



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 58 OF 2016

SAMSON MENDA JUMA.....PLAINTIFF

VERSUS

THE REGISTERED TRUSTEES GETUKI CATHOLIC CHURCH

CENTRE – SENGERA PARISH.....1ST DEFENDANT

THE BOARD OF MANAGEMENT GETUKI

D.E.B PRIMARY SCHOOL.....2ND DEFENDANT

THE LAND REGISTRAR.....3RD DEFENDANT

J U D G M E N T

1. The plaintiff is the administrator of the estate of Chuma Moncha (deceased) vide grant issued on 14th March 2005 in Kisii HC Succ Cause No. 250 of 2002. The plaintiff in the plaint claims that his deceased father was the registered owner of land parcel number **Majoge/Boochi/138** and he avers that the said land was sometime in 2007 fraudulently subdivided into land parcels **Majoge/Boochi/3959-3963** before the confirmation of the grant aforementioned was confirmed. The plaintiff further avers the same property was in the year 2007 fraudulently subdivided into land parcels **Majoge/Boochi/ 4780** and **4781** now in the names of the 1st and 2nd defendants respectively.

2. The plaintiff prays for judgment against the defendants jointly and severally for:-

- a. A declaration that the subdivision and transfer of LR No. Majoge/Boochi/138 into land parcels 4780 and 4781 was illegal, null and void.**
- b. An order directed at the 3rd defendant cancelling title documents Majoge/Boochi/1480 and 1481 in the names of the 1st and 2nd defendants and same do revert to the original title Majoge/ Boochi/ 138.**
- c. A permanent injunction restraining the 1st and 2nd defendants in anyway whatsoever interfering with land parcels Majoge/ Boochi/4780 and 4781 pending the hearing and determination of the suits.**
- d. Costs of the suit.**

3. The 1st and 2nd defendants filed a joint statement of defence dated 14th July 2016. The 1st and 2nd defendants admit the averments that the plaintiff was the administrator of the estate of Chuma Moncha (deceased) vide Kisii HC Succ Cause No. 250 of 2002 but deny that they had any interest in the succession cause. They state that land parcel **Majoge/Boochi/3959** was transferred to them and they were not aware that it was a subdivision from land parcel **Majoge/ Boochi/138**. The 1st and 2nd defendants further aver the plaintiff brought the suit in bad faith with the objective of discrediting the 1st and 2nd defendants in bad light by portraying them as fraudsters.

4. The 3rd defendant did not enter any appearance or file any defence. On 18th July 2016 the court directed the plaintiff and the 1st and 2nd defendants to observe and maintain the status quo obtaining at the time and dispensed with the pending interlocutory application for injunction in favour of fast tracking the matter to trial.

5. The suit was fixed for hearing before me on 18th September 2017 when the plaintiff testified in support of his claim and called no witness. After the close of the plaintiff's case, the 1st and 2nd defendants advocate Mr. Begi indicated that on the basis of the evidence tendered by the plaintiff there was no case established against the defendants requiring any rebuttal and he chose to offer no further evidence on behalf of the

1st and 2nd defendants stating he will place reliance on the evidence already on record.

6. The plaintiff in his evidence testified that his deceased father was the registered owner of land parcel number **Majoge/Boochi/138** and that in 2002 they filed Kisii HC Succ Cause No. 250 of 2002 in respect of his late father's estate which was however not finalized. The plaintiff stated some time in 2007 while he was serving a prison term following a conviction on a charge of assault, a person to whom he had sold a kiosk and who was a teacher brought him some documents to sign for him. He stated he did not know the documents he signed was a transfer form contending that he at any rate did not have capacity to sign a transfer for the land which was the subject of the succession case and was still pending.

7. The plaintiff relied on his filed witness statement and the documents he had filed together with the plaint in support of the application for injunction. In the witness statement the plaintiff states that he obtained a grant in the succession cause on 14th March 2005 but he did not apply for its confirmation. Owing to non action in the succession cause over a long period of time, A. O Muchelule, J. on 15th May 2009 directed that the succession file be closed until any concerned and/or interested party applied for it to be reopened. The plaintiff in the statement avers that the succession file had not been reopened and that he never subdivided land parcel **Majoge/Boochi/ 138**. He states that if at all he executed any documents relating to any transfer it was on the mistaken belief that he would be assisted to get out of jail and/or due to undue influence brought to bear upon him owing to the unpalatable prison conditions.

8. When cross examined he stated his prison term was only for 3 months but he allegedly could not remember the months that he was in prison and/or when he left the prison. The plaintiff further affirmed that Charles Onyancha Onsarigo was his brother and that he had not included him in the Succession Cause. He stated that his brother had applied to have the grant issued to him (the plaintiff) revoked. The plaintiff agreed that the abstract of title for parcel number **138** indicates he was registered as the owner on 16th May 2006 and that the parcel of land measured 24Ha. He stated the church is registered as the owner of parcel 4780 measuring 0.49Ha and the school is registered owner of parcel 4781 measuring 0.77Ha.

9. The parties filed their written submissions as per the court's directions. The plaintiff's submissions were filed on 7th November 2017 and the 1st and 2nd defendants' submissions were filed on 16th March 2018. I have considered and reviewed the pleadings, the evidence and the submissions made by the parties and the issues that arise for determination are as follows:-

i. Whether Kisii Succ. Cause No. 250 of 2002 relating to the estate of the late Chuma Moncha has been finalized.

ii. If the answer to (i) above is in the negative whether the instant suit is sustainable?

iii. Whether the plaintiff has proved that the 1st and 2nd defendants fraudulently acquired land parcels Majoge/Boochi/4780 and 4781.

iv. Who should bear the costs of the suit?

10. It is not disputed that the plaintiff filed Kisii HC Succession Cause No. 250 of 2002 respecting the estate of Chuma Moncha (deceased) who was his father. The court with a view of ascertaining the status of the succession case *suo moto* requested the High Court Registry to retrieve the file and to avail the same for purposes of perusal by the court before completing the preparation of this judgment. The file was availed and on perusal the following was revealed from the record:-

1. The plaintiff filed the petition for grant of letters of administration intestate on 12th September 2002.

2. Grant of letters of administration (P&A 41) was issued in favour of the plaintiff on 14th March 2005.

3. As no action had been taken by any party from 14th March 2005 the court on 15th May 2009 issued an order pursuant to Rule 73 of the P & A Rules ordering the file to be deemed as closed but granting liberty to the parties to apply for its re-opening, if need be.

4. On 17th June 2014 one, Charles Onyancha Onsarigo, a brother to the plaintiff filed an application seeking grant issued on 14th March 2005 to be revoked and/or annulled.

5. On 13th March 2015 the said Charles Onyancha Onsarigo filed an application seeking joinder of Getuki DEB Primary School to the succession cause as a party and further sought an injunction against both the 1st and 2nd defendants in regard to land parcels Majoge/ Boochi/4780 and 4781 pending the hearing and determination of the summons for revocation of grant.

6. The matter has been listed for hearing/mention on diverse dates notably on 3rd March 2015, 20th January 2016 and 9th March 2016.

7. On 9th March 2016 when the application for revocation of grant was scheduled for hearing Karanja, J. ruled that the application was made before an application for the re-opening of the file that was closed by Muchelule, J. vide the order of 15th March 2009 was made. He deemed the application to be obsolete and invalid and struck the same out.

11. The above sequence of events clearly demonstrates Kisii HC Succession Cause No. 250 of 2002 is yet to be finally concluded and as

matters stand the grant issued to the plaintiff herein does not appear to have been confirmed and is also contested by the plaintiff's brother. The petition for grant of letters of administration shows land parcel **Majoge/Boochi/138** as the only asset of the deceased estate. It is the succession court that is seized with the authority and jurisdiction to determine who the beneficiaries of the deceased estate are and the distribution of any assets of a deceased person. In the instant case, the plaintiff having commenced succession proceedings in respect of the deceased estate it was incumbent on him to see through the succession process.

12. The present suit was filed by the plaintiff after the High Court had on 9th March 2016 declined to proceed with the hearing of the application for revocation of grant. Mr. Abobo advocate who represents the plaintiff in the present suit, in the succession cause as per the record was appearing for the petitioner/objector, Charles Onyancha Onsarigo who is the brother of the plaintiff herein. It is not clear how on the one part Mr. Abobo can act for the objector who wishes to have the grant issued to the plaintiff revoked and at the same time he acts for the plaintiff asserting that the plaintiff holds perhaps a valid grant of the deceased estate. Whatever the case is, there is agreement that the succession cause was not finalized as there is no evidence that the grant was ever confirmed. It is my holding therefore in answer to issue number (i) that Kisii HC Succ. Cause No. 250 of 2002 has never been finalized.

13. In regard to issue No. (ii) whether the instant suit is sustainable, my answer would be in the negative. The essence of the plaintiff filing the succession cause was so that the estate of his late father could be appropriately administered. The only asset disclosed in regard to the estate was land parcel **Majoge/Boochi/138**. It is the succession court that had the mandate and duty to determine who the beneficiaries of the estate were and determine how and to who the estate was to be distributed. This court lacks that mandate and/or jurisdiction. The documents that have been availed in evidence particularly the abstract of title of land parcel number **Majoge/Boochi/138** (green card) shows that the parcel of land was registered in the plaintiff's name on 16th May 2006 by virtue of HC Succ. Cause No. 250 of 2002 subject to a certificate of confirmation of the grant. On 28th May 2007 the restriction relating to certificate of confirmation was removed and the plaintiff was formally registered as owner by way of transmission (Form RL 7) and on the same date (28th May 2007) the title in respect of land parcel **138** was closed upon subdivision of the same into parcels **3951 - 3963**. How were the beneficiaries of these subtitles determined? This is what the succession court was supposed to determine.

14. The plaintiff in the present case is asking the court to ignore all the other subtitles and deal with land parcel **3959** which apparently was subdivided to create parcels **4780** and **4781** which were transferred and registered in the 1st and 2nd defendants name on the ground that they were born from a flawed process as the succession had not been completed. What about the other sub titles and who are the owners of the same? I decline the invitation as my view is that if there was any mess, the same can only be cleansed by the succession court before who the matter is still pending. The orders the plaintiff seeks in this suit are in themselves to say the least incapable of being granted. Under prayer (a) for instance land parcel **Majoge/Boochi/138** was not subdivided into parcels **4780** and **4781**. The evidence is there that parcel **138** was subdivided into land parcels **3951 - 3963**. Under prayer (b) the plaintiff seeks the cancellation of title documents for parcels **Majoge/Boochi/4780** and **4781** in the 1st and 2nd defendants name and to revert the same to the original title **Majoge/Boochi/138**. Land parcels **4780** and **4781** were not subdivided from land parcel **138** and cannot therefore be reverted back to parcel **138**.

15. On the issue whether or not the plaintiff has proved the 1st and 2nd defendants procured titles to land parcels **Majoge/Boochi/4780** and **4781** fraudulently, my view is he has failed to do so. The evidence infact points to the plaintiff having been a willing participant in the activities that occurred. The plaintiff did not strike me as a truthful witness when he testified. For instance he could not remember the period when he allegedly served a prison term though he stated it was for only 3 months. I got the impression that the prison term bit just came in to explain away the documents that he executed in favour of the defendants. The plaintiff did not offer any explanation why the succession matter was never completed. It is not difficult to see why the plaintiff never pursued the succession cause to finalization. It must be that he obtained the temporary grant, he got himself registered as the owner of the land the subject of the succession cause and was able to cause the subdivision of the land into parcels **3951-3963**. It cannot be the 1st and 2nd defendants are the ones who caused this subdivision as their interest was only in one of the subdivisions being parcel **3959**. The plaintiff definitely did not have clean hands. I find and hold the fraud allegations are unproven having in mind that the burden of proof always rested on the plaintiff. The burden of proof where fraud is alleged is higher than on a balance of probabilities though not as proof beyond reasonable doubt as is the case in criminal cases. The plaintiff did not discharge that burden.

16. The net result is that I find the plaintiff has failed to prove his case on a balance of probabilities. The suit lacks any merit and in view of the pendency of the succession cause amounts to an abuse of the court process. I dismiss the plaintiff's suit with costs to the 1st and 2nd defendants.

17. Orders accordingly.

JUDGMENT DATED, SIGNED and DELIVERED at KISII this 11TH DAY of MAY, 2018.

J. M. MUTUNGI

JUDGE

In the presence of:

N/A for the plaintiff

Mr. Begi for the 1st and 2nd defendants

N/A for the 3rd defendant

Ruth court assistant

J. M. MUTUNGI

JUDGE