



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC SUIT NO. 163 OF 2015(O.S)

SAMIR CHITRANJAN GOR.....APPLICANT/PLAINTIFF

VERSUS

OFFICIAL RECEIVER.....1ST RESPONDENT/DEFENDANT

HARISH MANUBHAI PATEL.....2ND RESPONDENT/DEFENDANT

JUDGMENT

1. Samir Chitranjan Gor, hereinafter referred to as the plaintiff, brought this suit vide an Originating Summons dated 17th July 2015 and filed on 22nd July 2015 seeking determination of the following questions.:

1. Should the Official Receiver be registered as proprietor as trustee of Mahesh Manubhai Patel (the bankrupt) the co-owner in respect of the 20% interest in MOMBASA/BLOCK XLVII/31 (the land) of the land since a Receiving Order has been made against the bankrupt in Mombasa Bankruptcy Cause Number 9 of 2002 and he has been adjudged a bankrupt?

2. Should the plaintiff/applicant be authorized to sell the land by private treaty for an amount not less than Kshs.60,000,000.00 being the market value given in the valuation report on the market value of the land prepared by the valuer, Yusus Dattoo?

3. Should the land be sold by public auction through Mwara Auctioneers Limited in the event that the land cannot be sold by private treaty within forty five days of the order made herein?

4. Should the plaintiff/applicant and the respondents or any of them be entitled to purchase the land?

5. Should an order be made that the plaintiff/applicant be paid the amount of Kshs.136,854.20 being 20% share of the rates and other expenses paid by the plaintiff/applicant in respect of the land on behalf of the 1st respondent/defendant as the trustee of the bankrupt out of the sale proceeds of the land and failing which should the first respondent/defendant be ordered to reimburse to the plaintiff/applicant the said amount out of the estate of the bankrupt.

6. Should an order be made that the plaintiff/applicant be paid the amount of Kshs.163,159.02 being 20% share of the rates and other expenses paid by the plaintiff/applicant in respect of the land on behalf of the 2nd respondent/defendant out of the sale proceeds of the land and failing which should the 2nd respondent/defendant be ordered to reimburse to the plaintiff/applicant the said amount.

7. Should the costs of these proceedings, valuers fees, estate agents fees and the auctioneers charges be paid from the sale proceeds of the land?

8. Should the Official Receiver execute the transfer of the land on behalf of the bankrupt upon the sale of the land either by private treaty or public auction?

9. Should the Deputy Registrar of the High Court of Kenya execute the transfer of the land on behalf of the 2nd respondent upon the sale of the land either by private treaty or public auction in the event of the 2nd respondent not executing the same within 15 days of the sale?

10. Should the net balance of the sale proceeds be paid to the plaintiff/applicant and the respondents in the following proportions

a. Plaintiff 60%

b. 1st respondent 20%

c. 2nd respondent 20%

2. The summons is based on the grounds on the face of it and supported by the affidavit of CHITRANJAN BHANUPRASAD GOR sworn on 17th July 2015.

3. The defendants were duly served and they entered appearance through their respective counsel. Directions were taken that the summons be argued through affidavit evidence. The defendants however did not file any affidavit in response to the summons.

4. On 2nd November 2016, the parties agreed to dispose of the summons by way of written submission. However, it is only the plaintiff who filed his submissions. When the matter came up in court on 5th April, 2017, both the counsel for the 1st defendant and that of the 2nd defendant informed the court that they do not intend to file any affidavit or submissions as their clients were not opposed to the summons. The summons are therefore not opposed.

5. It is the plaintiff's case that the plaintiff and the respondents are owners in common of the property known as **MOMBASA/BLOCK XLVII/32**, with the plaintiff owning 60% share, the bankrupt owning 20% share and the 2nd defendant 20%. According to the plaintiff, the defendants have taken no interest in the maintenance of the land as they do not participate in its management. The plaintiff deposed that all efforts to have the defendants agree to a sale or sub-division have not borne fruit. The plaintiff therefore urges the court to exercise its jurisdiction under section 96 of the Land Registration Act, 2012 and grant the orders.

6. Section 96 (1) of the Land Registration Act, 2012 deals with sale of co-owned land and provides as follows:

“96 (1) If for any reason the land sought to be partitioned is incapable of being portioned, or the partitions would adversely affect the proper use of the land, and the application for partition or one or more of the other tenants in common require the land to be sold, and the tenants cannot agree on the terms and conditions of the sale or the application of the proceeds of the sale, the tenants in common may make an application to the court for an order for sale and the court may

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a) Cause a valuation of the land and of the shares of the tenants in common to be undertaken,

b) Order the sale of the land or the separation and sale of the share of the tenants in common by public auction or any other means which appears suitable to the court or

c) Make any other order to dispose of the application which the court considers fair and reasonable”

7. It is not disputed that the plaintiff and the defendants are owners in common of the suit land with the plaintiff owing 60% while the defendants own 20% each. The plaintiff has stated that the defendants have taken no interest in the maintenance of the land. That they have failed to pay rates and participate in the management of the land, leading to encroachment by third parties. In the supporting affidavit, the plaintiff has also stated that part of the land is in a ditch and by reason of its size and the terrain, any partitions will result in very small pieces and the land will lose its value.

8. The defendants are not opposed to the plaintiff's suit and therefore there was no evidence tendered to challenge the plaintiff's claim. The plaintiff's evidence was therefore not controverted.

9. A suit can only be commenced by way of an originating summons where the law expressly provides so or where the matter before the court is a simple one with undisputed facts. In the case of **MUKESH MAN CHAN SHAH & ANOTHER –VS- PRIYAT SHAH & ANOTHER, MOMBASA CIVIL APPEAL NO.39 OF 2014**, the court of appeal held as follows:

“Before we consider how the provisions apply to the question before us, we need to emphasize that it is perfectly well settled, and indeed ingrained in practice as repeatedly stated by legion of judicial authorities that unrestricted use of originating summons procedure is discouraged.the sole object of the procedure has always been to provide simplicity of the process and to eliminate prolonged pleadings...”

10. In my view, the present case can perfectly be decided by way of an originating summons as it has been filed. The issues are simple and straight forward.

11. Having analyzed the evidence on record and the submissions made, I am satisfied that the plaintiff has proved his case on a balance of probabilities. I now exercise my power under section 96 (1) of the Land Registration Act, 2012 and determine the questions framed in the originating summons dated 17th July 2015 and enter judgment for the plaintiff in the following terms: -

a. The official receiver be registered as proprietor as trustee of Mahesh Manubhai Patel (the bankrupt) the co-owner in respect of 20% interest in MOMBASA/BLOCK XLVII/32.

b. The plaintiff be and is hereby authorized to sell the land by private treaty for an amount not less than Kshs.60,000,000.

c. The land be sold by public auction through Mwara Auctioneers Limited in the event that it cannot be sold by private treaty within 45 days of the order herein.

d. The plaintiff and the defendants are at liberty to purchase the land.

e. An order is hereby made that the plaintiff be paid the amount of Kshs.136,854.20 being 20% share of the rates and other expenses paid by the plaintiff in respect of the land on behalf of 1st defendant out of the sale proceeds of the land and failing which the 1st defendant is ordered to reimburse to the plaintiff the said amount out of the estate of the bankrupt.

f. The plaintiff be paid the amount of Kshs.163,159.02 being 20% share of the rates and other expenses paid by the plaintiff in respect of the land on behalf of the 2nd defendant out of the sale proceeds of the land and failing which the 2nd defendant is ordered to reimburse to the plaintiff the said amount.

g. Costs of these proceedings, valuer's fees, estate agent's fees and auctioneer's charges be paid from the sale proceeds of the land.

h. The official receiver to execute the transfer of the land on behalf of the bankrupt upon the sale of the land either by private treaty or public auction.

i. The Deputy Registrar of the Court to execute the transfer on behalf of the 2nd defendant upon the sale of the land in the event of the 2nd defendant not executing the same within 15days of the sale.

j. The net balance of the sale proceeds be paid to the plaintiff and the defendants in the following proportions: -

i. Plaintiff 60%

ii. 1st defendant 20%

iii. 2nd defendant 20%

12. Orders accordingly

Dated, signed and delivered at Mombasa this 12th day of JUNE 2017.

C. YANO

JUDGE

.....for the applicant

.....for the respondent