



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC NO. 40 OF 2013 (OS)**

**PETER OKORE PONGE.....APPLICANT/PLAINTIFF**

**VERSUS**

**MARK ODORO SEDA.....RESPONDENT/DEFENDANT**

**JUDGMENT**

**Plaintiffs Case**

1. Peter Okore Ponge, (*hereinafter referred to as the plaintiff*), came to this court through an Originating Summons filed on 6th December 2013, against Mark Odoro Seda (*hereinafter referred to as the defendant*) seeking orders and/or determinations regarding the ownership of land parcel No. KISUMU/DAGO/631 (*hereinafter referred to as the suit property*) thus whether the same was co-owned by Ponge Gumba, Sambianas Okemia, Otiende Gumba, Mboya Chiaga and Nyangiri Ndia in common undivided shares of 1/5 each.

2. Moreover, he sought a determination as to whether Ponge Gumba was entitled to an undivided 1/5 share in the said suit property and whether on his death his share should be treated as part of his estate in terms of the provisions of **Section 91(5) of the Land Registration Act 2012** and **Section 103 (1) of the then Registered Land Act Cap 300 Laws of Kenya (Repealed)**.

3. He also sought for a declaration on the validity of the transfer of the suit property to the Defendant as a result of Kisumu HC Succession Cause No. 110 of 1990; (c) the validity of the subsequent sub-divisions of the suit property and the appropriate reliefs entitled to persons with a right or interest in the suit property and whether the Court should find that the transfer and sub-divisions of the suit property were irregular and/or fraudulent. He prayed for costs of the suit.

4. Through his supporting affidavit dated 6th December 2013, the Plaintiff stated that he was one of the surviving sons of Ponge Gumba who co-owned the suit property in common in undivided 1/ 5 share each with four others (Sabianus Okemia, Otiende Gumba, Mboya Chiaga, and Nyangiri Ndia – the Defendant’s father).

5. The Plaintiff claims the Defendant applied for a grant of letters of administration in Kisumu HC Succession Cause No. 110 of 1990 and listed the suit property as the sole property of Nyangiri Ndia. That the Defendant concealed the co-ownership of the property in the succession cause and, after being granted letters of administration, transferred the whole property to himself. That this transfer was illegal, irregular, fraudulent and null and void.

6. Plaintiff’s Counsel submitted that under Section 91 (5) of the Land Registration Act and Section 103 of the repealed Registered Land Act, if a co-owner of land owned in common dies, his undivided share shall be treated as part of his estate. That the Defendant had never been the administrator of the estate of Ponge Gumba.

7. Counsel submitted that the suit property was transferred to the Defendant by transmission on 9th January 1991 before the grant of letters of administration issued to him was confirmed. Counsel contended that this transfer ran afoul of **Section 80 (2) of the Law of Succession Act and Section 61 (2) of the Land Registration Act**. That a letter from the Deputy Registrar dated 11th October stated that the grant issued to the Defendant was never confirmed. That the transfer to the Defendant and subsequent transfers to other persons were therefore irregular, unlawful and null and void on the ground of non-confirmation of the grant.

8. Counsel contended that the original title was protected under **Article 40 (6) of the Constitution and Article 26 (1) of the Land Registration Act**. That the evidence showing that the Defendant had acquired title illegally, unprocedurally or through a corrupt scheme had not been challenged. Counsel urged the Court to have the Defendant’s title impeached and the register rectified to restore the suit property’s ownership to the Plaintiff’s father and the other four original joint co-owners.

**Defendants Case**

9. Through his replying affidavit dated 13th October 2016 and his witness statement dated 5th September 2017, claims that the suit property

belonged to his grandfather Okiemba Akoko, and that one Sabianus Okiemba registered the suit property as a joint community land without the knowledge of the grandchildren of Okeimba Akoko.

10. The Defendant claims that a dispute arose as to the ownership of the suit property and the matter taken to the assistant chief and later the area chief who heard the matter and decided that the land belonged to the family of Okiemba Akoko. That the family agreed that the Defendant would be the administrator and, after the grant of letter of administration, the suit property was subdivided to parcels 1524, 1525, 1526 and 1527. That three of the parcels were sold to one Joseph Ogweno Omwanga but the buyer never completed payments

11. The Defendant's Counsel submitted that the Plaintiff lacked the locus to maintain the suit as he had failed to demonstrate that he was the administrator of the estate of Ponge Gumba. Counsel contended that the Plaintiff should have first moved to recover the property back to the name of the deceased in order to take out the originating summons. Counsel also faulted the failure of the Plaintiff to join the owners of the subsequent sub-divisions of the suit property since he seeks to have their titles nullified.

12. Counsel submitted that the wrongly challenged the grant of letters of administration in the Environment and Land Court instead of the High Court Succession case in which the grant was issued. Counsel submitted that he Plaintiff participated in the succession cause without objection.

### **Issues for Determination**

**1. Whether new issues raised in Defendant's submissions should be considered.**

**2. History of ownership of the suit property**

**3. Validity of the transfer of the suit property to the defendant and its subsequent sub-division**

13. **Order 2 Rule 4 of the Civil Procedure Rules** requires a party to specifically plead any claim or issue:

**a) which he alleges makes any claim or defence of the opposite party not maintainable;**

**b) which, if not specifically pleaded, might take the opposite party by surprise; or**

**c) which raises issues of fact not arising out of the preceding pleading**

14. In the case of ***DEN v PNN [2015] eKLR***, the Court of Appeal held as follows:

**“Generally, the law is that the Courts would determine a case on the issues that flow from the pleadings and judgment would be pronounced on the issues arising from the pleadings or from issues framed for courts’ determination by the parties... See the Case of Chalicha FCS Ltd Vs Odhiambo & 9 Others [1987] KLR 182 for the proposition that “Cases must be decided on the issues on the record. The Court has no power to make an order, unless by consent, which is outside the pleadings”;**

15. The import of the case of ***GALAXY PAINTS CO. LTD. – VS - FALCON GUARDS LTD.- EALR (2000)2 EA 385*** was the proposition that the issues for determination in a suit generally flow from the pleadings and a court could only pronounce judgment on the issues arising from the pleadings or such issues as the parties framed for the court's determination.

16. The Defendant raised the issues of the Plaintiff's lack of capacity and failure to join purported owners of the sub-divided portions for the first time through his Counsel's written submissions and after the close of the Plaintiff's case. Therefore, these issues ought not to be considered by the court.

17. The Defendant's Counsel also misapprehended the claim of the Plaintiff regarding the grant of letters of administration and the jurisdiction of this court to determine the Plaintiff's claims. The Plaintiff is challenging the process through which the Defendant obtained his title, a question which the court has jurisdiction to entertain with regard to Section 26 (1) of the Land Registration Act.

### **2. History of ownership of the suit property**

18. The Plaintiff laid a good basis in evidence to support his claims as to the history of the title. Along with his supporting affidavit, he filed a copy of a Certificate of Official Search dated 16th July 1990 indicating that KISUMU/DAGO/631 was co-owned by five persons, including his father and the Defendant's father, each with a 1/5 share. He also filed a copy of the Demarcation Book of KISUMU/DAGO and Adjudication Record to the same effect. Further, the Plaintiff also filed a copy of the petition for grant in Kisumu HC Succession Cause No. 110 of 1990, which included a copy of a letter from the Chief of Kisumu East Location dated 23rd July 1990. The letter indicated that the Defendant's father owned ***“a share with other persons”*** of the suit property. None of these documents were specifically challenged by the Defendant in his pleadings or on the course of proceedings.

19. On the other hand, the Defendant failed to adduce any evidence or call witnesses to support his claim that one Sambianus Okiemba fraudulently registered the land as a joint community land. He did not adduce any evidence to support his claim that a dispute over the property was heard by the assistant chief and area chief. The balance of probability in this case tilts in favour of the Plaintiff.

### **3. VALIDITY OF THE TRANSFER OF THE SUIT PROPERTY TO THE DEFENDANT AND ITS SUBSEQUENT SUB-DIVISION**

20. Section 91 of the Land Registration Act at sub-sections (5) and (6) provide as follows:

(5) 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.

(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.

19. Section 103 of the repealed Registered Land Act describes the characteristics of proprietorship in common in the exact same words as the Land Registration Act above.

20. It therefore follows that the Defendant ought to have sought letters of administration only in respect of the 1/5 portion of the suit property registered in the name of his father. The Defendant's subsequent transfer of the suit property to himself was therefore illegal and his title is impeachable by virtue of Section 26(1) of the Land Registration Act whose core purpose was succinctly expounded by my brother Munyao J. in *Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & Another [2013] eKLR:*

*"It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions."*

21. The subsequent sub-divisions of the suit property after the illegal registration of the Defendant as the proprietor were therefore unprocedural and impeachable by virtue of Section 26 (1) of the Land Registration Act as they had the effect of depriving the original proprietors in common (or their estates) of their titles.

#### 4. VALIDITY OF THE SALE OF PORTIONS OF THE SUIT PROPERTY

22. Section 82 of the Law of Succession Act provides for the powers of personal representatives, including selling assets of the deceased, with the following condition:

**"Provided that - ...**

(ii) no immovable property shall be sold before confirmation of the grant."

23. In the case of In *re Estate of M' Ajogi M' Ikiugu (Deceased) [2017] eKLR*, Gikonyo J. held:

*"Courts have said time and again- and I will not be tired of stating it again- that, under section 82(b) (ii) of the Law of Succession Act, sale of immovable property of the estate before confirmation of grant is prohibited. Again, under section 55 of the Law of Succession Act, the law has placed restriction on distribution of any capital assets of the estate before confirmation of grant. Therefore, no person shall have any power or legal authority or capacity to sell immovable property of the deceased before confirmation of grant. As such, any such attempted sale of immovable property of the estate before confirmation of grant shall be null and void for all purposes and intents. I need not also state that beneficial interest of a person beneficially entitled to a share in the estate must be identified and be capable of registration in his name before it could be sold or pledged as security or exchanged with another type of property... Therefore, before confirmation, the interest of the beneficiary remains amorphous and entangled within the estate; and vested in the administrator or executor as the estate property as by law stated."*

24. The Plaintiff filed a copy of a letter from the Deputy Registrar dated 2nd November 2018 stating that the grant issued to the Defendant was never confirmed and that there was no application for confirmation on record. This failure on the part of the Defendant has the effect of rendering the purported sale of sub-divided portions of the suit property illegal and null and void.

#### 5. APPROPRIATE RELIEFS

25. In reference to Section 26 (1) of the Land Registration Act, *Kemei J. in John Kiguru Karume v Kenya Institute of Administration & 4 others [2017] eKLR held:*

*"The concept of absolute and indefeasible ownership of land cannot be clothed with legal and constitutional protections if the interest was acquired through fraud, misrepresentation, illegality unprocedural ways or corrupt schemes. This concept cannot be used to sanitize the commissioner if it allocates or issues title in such manner. In the Case of Champaklal Ramji Shah & 3 Anors Vs AG & Anor, HCCC No. 145 of 1997, it was held that the Court has a duty to examine the process of acquisition of such title and if it determines that there is an illegality, should nullify the titles as required."*

26. Section 80 of the Land Registration Act further provides that: (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 register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.

27. This court finds that the transfer of the suit property from Ponge Gumba, Sambianas Okembia, Otiende Gumba Mboya Chiaga and

Nyangiri Ndia in common undivided shares of 1/5 each to Mark Odoro Seda was illegal null and void and the same is hereby nullified and the all transactions are hereby cancelled and the register be and is hereby restored in the names of Ponge Gumba , Sambianas Okemia, Otiende Gumba Mboya Chiaga and Nyangiri Ndia to be held in common undivided shares of 1/5 each Defendant should bear costs.

**A. O. OMBWAYO**

**ENVIRONMENT & LAND**

**JUDGE**

**DATED AND DELIVERED THIS 25<sup>TH</sup> DAY OF OCTOBER, 2019.**

**In the presence of:**

Mr. Juma C.K. for Oreyo for Plaintiff

Mr. Odeny B. O. for Defendant

Okore Ponge present

Mark Odoro Seda present

**A. O. OMBWAYO**

**ENVIRONMENT & LAND**

**JUDGE**