



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 1200 OF 2016

(FORMERLY HCC NO. 285 OF 2010)

VINCENT TUMBO SIRO.....PLAINTIFF

VERSUS

SOSPETER MOINDI MOKAYA.....1ST DEFENDANT/APPLICANT

THE HON. ATTORNEY GENERAL...2ND DEFENDANT/APPLICANT

J U D G M E N T

Background and the Pleadings:

1. The Plaintiff instituted the instant suit as the personal legal representative of Paul Siro Mogaka (deceased) vide a plaint dated 8th October 2010. The Plaintiff's claim is that his late father Paul Siro Mogaka (deceased) was a co-owner with Johnson Matundura Abuta and Sospeter Moindi of land parcel **Kisii Town/Block II/66** (hereinafter referred to as "**the suit property**"). The Plaintiff averred that his late father together with his co-owners were business partners and were jointly registered as proprietors of the suit property for a lease term of 33 years from 1st June 1953. The Plaintiff stated that the registered owners applied for renewal of the lease upon expiry and that renewal of the lease was granted for a term of 99 years from 1st June 1953.

2. The Plaintiff further averred that the Defendants caused the extended lease to be registered and in doing so fraudulently excluded the name of Siro Mogaka (Plaintiff's deceased father) as one of the registered owners of the suit property with the objective of denying the Plaintiff's deceased father ownership of 1/3 share of the property that he held and was entitled to continue holding in the renewed lease. The Plaintiff further contended that the 1st Defendant following the fraudulent transfer embarked on harassment of Siro Mogaka's tenants who were occupying his 1/3 share of the property. He sought the following prayers in the plaint:

- a. A declaration that SIRO MOGAKA is still the owner of 1/3 share of the suit land No. Kisii Town/Block II/66.**
- b. An order directing the Commissioner of Lands to rectify the extended lease of the suit property to include the names of SIRO MOGAKA as one of the proprietors in common in equal shares.**
- c. A permanent injunction restraining the 1st Defendant, his agents and/or servants from in any way interfering with the 1/3 share of SIRO MOGAKA and/or his tenants on the same.**
- d. Costs of this suit.**
- e. Any other or further reliefs the court may deem fit to grant**

3. The 1st Defendant filed his statement of defence dated 19th January 2011 on the same date. He denied the Plaintiff's averments in the plaint and further stated it was in fact the Plaintiff's deceased father, Siro Mogaka who fraudulently caused the extension of the lease and unlawfully caused his name (Siro Mogaka) to be included in the register of suit land. The 1st Defendant's contention was that the Plaintiff's deceased father was not entitled to 1/3 share of the suit land. The 1st Defendant averred that the Plaintiff's suit was misconceived and constituted an abuse of the court process.

4. The 2nd Defendant filed a statement of defence dated 10th December 2010. The 2nd Defendant admitted that Johnson Matundura, Sospeter Moindi and Siro Mogaka were registered as lessees of the suit property for a term of 33 years from 1st June 1953. The 2nd Defendant stated on expiry of the term a fresh lease was issued by the Commissioner of Lands to Sospeter Moindi and Johnson Matundura for a period of 66

years and that Siro Mogaka was not a party to the new lease. The 2nd Defendant denied the allegations of fraud attributed to it and further pleaded that there was a previous pending suit Kisii HCCC No. 243 of 2010 between the same parties and the cause of action was similar and thus the instant suit was incompetent and was an abuse of the court process.

Evidence of the Parties:

5. The Plaintiff testified and called two witnesses in support of his case. The 1st Defendant gave evidence and called one witness in support of his case while the Kisii Land Registrar testified on behalf of the 2nd Defendant.

6. The Plaintiff (PW1) testified that his deceased father, Paul Siro Mogaka was a business partner of both Johnson Matundura and Sospeter Moindi and as such partners they were co-owners of **LR No. Kisii Town/Block II/66** with each owning 1/3 share of the property. The Plaintiff stated that the property had initially been registered in the names of Johnson Matundura and Sospeter Moindi. The Plaintiff referred to a copy of certificate of registration of business name dated 11th January 1958 to illustrate that Johnson Matundura s/o Abuta, Siro s/o Abuta were all carrying on business under the name of **“Johnson Matundura & Co” (“PEX.3”)**. He testified that both Johnson Matundura and Sospeter Moindi wrote to the Commissioner of Lands letter dated 16th August 1964 (not 3rd December 1964 as record indicates) seeking consent to include Siro Mogaka as a co-owner of the suit property. The full content of this letter is reproduced hereunder:-

The Commissioner of Lands,

Department of Lands,

P.O Box 30089,

NAIROBI

Through:

The Assistant Land Registrar,

P.O Box 569,

KISII

Dear Sir,

RE: L/R 1436/19/VII KISII

INO

Johnson Matundura & Sospeter Moindi

33 Years Dier,

1/6/53

I, Johnson Matundura and Sospeter Moindi originally the registered proprietors of Plot No. 19 above hereby agree to include name of Mr. Siro Mogaka to be a third partner in the title deed.

Mr. Mogaka has been our dark share holder in the partnership since 1953 and his name had never appeared in the lease.

We shall be pleased to have Mr. Siro Mogaka's name entered in the lease as a third partner.

For your information, Mr. Siro's contribution for partnership is shs.9,000/=

We beg to remain,

Sir,

Yours obedient servants,

1. Mr. Johnson Matundura signed

2. Mr. Sospeter Moindi signed

7. The parties advocate Mr. Dhanwant Singh, Esq vide a letter dated 16th February, 1965 wrote to the Commissioner of Lands (“PEX.2”) as follows:

The Commissioner of Lands

Nairobi

Dear Sir,

RE: LR No. 1436/19/VII Kisii Township

My clients, Messrs. Johnson Matundura and Sospeter Moindi, who are registered lessees of the above named plot, have subject to your concern agreed to transfer to Siro Mogaka one third undivided share in the above named piece of land together with all the buildings standing thereon and improvements made thereto for the sum of shillings twenty thousand.

I am instructed by my clients to prepare the aforesaid transfer and have it registered. I shall be obliged if you would grant to my clients the requisite consent of yours to the said transfer.

Yours faithfully

signed

8. The Commissioner of Lands vide a letter of 6th March 1965 (“PEX.4”) accorded his consent to the transfer of 1/3 undivided share of the suit property. This letter was addressed to Dhanwant Singh, Esq. Advocate and read as follows:-

Dhanwant Singh, Esq Advocate

P.O Box 435,

KISII

Sir,

LR No. 1436/19/VII KISII TOWNSHIP

Further to my letter 47270/30 dated 16th February, 1965 I hereby accord my consent to the proposed transfer of one third undivided share of the above mentioned property to Mr. Siro Mogaka for a sum of shs.20,000/=.

I have the honour to be,

Sir,

Your obedient servant,

(P.M. Thumi)

For: Commissioner of Lands

PMT/AM

N.O.O.

Copy to:- The District Commissioner,

P.O Box 590,

KISII Your LJ.7/19/77 dated 23rd

February, 1965 refers

9. The Plaintiff testified that following the approval and consent by the Commissioner of Lands, his late father was registered as co-owner of the suit property and produced the copy of abstract of title (green card) as evidence (“PEX.5”). As per the abstract of title Siro Mogaka was registered as 1/3 co-owner of the suit property on 1st April 1982 and a certificate of Lease was issued on the same day showing Johnson Matundura, Sospeter Moindi and Siro Mogaka as the owners of the suit land in equal shares. The Plaintiff further stated the initial lease was for a term of 33 years and was to expire in 1986. He stated the partners sought for the renewal/extension of the lease and the Commissioner

of Lands issued a fresh letter of allotment dated 8th April 1987 extending the lease to 99 years from the effective date. The letter of allotment was produced as “**PEx.6**” and was addressed to “**Johnson Matundura & Others**” of P.O Box 92, Kisii. The Plaintiff testified that the extended/renewed lease was registered after Johnson Matundura death on 28th November 1994 where his widow Theresa Nyaechero Matundura, Sospeter Moindi and Siro Mogaka were registered as the owners as evidenced by a certificate of official search issued on 12th May 2005 (“**PEx.7**”). He stated the renewed lease would have expired in 2052.

10. The Plaintiff stated that after his father died in 2008 he discovered that his father’s name had been removed as one of the proprietors of the suit property although earlier in 2005, Sospeter Moindi had brought a suit against him vide **Kisii HCCC No. 130 of 2005 (Sospeter Moindi -vs- Siro Mogaka)** claiming that his father (Siro Mogaka) had irregularly inserted his name as one of the proprietors of the suit property fraudulently. The case was withdrawn apparently after Sospeter Moindi obtained a new lease that excluded the Plaintiff’s father’s name.

11. In cross examination the Plaintiff stated that his father was enjoined as a co-owner of the suit property as he was in partnership with the original registered owners. The Plaintiff indicated he did not have a copy of the transfer of the 1/3 share of the property to his father or any minutes from the council approving the transfer. He denied the transfer of the 1/3 share of the property to his father was fraudulent.

12. PW2 Julius Moracha Matundura stated he was the son of Johnson Matundura Abuta and that Sospeter Moindi Abuta was his uncle. He was emphatic that the suit property was owned by three (3) proprietors each holding 1/3 share. He stated the three shareholders were carrying on partnership business together. The witness relied on his filed witness statement as his evidence.

13. In cross examination the witness stated there was a period he represented his deceased father in the business and he had wanted to sell his father’s share of the property to one Anne Ondiek owing to the dispute concerning ownership of the property. He stated that he sold the share of his father to Anne Ondiek in 1983 and that she is still in occupation of the portion he sold her. He further stated when questioned by the court that the property was delineated into 3 distinct shares during the lifetime of the original proprietors.

14. PW3 Anne Ondiek testified that she was rented a shop at the suit premises by Siro Mogaka and stated that she had operated a retail shop at the premises since 2003. She stated she was paying rent to Siro Mogaka but after he died Sospeter Moindi went and demanded to be paid rent which she declined to pay to him as he was not her landlord. She stated that Mr. Moindi issued her demand notice for rent arrears amounting to kshs. 480,000/- which prompted her to refer the dispute to the Tribunal where she was ordered to be depositing rent until the ownership dispute of the suit property was resolved.

15. In cross examination she admitted that she bought a share of Julius Moracha’s Plot No. 66 of 2009 which was part of the suit property where she was a tenant of Siro Mogaka though Julius Moracha was not the registered owner of the 1/3 share he was selling. She confirmed that when she rented Siro Mogaka’s share the property had been partitioned into 3 portions. When questioned by the Court she stated she was still operating the shop she rented from Siro Mogaka but that she had not taken over the share she bought from Julius Moracha.

16. DW1 Elijah Nyakundi Moindi a retired teacher testified that Sospeter Moindi was his deceased father and he was duly appointed as personal administrator of his estate (“**DEx.1**”). He stated his father owned a property in Kisii Town and that his father had made a witness statement filed on 19th January 2011 which he wished to rely on in his evidence. DW1’s evidence was to the effect that his late father and Johnson Matundura owned the suit property jointly and that they had been issued initial lease for a term of 33 years in 1953 as per the copy of grant No. **LR 255** dated 22nd October 1953 (“**DEx.3**”). After the expiry of the lease he stated his father and Johnson Matundura applied for extension/renewal of lease which application was duly approved and a lease dated 11th January 2008 was issued and forwarded for registration vide Commissioner of Lands letter dated 10th March 2008 (“**DEx.5 and 4**”) respectively. The witness stated that the abstract of title (green card) produced as “**DEx.5**” shows his father and his uncle were registered as joint owners in equal shares. The witness stated the property was always owned and in the names of his father and his brother Matundura.

17. In cross examination the witness stated he was not aware that the lease was renewed in 1987. He stated that his father had sued Siro Mogaka in 2005 claiming that Siro Mogaka had fraudulently gotten his name included in the ownership of the suit property. He stated that he was not aware that his father and his uncle had applied for Siro Mogaka to be included in the title of the suit property. The witness conceded that the initial lease expired in 1986 and that the renewed lease dated 11th January 2008 was issued after about 21 years since the lease expired. The witness was not aware when the application for renewal was made and/or how the approval was made or communicated.

18. DW2 William Okoba Matundura in his evidence relied on his recorded filed witness statement. He stated that he was not aware that there was any time Siro Mogaka was incorporated as a co-owner of the suit property or that any application had been made by his late father and uncle to incorporate him as a co-owner of the suit property.

19. In cross examination, the witness stated that the documents produced by the Plaintiff to show that Siro Mogaka was incorporated as a co-owner of the suit property were fraudulent and/or fake. He however did not substantiate or demonstrate in what manner the documents were fake or fraudulent.

20. Steve Mokaya, Land Registrar Kisii testified for the 2nd Defendant as DW3. He stated that land parcel **Kisii Municipality/Block II/66** as per records held at the lands office was registered in the name of Elijah Nyakundi Moindi and Anne Ondiek as joint owners and they were so registered on 18th August 2016 pursuant to Succession Cause No. 584 of 2015. He however stated the land office did not have any documents respecting the said succession cause in its records. A Certificate of Lease was issued in favour of Elijah Moindi and Anne Ondiek. Prior to that the lease from Nairobi was registered on 4th November 2009 in favour of Johnson Matundura and Sospeter Moindi as joint tenants in equal shares.

21. The Land Registrar further added that according to the records Siro Mogaka was on 10th July 1980 added to the lease as the third owner and each of them held an equal share of 1/3 share of the suit property. After the renewal of the lease, the Land Registrar stated that the old

lease was surrendered. He stated the renewed lease did not have the name of Siro Mogaka. He explained that could be because the records held at Nairobi from where the lease was issued had not been updated and only carried the names of the original owners.

22. The Land Registrar affirmed that the transfer of the undivided 1/3 share of the suit property was executed by the parties on 10th July 1980 and was duly stamped. He stated that the original owner signed the transfer voluntarily and Certificate of Lease was issued on 1st April 1982 which carried the names of all the three co-owners including Siro Mogaka. In his view the new lease (extended) ought to have included the name of Siro Mogaka as there was no instrument that showed that Siro Mogaka relinquished his interest in the suit property. The land Registrar stated that the effect of the letter of allotment issued in 1987 in respect of the suit property for a term of 99 years from 1953 was to renew/extend the lease that was there and the omission of Siro Mogaka's name in the renewed lease in his view was a mistake.

23. The Land Registrar concluded his evidence by producing all the documents that are held in the parcel file of the suit property at the lands office which he referred to in his evidence.

Analysis and Determinations:

24. After the close of the trial the Plaintiff and the 1st Defendant filed their final closing submissions. Having reviewed the pleadings, the evidence and the submissions the following issues arise for determination.

(i) Whether Johnson Matundura Abuta, Sospeter Moindi and Siro Mogaka were at any time business partners?

(ii) Whether Johnson Matundura and Sospeter Moindi were the initial registered owners of LR No. 1436/19/VII (new No. Kisii Town/Block II/66) and if so whether they invited Siro Mogaka to join them as a co-owner?

(iii) Whether the initial lease for the property for 33 years from 1st June 1953 was renewed and if so who were the owners at the time of renewal?

(iv) Whether Siro Mogaka's name was fraudulently included as one of the owners of the suit property?

(v) What orders or reliefs should the court grant?

25. In regard to whether the Plaintiff, Johnson Matundura Abuta and Sospeter Moindi Abuta were business partners there can be no doubt. The witnesses who testified including the 1st Defendant admitted the Plaintiff's father and both Johnson Matundura and Sospeter Moindi were doing some business together. The 1st Defendant stated they were doing a posho mill (flour) business. The Plaintiff produced a certificate of registration of business dated 11th January 1958 which carried the names of the three partners Matundura, Moindi and Siro Mogaka as carrying business under the name of "**Johnson Matundura and Coy**". I therefore find and hold that the three named persons were business partners.

26. Concerning whether or not Johnson Matundura and Sospeter Moindi were the initial registered owners of the suit property there can be no contest as there is credible documentary evidence that is not disputed. This is admitted by both the Plaintiff and the 1st Defendant in the evidence. The record equally supports that position. The 1st Defendant produced as "**DEx.3**" a copy of the Grant **I.R No. 255** for land reference number **1436/19/VII** Kisii Township which shows Johnson Matundura and Sospeter Moindi were issued a grant over the said property for a term of 33 years from 1st June 1953. This grant was duly registered under the Registration of Titles Ordinance on 22nd October 1953. This is the same land which on conversion was registered under the Registered Land Act in 1972 as **Kisii Town/Block II/66**. The lease was to expire on 31st May 1986.

27. The issue in dispute is whether before the lease expired the registered proprietors (Matundura and Moindi) invited their business partner to become a co-owner of the property so that the ownership was to be in equal shares with each of them owning an undivided 1/3 equal share of the property. The Plaintiff maintained that is what happened but the 1st Defendant insisted that was not the case. The Plaintiff in support of his assertion produced correspondence in form of letters written by the both Johnson Matundura and Sospeter Moindi dated 16th August 1964 (earlier reproduced) addressed to the Commissioner of Lands requesting that the Plaintiff be included in the title of the property as a third owner. This letter was signed by the two proprietors and was copied to Siro Mogaka. The registered proprietors advocate Dhanwant Singh, Esq. vide a letter dated 16th February, 1965 ("**PEx.2**") also earlier reproduced in this judgment followed up on the request by the registered owners with the Commissioner of Lands. The Commissioner of Lands vide his letter dated 6th March 1965 ("**PEx.4**") reproduced earlier in the judgment responded to the request and gave his approval and consent to the proposed transfer of 1/3 undivided share of the property to Siro Mogaka.

28. The 1st Defendant stated he was not aware of any such correspondences and asserted that they were not genuine. He stated the said letters were fake and/or fraudulent. However, no evidence was tendered to prove the letters were fake and/or fraudulent. It is a fact that Johnson Matundura and his brother Sospeter Moindi were business partners with Siro Mogaka going back to the 1950s and it is more likely than not that the correspondence referred to was voluntarily and willingly generated with the consensus of the three business partners as the subsequent events reveal.

29. When Steve Mokaya DW3 the Land Registrar Kisii testified he affirmed that the initial registered owners executed a form of transfer of undivided share transferring 1/3 share of the property to Siro Mogaka on 10th July 1980 with the result that each of them henceforth owned 1/3 share of that suit property. The transfer was attested by D. A Onyancha Advocate and the transfer was duly registered on 1st April 1982 and a Certificate of Lease issued bearing all the three names of Johnson Matundura, Sospeter Moindi and Siro Mogaka. The abstract of Title (green card) for the property shows the transfer was given effect as the registration of the Transfer was endorsed as Entry No. 2 under the

proprietorship Section and the issue of Certificate of Lease was endorsed as Entry No. 3. It is noteworthy that although the register for the suit property under the Registered Land Act was first opened on 8th August 1972 and Johnson Matundura and Sospeter Moindi were then registered as joint tenants until the transfer of the 1/3 share to Siro Mogaka which was registered on 1st April 1982, the 1st Defendant produced another abstract of title that showed the register was opened on 4th November 2009. The bundle of documents availed by the Land Registrar had both abstracts. It is not possible that the same property could have two separate registration registers. One of the registers must have been irregularly opened.

30. I have reviewed the documents and I am satisfied the authentic abstract of title for the suit property was the one opened on 8th August 1972 on the basis of which the Certificate of Search dated 12th May 2005 produced in evidence by the Plaintiff was prepared. This abstract of title shows that Theresia Nyaechero Matundura was registered by way of transmission as the owner of 1/3 share of the property representing the share held by Johnson Matundura (deceased) on 28th November 1994. Sospeter Moindi and Siro Mogaka were equally shown to be registered as owners of 1/3 share of the property each. On the basis of the evidence, I accept and hold that Siro Mogaka was properly and validly registered as proprietor of 1/3 share of the suit property with the participation of his co-owners. Indeed, after the death of Theresia Nyaechero Matundura, a Certificate of Confirmation of Grant issued in Kisii HC Succ. Cause No. 62 of 2009 on 17th December 2012 for her estate included among the documents produced in evidence by the Land Registrar, shows she held a 1/3 share of the suit property which was distributed to Julius Moracha Matundura in trust for his sons and grandsons. On the basis of the foregoing analysis, I answer the second issue affirmatively.

31. Having found and held that Siro Mogaka was invited to join in the ownership of the suit property as an equal partner it follows any renewal and/or extension of the lease in respect of the suit property would of necessity incorporate the interests of all the owners. That the lease of the suit property was renewed and/or extended is evident. The Commissioner of Lands issued a letter of allotment (“**PEx.6**”) in April 1987 to “**Johnson Matundura & Others**” in regard to the suit property for a term of 99 years from 1st June 1953. The initial term of 33 years expired on 31st May 1986. The allotment must have been extending the initial term of 33 years to 99 years and that is why it was backdated to 1st June 1953. The import of this was that the owners of the initial expired lease were the same persons who were to enjoy the extended term of the lease. Thus the persons in whose favour the lease which expired on 31st May 1986 was registered were to be the same persons who were to be registered as the owners of the newly extended/renewed lease. Hence the allotment to “**Johnson Matundura & Others**” must have been to Johnson Matundura, Sospeter Moindi and Siro Mogaka who were then the registered proprietors of the lease that had expired.

32. The Land Registrar in his evidence before the Court stated that after Siro Mogaka was registered as a co-owner of the suit property, there was no instrument in their records to show that he at any time thereafter relinquished his interest in the property or ceased to be one of the owners of the suit property. Once he had been registered as an owner, he could only have ceased to be an owner if he transferred his interest and share to somebody else and there was no evidence that he did so. The Land Registrar stated that the omission of the name of Siro Mogaka in the new lease was a mistake and further stated the new lease purportedly issued in 2008 ought to have been issued in the name of Theresa Nyaechero Matundura and not Johnson Matundura as she had already substituted her husband in 1994 through succession. It is my finding in the circumstances that the renewed lease issued on 11th January 2008 (“**DEX.5**”) in the names of Johnson Matundura and Sospeter Moindi was irregularly issued to the extent that it omitted the name of Siro Mogaka and was also issued in the name of Johnson Matundura who was deceased and had been substituted by his wife. It is also important to note that the lease is not shown to have been executed by the lessees nor registered by the Land Registrar. Johnson Matundura could not of course execute the lease since he had been long dead. The 1st Defendant produced an abstract of title (green card) for the property which showed the register was opened on 4th November 2009 when Johnson Matundura and Sospeter Moindi were registered owners of the property and a Certificate of Lease issued (entries 1 and 2 respectively). There is nothing to support these entries and/or to explain what had happened to the register that had been opened on 8th August 1972. The opening of the new register was irregular as already a register for the property existed. My view is that somebody must have been involved in the manipulation of the records to obscure the true and authentic records relating to the suit property.

33. From the foregoing analysis, it is clear the lease of the suit property was renewed and/or extended after the initial lease expired in 1986 and that as at the time of the renewal of the lease the registered owners were Johnson Matundura, Sospeter Moindi and Siro Mogaka with each holding 1/3 share in the property. The lease issued on 11th January 2008 was invalid and null and void. The lease in my view was renewed in furtherance of the letter of allotment issued on 8th April 1987 in consequence whereof Theresa Matundura, Sospeter Moindi and Siro Mogaka were registered as owners on 28th November 1994.

34. On the issue whether Siro Mogaka’s name was fraudulently included as one of the owners of the suit property, my answer must be in the negative. No evidence of any fraud has been adduced to support the allegation. The 1st Defendant (DW1) and DW2, William Okoba Matundura merely alleged fraud against the inclusion of Siro Mogaka’s name as a co-owner. Their primary reasons were that the initial lease was only in the names of Johnson Matundura and Sospeter Moindi and further that the renewed lease was only issued in the same names. Apart from that the 1st Defendant stated that his late father had brought a suit Kisii HCCC No. 130 of 2005 against Siro Mogaka challenging his inclusion as a co-owner of the suit property. This suit was withdrawn by the 1st Defendant’s late father before it was heard and determined on merits. I have reviewed and considered the evidence and I have held that Siro Mogaka was properly and legally included as a co-owner of the suit property. It is my finding that the allegations of fraud were not established and/or proved to the required standard and thus remain as mere allegations.

Conclusion:

35. The upshot is that Siro Mogaka is still the valid and legal owner of the suit property to the extent of 1/3 share as he has never transferred the same out since he became registered on 1st April 1982. The evidence that was adduced demonstrated that the property was partitioned into 3 parts (one each) for each of the 3 co-owners. Anne Ondiek PW3 affirmed she had rented the shop that belonged to Siro Mogaka and that she had purchased the portion that belonged to Johnson Matundura from Julius Moracha Matundura (PW3). The said Julius Moracha Matundura in his evidence confirmed that he had sold the share that belonged to his father to Anne Ondiek and he further affirmed the original owners had partitioned the property into 3 parts during their lifetime. The evidence that Siro Mogaka was a co-owner of the suit

property is overwhelming and I view the position taken by the 1st Defendant as an attempt to wrestle ownership of 1/3 share of the suit property from the family of Siro Mogaka. That would constitute unjust enrichment which the court cannot countenance.

Decision:

36. The court is satisfied that the Plaintiff has proved his case on a balance of probabilities and I accordingly enter judgment in his favour on the following terms:-

(i) A declaration is hereby issued that Siro Mogaka (deceased) is still the lawful owner of 1/3 undivided share of land parcel number Kisii Town/Block II/66.

(ii) The Land Registrar, Kisii County is hereby ordered and directed to cancel and rectify the lease in regard to land parcel number Kisii Town/Block II/66 to include the name of Siro Mogaka (deceased) as the owner of 1/3 undivided share of the property.

(iii) The costs of the suit are awarded to the Plaintiff.

JUDGMENT DATED, SIGNED AND DELIVERED AT KISII THIS 24TH DAY OF MAY 2019.

J. M. MUTUNGI

JUDGE