED and DELIVERED in open court at MIGORI this 5th day of November 2020.

G. M.A. ONGONDO

JUDGE

In presence of :-

Mr. Job Oywer learned counsel for the plaintiff

Plaintiff present in person

Court Assistant – Tom Maurice