



REPUBLIC OF KENYA



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**Ogwankwa v Nyaruri & 4 others (Civil Suit 75 of 2017)
[2023] KEELC 15717 (KLR) (22 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 15717 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
CIVIL SUIT 75 OF 2017
M SILA, J
FEBRUARY 22, 2023**

BETWEEN

CYRUS ANYONA OGWANKWA PLAINTIFF

AND

MAUTI NYARURI 1ST DEFENDANT

BENJAMIN BITERA NYARURU 2ND DEFENDANT

KENYATA MOIRURUKI 3RD DEFENDANT

DENNIS ALLOYS 4TH DEFENDANT

DISHON ONSERIO 5TH DEFENDANT

JUDGMENT

1. This suit was commenced through a plaint which was filed on 4 April 2017. The plaintiff is acting in person. He pleaded that he is the grandson of one Monyinyo Onkundi who died intestate on 20 October 1980 and that he is a beneficiary of her estate. He avers that he holds a grant of letters of administration ad litem for the estate of the deceased. He pleaded that the deceased was the registered proprietor of the land parcel South Mugirango/Boikanga/1342 and that the defendants have fraudulently subdivided the said land into the land parcels No. 3344, 3345, 3346, 3347, and 3348 without first subjecting the property to a succession cause. He also pleaded that the defendants have been tilling and occupying the land. In the suit, the plaintiff has asked for orders to have the titles of the defendants cancelled and for them to be evicted from the land.
2. The defendants filed a joint statement of defence. They contended that the plaintiff is son of one Ogwankwa Onkundi and a grandson to one Nyaboke Onkundi (deceased) and not a direct grandson of Monyinyo Onkundi. They averred that Monyinyo Onkundi had only two sons and her parcel of land was South Mugirango/Boikanga/1342 (parcel No. 1342). They pleaded that the plaintiff's father's



land is South Mugirango/Boikanga/1341 which is registered in the name of Ogwankwa Onkundi. They stated that they are purchasers of the parcel No. 1342 from the sons of Monyinyo Onkundi. They pleaded that the sons of the late Monyinyo sold the land to the five defendants and also to one Joel Obara and Nyabuto Okeno. They further pleaded that there are two other pending cases over the same issue being Ogembo PMCC No. 209 of 2014 and Kisii High Court No. 447 of 2013 and stated that they would raise a preliminary objection to that effect. I have not seen any preliminary objection filed.

3. Hearing commenced on 20 June 2018 before Mutungi J, when the plaintiff testified. He exhibited the grant of letters of administration ad litem and a search to the parcel No. 1342 showing that the land was registered in the name of Monyinyo (deceased). He displayed a Certificate of Death indicating that Monyinyo died on 20 October 1980. He testified that the 1st defendant fraudulently subdivided the land into the parcels No. 3344 – 3348 and he produced a copy of the mutation form registered on 30 March 2016. He wished to have the titles annulled. Cross-examined by Mr. Sagwe for the defendants, he testified that Monyinyo was his grandmother and one Onkundi Nyatenga was his grandfather. He stated that his grandfather had three wives. One was Monyinyo, the other Nyaboke, and the last Nyambeki. Nyaboke was mother to the plaintiff's father, one Zebedeo Ogwankwa. Monyinyo had two sons, being Didimus Omweri and Dickson Mauti, and he stated that both died without families. Zebedeo, the plaintiff's father, had two sons, the plaintiff and one David Siko (now deceased). He testified that Monyinyo was registered as proprietor of the parcel No. 1342. Nyaboke was registered as proprietor of the parcel No. 1341. Nyambeki was given land far from where they reside. He testified that he resides in the parcel No. 1341 which is where his father also lives. His deceased brother was also living in this parcel No. 1341. Didimus, son of Monyinyo was living in the parcel No. 1342. He stated that he (Didimus) disappeared when the defendants came to the land in the year 2010 and has never been seen again. He did not know Nyabuto Okero or Joel Obaga, and did not know that they also bought some of the land. The defendants are residing in the parcel No. 1342 and the 3rd defendant has constructed a house. He stated that he does not know how the defendants came to be registered as proprietors of the land. He mentioned that he lays claim to this parcel No. 1342 although his father's land is the parcel No. 1341.
4. PW-2, Zebedeo Ogwankwa, testified before Onyango J, on 20 November 2019. He is father to the plaintiff. He was aware that the plaintiff has sued the defendants over a parcel of land. He alleged that this is his land though he does not have a title deed. He also claimed that he lives on the land with his two sons, one of whom is the plaintiff. He testified that sometimes in the year 1972, the 1st defendant came and occupied their land and he was followed by the other defendants. They came while he was away working in the tea estates and asserted that they had purchased the land. He stated that they have never told them from whom they purchased the land. He added that the land was registered in the name of his late mother, Monyinyo. Cross-examined, he affirmed that he is the registered proprietor of the parcel No. 1341. He acknowledged that his father had three wives, including Monyinyo, and Nyaboke. His biological mother was Nyaboke thus Monyinyo was his step mother. He affirmed that Monyinyo had two sons, Didimus and Dishon, whom he stated are both deceased. He stated that after their death, and that of Monyinyo, he used the land for some time but when he went to work in the tea estates in Kericho he found the defendants have occupied the land.
5. With the above evidence, the plaintiff closed his case.
6. DW-1 was Charles Mauti Moruri, the 1st defendant. He testified that Nyatenga, the plaintiff's grandfather, had two wives, Monyinyo and Nyaboke; that Nyaboke (the first wife) owned the parcel No. 1341 while Monyinyo owned the parcel No. 1342. He testified that the father to the plaintiff is the late Ogwankwa Onkundi and his mother was Nyaboke who held the title to the parcel No. 1341. He testified that the plaintiff's father was given land by Nyaboke. He added that the plaintiff has two



brothers and each was given his own portion of land by their father. He stated that the plaintiff lives on his late father's land. He testified that he bought land from Didimus Omweri, son of Monyinyo, in the year 2010. He testified that the parcel No. 1342 belonged to Monyinyo and she subdivided it into 7 portions. None of her sons was given any of the 7 portions. Didimus is the one who transferred to him the land. He was not sure if Didimus had taken out letters of administration. He has lived on the land since the year 2010 and has built a house, planted coffee and trees.

7. Cross-examined by the plaintiff, he reiterated that he bought his land from Didimus. He had done a search which established that the land belonged to Monyinyo. Didimus sold to him a portion of his mother's land while the land was still registered in her name. He (Didimus) thereafter relocated to an unknown place. He got title in the year 2010. He did not know if succession had been done in respect of the estate of Monyinyo. He demolished some vacant houses on the land after he had purchased it. At some point, the plaintiff attacked him and was charged with assault where he pleaded guilty and was placed on probation.
8. DW-2 was Dishon Onserio Obare, the 5th defendant. He testified that he bought land from Dishon Mauti measuring 70 X 160 feet from the parcel No. 1342. The person who sold him the land died and he has been in occupation since the year 1986. He stated that the plaintiff has his own land within the parcel No. 1341 and wondered why the plaintiff has sued him. Cross-examined, he testified that he does not know if Dishon was registered as proprietor of the land. He also stated that Ogwango, the father of the plaintiff was a witness to the sale agreement. He however did not have the sale agreement.
9. DW-3 was Stephano Obita Kenyatta Moiruruki, the 3rd defendant. He testified that he bought land measuring 400 X 85 feet from Didimus, son of Monyinyo, at Kshs. 60,000/=. He has been living on the land since the year 1986. He stated that the plaintiff is son to Zebedeo Ogwankwa who owns the parcel No. 1341. He stated that Didimus has no claim against him as he paid him in full. Cross-examined by the plaintiff, he stated that he conducted an official search and the land was registered in name of Monyinyo. He bought the land from Monyinyo's son, who was also his uncle. He claimed that Didimus was still alive though he had not seen him for about 12 years. He denied defrauding the owner of the land.
10. DW-4 was Denis Omweri Aloys, the 4th defendant. He also testified that he bought a piece of the parcel No. 1342 measuring 550 X 130 feet. He purchased from Dishon Mauti in the year 1997. He paid Kshs. 50,000/= for it. After he bought the land he took possession and has been living on it since the year 1997. He also stated that the plaintiff has his own land within the parcel No. 1341. Dishon died in the year 2010. Cross-examined, he stated that he does not know whether succession was done. He obtained title in the year 2016. He lives on the suit property and also carries out some farming on it.
11. With the above evidence, the defendants closed their case.
12. The plaintiff and counsel for the defendants filed submissions which I have considered. The main thrust of the defendant's counsel submissions is that the plaintiff is not a direct grandson of the late Monyinyo. Further, it is submitted that the share of the plaintiff is within the land parcel No. 1341 which was owned by his biological grandmother. It is submitted that the sons of Monyinyo sold the land and they have no claim over it. More or less, they contend that the plaintiff is a stranger.
13. I appreciate where the defendants are coming from, but we cannot run away from the fact that the land parcel No. 1342 was subdivided in the year 2016, when the registered owner, Monyinyo Onkundi, was long dead having died in the year 1980. There is no evidence of any succession cause having been conducted by either the sons of Monyinyo or the defendants. From the mutation forms, the person who did the subdivision was Charles Mauti, the 1st defendant, and as I have mentioned, this was done in the year 2016. The 1st defendant did not hold any grant of letters of administration for the estate of



Monyinyo and had no capacity to execute the mutation forms or cause the subdivision of the parcel No. 1342. To do so, he first needed to obtain a grant of letters of administration which he did not. It was mentioned in the evidence that Monyinyo had two sons. One, was Dishon Mauti and the other Didimus. It was said that both died, or that Dishon died and that Didimus left to a place where nobody knows but this doesn't matter. They were not there in the year 2016 to cause the subdivision of the suit land. They did not even have capacity to sell the land without first obtaining a grant of letters of administration. At face value, it would seem that the plaintiff is a stranger, given that their grandfather appears to have subdivided his land amongst his wives, and the plaintiff is from a different house which has its own land. But given that Monyinyo is deceased, and her sons are either dead or not available, any person within the line of consanguinity is at liberty to apply to represent the estate of the deceased and seek that the estate be properly distributed. If the defendants felt that they have an interest in the estate of Monyinyo, they could as well have applied to hold the grant of letters of administration. I do not think that the solution would be to bend the law and proceed to obtain title in their name. To permit the actions of the defendants would be to allow a person to break section 45 of the [Law of Succession Act](#), cap 160, Laws of Kenya, which provides as follows :-

45. No intermeddling with property of deceased person
 - (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
 - (2) Any person who contravenes the provisions of this section shall-
 - (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
 - (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

14. The law above is very strict, that no person shall take possession or dispose of the free property of a deceased person. That is exactly what the defendants did, and to me, it does not matter that they claim to have purchased the land from sons of the deceased. The sons of the deceased had no capacity to sell the land and I have already demonstrated that the defendants could not take the law into their hands and proceed to subdivide the land and issue themselves with titles without first obtaining a grant of letters of administration.
15. For the above reasons, I allow the plaintiff's suit. I proceed to cancel the titles of the defendants to the land parcels South Mugirango/Boikanga/3344, 3345, 3346, 3347, and 3348. I order that the land do revert back to the title South Mugirango/Boikanga/1342 in name of Monyinyo Onkundi (deceased) and be subjected to succession in the usual manner. I also give the defendants 90 days to give vacant possession and in default, they be evicted. Within the 90 days period, or until they give vacant possession, the defendants are barred from excavating any stones, cutting trees, or removing any material from the land, constructing, or in any other way wasting the land. The only other issue left is costs. The plaintiff will have the costs of this suit jointly and/or severally against the defendants.
16. Judgment accordingly.



DATED AND DELIVERED THIS 22 DAY OF FEBRUARY 2023
JUSTICE MUNYAO SILA
JUDGE, ENVIRONMENT AND LAND COURT AT KISII

