



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
LAND CASE NO.8 OF 2013

TERESA ANDAWO OGOLA.....1ST PLAINTIFF

CATHERINE JUMA SALALA.....2ND PLAINTIFF

GEORGE ODHIAMBO OMWANDA.....3RD PLAINTIFF

JOSEPH ODERA ANGWEN.....4TH PLAINTIFF

VERSUS

GEORGE ONYANGO OBWANDADEFENDANT

J U D G M E N T

1. Teresa Andawo Ogola, Catherine Juma Salala, George Odhiambo Omwanda, and Joseph Odera Angwen, hereinafter referred to as the 1st to 4th Plaintiff, commenced this suit against **George Onyango Obwanda**, the Defendant, under the plaint dated 18th January 2013 and later amended on 30th July 2013, seeking for an order that the Siaya District Land Surveyor be directed to subdivide land parcel **East Gem/Uranga/142** in accordance with the Siaya Land Control board consent. They also pray for costs. The Plaintiffs aver that a scheduled subdivision of the land on 28th November 2012 did not go on after the Defendant declined to allow the surveyor to carry on with the work. They further aver that the suit land is ancestral land and should be subdivided for each beneficiary to be registered with their own portion.

2. The Defendant filed his statement of defence dated 19th October 2015, disputing that he had stopped the surveyor from carrying out the subdivision. He averred that the suit land **East Gem /Uranga/142** was first registered in the names of **Ogola Lago** and after his death, it was registered in the names of the Plaintiffs and himself, as proprietors in common in equal shares. He prays that the said land be subdivided equally between the four Plaintiffs and himself.

3. Mr. Onsongo Advocate represented the Plaintiffs in this case. The Plaintiffs testified as PW1 to PW4 while the Defendant, who was in person, testified as DW1 and called his brother, who testified as DW2.

4. The issues for determination are as follows;

- a) Who are the registered proprietors of land parcel **East Gem/Uranga/142**.
- b) Whether the suit land should be subdivided and the share of each of the proprietors.
- c) Who meets the costs of the suit.

5. The court has carefully considered the evidence adduced by the Plaintiffs, the Defendant and his brother and come to the following conclusions;

a) That the Plaintiffs and Defendant are relatives and therefore had beneficial interests over the land parcel **East Gem/Uranga/142**, which was registered in the names of the first registered proprietor namely, **Ogola Lago**, upon his death.

b) That upon the death of the said **Ogola Lago**, the Plaintiffs and Defendant had the land transferred to their names on 1st November 2004 and a title deed was duly issued on 4th November 2004. The Plaintiffs have availed a copy of the certificate of official search and title deed for parcel **East Gem/Uranga/142** confirming their registration aforesaid in their lists of documents dated 18th January 2013.

c. That even though it was not clear whether the registration of the Plaintiffs and Defendant as proprietors of the suit land was done through the Succession court in accordance with the **Law of Succession Act, Chapter 160 of Laws of Kenya**, none of the parties challenged the process of their registration and this court was not called upon to make any determination on the legality or otherwise of the process followed in the transmission.

d) That the certificate of official search, and title deed for the suit land do not specify the share of each of the five registered proprietors. The court therefore takes the Plaintiffs and Defendant to have been registered with the suit land as tenants in common in terms of **Section 91(8) of Land Registration Act No.3 of 2012** which states;

" On and after the effective date, except with leave of a court, the only joint tenancy that shall be capable of being created shall be between spouses, and any joint tenancy other than that between spouses, that purported to be created without the leave of a court shall take effect as a tenancy in common.

The effective date is the date of commencement of the said Act, which is 2nd May 2012. The Act defines co-tenancy at **Section 91(1)** as follows;

" In this Act, co-tenancy means the ownership of land by two or more persons in undivided shares and includes joint tenancy or tenancy in common".

The provision of **Section 94(1)** of the said Act provides for partitioning of land held in common in the following words;

"Any of the tenants in common may, with the consent of all the tenants in common, make an application, in the prescribed form, to the Registrar for the partition of land occupied in common and subject to the provision of this Act and of any other written law applying to or requiring consent to a subdivision of land and of any covenants or conditions in a certificate of land, the Registrar shall effect the partition of the land in accordance with the agreement of the tenants in common."

The Plaintiffs and Defendant herein are in agreement that the land should be subdivided (partitioned) to enable each one of them be registered with their specific portion. They however disagree on how much land each person is entitled to out of the suit land. The evidence adduced indicated that the 1st Plaintiff occupies the largest portion and the Defendant the smallest portion of land out of the suit land. The Plaintiffs position is that the subdivision should honour their occupation on the ground but the Defendant disagrees, demanding that they all get equal shares.

d. That in the absence of any shares indicated against each of the five registered proprietors of land parcel **East Gem/Urenga/142**, the operations of law supports the position taken by the Defendant that all the five registered proprietors are tenants in common with equal shares. Had the intention had been for some to have bigger portions than the other, then that should have

been captured in the document under which the Plaintiff and Defendant used to transfer the land to their names.

6. That having held as above, the court enters judgment in the following terms;

a) That the five registered tenants in common of land parcel East **Gem/Uranga/142** having expressed their desire to have the said land partitioned, the County Land Registrar and Surveyor are directed to ensure the said land is partitioned equally among the five registered proprietors.

b) That after the partitioning of the said land, each of the five registered proprietors be registered with his/her own portion.

c) That the five registered proprietors do share equally the costs of partitioning the suit land into five equal parcels.

d) That each of the five registered proprietors do meet the costs to transfer their portions into their respective names.

e) That so as to foster unity between the parties herein who are related, each party to bear their own costs in this suit.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 18TH DAY OF MAY 2016

In presence of;

Plaintiffs Present

Defendant Present

Counsel Mr Obuso for Plaintiffs

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

18/5/2016

18/5/2016

S.M.Kibunja

Oyugi court assistant

Plaintiffs present

Defendant present

Mr Obuso for Plaintiff

The Defendant is in person and present.

Court; Judgment delivered in open court in presence of parties and Mr Obuso for the Plaintiffs.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

18/5/2016