



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**CASE NO. 203 OF 2013**

**AMOS ONYANGO ODONGO.....PLAINTIFF**

**VERSUS**

**MAURICE WERE OJOWI.....1<sup>ST</sup> DEFENDANT**

**YASHON OCHIENG WANGA.....2<sup>ND</sup> DEFENDANT**

**DOLPHINE ACHIENG ODERO.....3<sup>RD</sup> DEFENDANT**

**LAND REGISTRAR, RACHUONYO DISTRICT.....4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff by an agreement of sale entered into between himself and the 1<sup>st</sup> defendant, Maurice Were Ojowi on 25<sup>th</sup> June 1991 the 1<sup>st</sup> defendant agreed to sell to the plaintiff a portion of 3 acres out of land parcel **Central Kasipul/Kachieng/549** which parcel of land was then registered in the 1<sup>st</sup> defendant's father's name Andricus Ojowi Muma who had passed away on 27<sup>th</sup> November 1990. The 1<sup>st</sup> defendant was to cause succession of his late father's estate to be undertaken to enable the plaintiff to get the portion he had purchased, transferred to him once the grant of letters of administration to the estate had been obtained. The 1<sup>st</sup> defendant did not process the letters of administration for his late father's estate but instead fraudulently caused the land parcel **Central Kasipul/Kachieng/549** to be subdivided by purporting it was his deceased father who was carrying out the transaction in February 2001 whilst his father had by then been dead for over 10 years. The 1<sup>st</sup> defendant further fraudulently caused one of the subdivisions on land parcel **Central Kasipul/Kachieng/1395** to be sold and transferred to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants on the basis that it was his deceased father who was carrying out the transaction.

2. The plaintiff avers that the 1<sup>st</sup> defendant engaged in unlawful and illegal acts when he purported to cause the suit property to be subdivided and a subtitle thereof sold and transferred to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants without following due process. The 1<sup>st</sup> defendant had not taken out any letters of administration to his late father's estate and the plaintiff avers that the 1<sup>st</sup> defendant's action were intended and calculated to deny the plaintiff his rightful share of land parcel **Central Kasipul/Kachieng/549**. The plaintiff thus by the plaint dated 13<sup>th</sup> March 2013 but filed in court on 29<sup>th</sup> April 2013 prays for judgment against the defendants jointly and severally for:

**(a) Declaration that the purported transfer of title Central Kasipul/1395 unto the names of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants is illegal, null, void and fraudulent and the registration be cancelled.**

**(b) Declaration that the subdivision of land parcel Central Kasipul/Kachieng/549 a property belonging to a deceased person intestate without complying with the Law of Succession Act, amounts to meddling with the deceased's property and, the register be rectified to reinstate the name of Andricus Ojowi Muma.**

**(c) An order directing the estate of the deceased Andricus Ojowi Muma to effect the succession process having regard to the interest of the beneficiaries including the plaintiff as a purchaser.**

**(d) Permanent injunction to restrain the defendants either by themselves, agents/servants from selling or dealing howsoever or otherwise interfering with title Central Kasipul/Kachieng/1395 in any manner adverse to the interest of the beneficiaries including the plaintiff.**

**(e) Costs of the suit.**

3. The plaintiff filed the plaint simultaneously with a Notice of Motion application seeking inter alia an interlocutory order of injunction restraining any dealings whatsoever with land parcel number **Central Kasipul/Kachieng/ 1395** pending the hearing and determination of the suit. The defendants though served with the plaint, summons and the Notice of Motion application did not appear and/or file any response to either the application and/or the plaint. The court on 18<sup>th</sup> July 2013 granted an injunction restraining any dealings with land parcel **Central Kasipul/ Kachieng/1395** pending the hearing and determination of the suit.

4. The suit was fixed for formal proof hearing before me on 5<sup>th</sup> May 2016. The defendants though served with a hearing notice did not attend court and the matter proceeded to be heard *ex parte* when the plaintiff testified as the sole witness in support of the plaintiffs claim. The plaintiff relied on his witness statement dated 13<sup>th</sup> March 2013 as his evidence in chief and further relied on the documents contained in the bundle of documents as follows:-

**1. Agreement of sale of land dated 25<sup>th</sup> June, 1991.**

**2. Death certificate in regard to Andricus Jowi Muma dated 25<sup>th</sup> September 1992.**

**3. Copy of green card (abstract of title) for parcel Central Kasipul/ Kachieng/1394.**

**4. Copy of green card (abstract of title) for parcel Central Kasipul/ Kachieng/1395.**

**5. Copy of green card (abstract of title) for parcel Central Kasipul/ Kachieng/549.**

**6. Correspondences to the area chief and responses.**

**7. Letter dated 15<sup>th</sup> October 2001 from the District Surveyor, Rachuonyo District acknowledging land parcel 549 was fraudulently subdivided into parcels 1394 and 1395.**

**8. Application for land control board consent dated 3<sup>rd</sup> July 2001 purporting to be made by Andrekus Ojowi (then long deceased).**

**9. Application for consent to subdivide land parcel 549 by Anderikus Ojowi in 2001 when he was deceased.**

**10. Copy of transfer of land parcel Central Kasipul/Kachieng/1395 to Yashon Onchieng Wanga and Dolphine Achieng Odero by Andrekus Ojowi dated 19<sup>th</sup> September 2001 when he was long deceased.**

**11. Letter of land control board consent for transfer of land parcel Central Kasipul/Kachieng/1395 from Andrekus Ojowi to Yashon Ochieng Wanga and Dolphine Achieng Odero dated 5<sup>th</sup> July 2001.**

5. The plaintiff testified that the 1<sup>st</sup> defendant deliberately impersonated his late father and caused the subdivision of the land parcel **Central Kasipul/Kachieng/549** with the intention of defrauding the plaintiff of his entitlement to a portion of the subject **parcel 549**. The plaintiff has sought for orders annulling the transactions carried out by the plaintiff in regard to land parcel 549 for being unlawful and illegal for failure to comply with the law of succession as provided under the Law of Succession Act, Cap 160 Laws of Kenya.

6. I have reviewed the pleadings and the evidence given orally by the plaintiff and the documents tendered in evidence by the plaintiff in support of his claim and I am satisfied that the 1<sup>st</sup> defendant deliberately held himself out as his deceased father, Anderikus Ojowi and using that façade procured the subdivision and transfer of a portion of land parcel **Central Kasipul/Kachieng/549** to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The death certificate issued on 25<sup>th</sup> September 1992 shows that Andricus Ojowi Muma died on 27<sup>th</sup> November 1990. The permit for his burial exhibited in the plaintiff's bundle of documents indicates that the same was issued to Moris Were Ojowi, the 1<sup>st</sup> defendant herein on 30<sup>th</sup> November 1990. The title abstract for land parcel **Central Kasipul/Kachieng/549** shows that Anderikus Ojowi (1<sup>st</sup> defendant's father) was registered as owner of the parcel of land on 29<sup>th</sup> October 1968. This title as per the abstract was closed on subdivision following the creation of two parcels **1394** and **1395** on 19<sup>th</sup> September 2001. **How did this subdivision come about if the registered owner had passed on in November 1990?** The application for subdivision allegedly was made by Anderikus Ojowi and equally the transfer of **parcel 1395** to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants was executed by Anderikus Ojowi in 2001. Certainly the 1<sup>st</sup> defendant's deceased father could not have woken up from the grave to make the application to the land control board for subdivision and to execute the transfer in favour of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. There is no evidence whatsoever that indeed any succession proceedings in regard to the estate of the late Anderikus Ojowi (deceased) were ever instituted as the documents are shown to have been executed by the deceased and not by the personal legal representative following issuance of letters of administration. It is apparent that indeed no succession proceedings were undertaken.

7. The letter by the District surveyor, Rachuonyo District dated 15<sup>th</sup> October 2001 which was also copied to the 1<sup>st</sup> defendant clearly acknowledged that a crime had been perpetrated and called for the annulment and cancellation of the subdivision. The defendants have chosen not to defend the suit as they never appeared and/or filed any defence in spite of being served. The plaintiff's averments thus remain uncontroverted and having considered the evidence and the documents tendered, I have no doubt the 1<sup>st</sup> defendant unlawfully and illegally caused his late father's land parcel **Central Kasipul/Kachieng/549** to be subdivided and transacted on without going through succession as the law demands. The court cannot condone an illegality as to do so would lead to a proliferation of the application of the law of the jungle which could lead to a breakdown of the rule of law. The court would be failing in its duty of upholding the rule of law if it failed to condemn the acts of the 1<sup>st</sup> defendant for being contrary to the law.

8. Having regard to all the attendant circumstances of this matter, this court has an obligation and duty to ensure that the rule of law is applied. The rule of law requires that the estate of the deceased be administered in accordance with the law so that any person with a claim such as the plaintiff can establish his claim, if at all in the succession cause. The actions by the 1<sup>st</sup> defendant were void and a nullity.

9. In the premises therefore I am persuaded the plaintiff has established his case on a balance of probabilities and I accordingly enter judgment against the defendants on the following terms:-

**1. I declare the subdivision of land parcel Central Kasipul/Kachieng/549 into land parcels Central Kasipul/Kachieng/1394 and 1395 null and void as there was no compliance with the Law of Succession Act, Cap 160 Laws of Kenya.**

**2. I direct that land titles Central Kasipul/Kachieng/1394 and 1395 be cancelled forthwith and title number Central Kasipul/Kachieng/549 be restored in the register by the Land Registrar in the name of Anderikus Ojowi (deceased) until Grant of Letters of Administration of the estate are issued in an appropriate succession cause.**

**3. There will be no order for costs of the suit.**

**Judgment dated, signed and delivered at Kisii this 1<sup>st</sup> day of July, 2016.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

..... for the plaintiff

..... for the 1<sup>st</sup> to 4<sup>th</sup> defendants

..... for the Court Assistant

**J. M. MUTUNGI**

**JUDGE**