



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND COURT CASE NO. 230 OF 2002

CHARLES MOKAYA NYAMBUNDE 1ST PLAINTIFF

PETER MUSUNGU NYAMBUNDE 2ND PLAINTIFF

CARLIMAX M. N NYAMBUNDE 3RD PLAINTIFF

VERSUS

ANDREW NYAKUNDI NYAMBUNDE DEFENDANT

JUDGMENT

1. The plaintiffs who are the step brothers of the defendant filed the instant suit on 15th August 2002 and they are seeking the following orders:
 - i. **That the transfer of land parcel number Wanjare/ Bogitaa/790 made in favour of the defendant herein on the 6th day of March 2002 be and is hereby nullified and it is ordered that proper and legal procedures are followed in the transfer of the said land parcel and further the honourable court be pleased to commit the defendant to jail for committing fraud for a period which pleases the honourable court.**
 - ii. **Costs of the suit.**

Following the subdivision of land parcel **Wanjare/Bogitaa/790** by the defendant the plaintiff amended the plaint to plead the act of subdivision and to introduce the resultant subtitles being land parcels numbers **3846, 3847 and 3848**. The plaintiff amended the substantive prayer such that the prayer after the amendment was in the following terms:-

“That the transfer of land parcel No. Wanjare/ Bogitaa/790 made in favour of the defendant on 6th March 2002 which later was subdivided by the defendant to create new numbers Wanjare/Bogitaa/3846, 3847 and 3848 and any other new numbers crated thereafter be and are hereby nullified and it is ordered that proper and legal procedures are followed in the transfer of the said land parcel.”

2. The defendant was served with summons to enter appearance and on 23rd September 2002 he filed a memorandum of appearance in person. On 3rd December 2003 the defendant appointed the law firm of **Obaga & Co. Advocates** to act for him and the said firm duly filed Notice of Appointment of Advocates on the same date. The defendant however never filed any defence in the suit prompting the matter to be fixed for formal proof hearing on 7th may 2013 and 16th July 2013. After the plaintiff closed his case **Hon. Justice Okongo** before whom the hearing had

proceeded reserved judgment for delivery on 13th December 2013. As per the record before the judge could prepare the judgment it became evident that the defendant's advocates M/s Obaga & Company Advocates who the defendant had appointed to act for him on 3rd September 2003 and were still on record for the defendants when the matter came for hearing on 16th July 2013 had not been served with a hearing notice for the suit rendering the proceedings that took place on 16th July 2013 irregular for want of proper service. On 19th November 2014 Hon. Justice Okong'o set aside the proceedings that took place on 7th May 2013 and 16th July 2013 and directed that the hearing of the case be started afresh.

3. The suit was fixed for hearing and was listed before me on 24th November 2015. Both the defendant and the defendant's counsel on record M/s Obaga & Co. Advocates were served with the hearing notice on 9th November 2015 by one Isaiah Miruka who swore and filed an affidavit of service on 23rd November 2015. Neither the defendant nor his advocate attended court and being satisfied the defendant and his counsel were approximately served with a hearing notice I allowed the plaintiffs to proceed with the hearing ex parte.
4. The 1st plaintiff testified on behalf of the plaintiffs as PW1. The 1st plaintiff testified that the defendant was their elder step brother being their father's son from his first wife. That their father **Denis Nyabunde** (deceased) was the registered proprietor of land parcel title number **Wanjare/Bogitaa/790** measuring **5.4hectares** and was so registered on 4th August 1976. That their father died on 27th September 1977 as per the certificate of death issued on 18th September 1981 included as an exhibit in the plaintiffs' bundle of documents (PEx1).
5. The 1st plaintiff testified that no succession proceedings in regard to their late father's estate was ever instituted and that it came as a surprise to the plaintiffs when they learnt that the defendant who is their brother had caused the land to be transferred to his name without consulting or involving them and without any succession proceedings being instituted. A copy of the abstract of title in regard to land parcel **Wanjare/Bogitaa/790** was tendered as P.Ex2 and it shows Denis Nyabunde (deceased) was registered on 4th August 1976 as owner and that the defendant, **Andrew Nyakundi Nyabunde** was registered as owner on 6th March 2000. Upon discovering the defendant had caused the property to be registered in his name without involving them the plaintiffs lodged a complaint with their local chief and the police. On 30th April 2002 the land registrar registered a restriction against the land parcel barring any dealings owing to suspect fraud. The 1st plaintiff on 2nd May 2002 caused a caution to be registered against the title claiming a beneficiary interest.
6. The 1st plaintiff testified that the caution that he had placed against the title was irregularly removed by the land registrar and that the defendant in 2004 caused the suit land to be subdivided into three parcels being land parcel numbers **Wanjare/Bogitaa/3846, 3847** and **3848** when the present suit was still pending. The abstracts of title in respect of the three subtitles and copies of searches in regard to the same were produced in court as exhibits and show that the defendant was registered as the owner of the 3 subtitles on 11th June 2004 and that on 8th October 2004 the defendant transferred land parcel **Wanjare/Bogitaa/3848** measuring 0.05 of a hectare to one **Vincent Paul Tamaro**. That when the plaintiffs became aware of the new development that the land had been subdivided and the subdivisions had been transferred and registered in the defendant's they on 16th November 2004 caused the land registrar to register restriction barring any dealings with the parcels of land as per the abstracts of title duly certified by the land registrar, Kisii on 29th November 2004 produced as exhibits in evidence.
7. It is the evidence of the plaintiffs that their deceased father had two wives and that after his death the suit parcel of land **Wanjare/ Bogitaa/790** was physically demarcated into two portions by the elders and that each wife was allocated a portion which was to be shared out amongst the children of each respective household. The plaintiffs' mother was allocated and shown her portion of the land and it is on that portion that the plaintiffs settled and have built their homes. The defendant's mother was allocated her portion where the defendant was supposed to settle and in fact has settled. The plaintiffs stated the elders subdivided and allocated the land between the two wives in 1986 and that each of the siblings including the defendant were shown where they were to settle and build their houses.

8. The defendant however without consulting with the other family members and without filing a succession cause as required for the administration of the estate of their late father caused the land to be transferred in its entirety to himself and as is evident from the sale and transfer of a portion to the said Vincent Paul Tamaro of parcel number 3848 the defendant is intent on disinheriting the plaintiffs. The plaintiffs state the acts by their elder brother were irregular, illegal and a nullity since no succession cause had been instituted in regard to their late father's estate to entitle the defendant to exclusively deal with their deceased father's estate.
9. I have reviewed and considered the evidence tendered by the plaintiffs in this matter which evidence is uncontraverted. The issue for the court to determine is whether the transfer of land parcel **Wanjare/Bogitaa/790** to the defendant was irregularly and illegally procured and further whether the consequent subdivision of the suit land was lawful.
10. The evidence on record shows that land parcel **Wanjare/Bogitaa/ 790** was owned by Denis Nyabunde (deceased) who was the father of both the plaintiffs and the defendant. As per the abstracts of title produced in evidence, the said Denis Nyabunde (deceased) was registered as the owner of the suit land on 4th August 1976. The death certificate dated 18th September 1981 shows that the said Denis Nyabunde died on 27th September 1977. The plaintiffs who were the deceased sons have stated that no succession case was ever filed for the administration of his estate and therefore the suit land which was in his name could not be transferred without the appropriate personal legal representative or administrator of the deceased estate being appointed. The defendant did not appear and neither did he file any defence to show how he acquired the right to have the suit property transferred to him.
11. The plaintiffs claim and rightly so that they would be entitled as beneficiaries to a share of their late father's estate. The suit land would properly form part of the assets of the late Dennis Nyabunde and in my view could not be dealt with otherwise than through a succession cause. If there was a succession cause the plaintiffs would have been necessary parties as beneficiaries. They say there was no such cause. I believe them. The chief of the area in his letter of 20th May 2002 tendered in evidence states there was no succession procedure followed. Ordinarily the chief would be aware in case a succession cause was instituted as it is usual for the chief in intestacy cases to be required to certify who the dependants and/or beneficiaries of deceased were as at the time of death. In the premises I am satisfied no valid succession proceedings were instituted in regard to the estate of Denis Nyabunde and accordingly the defendant could not have properly been entitled to deal with the deceased estate when he transferred the suit property to his name. The transfer was irregular, fraudulent and therefore a nullity. The beneficiaries of Denis Nyabunde (deceased) are duty bound to undertake valid succession if they wish to distribute his assets and it is my expectation they will do so. The purported transfer of the suit property to the defendant was incapable of passing any interest to the defendant the same having been done in flagrant breach of the law.
12. As I have come to the conclusion that the transfer of the suit property to the defendant was fraudulently procured I hold that the plaintiffs have proved their case on a balance of probabilities and are therefore entitled to judgment. I enter judgment in favour of the plaintiffs and make the following orders:
 - i. **That the transfer of land parcel Wanjare/Bogitaa/790 to the defendant was irregular and illegal and therefore a nullity.**
 - ii. **The land registrar, Kisii be and is hereby directed to cancel the subdivision of land title Wanjare/Bogitaa/790 resulting in title numbers Wanjare/Bogitaa/ 3846, 3847 and 3848 and to restore the original title land parcel Wanjare/Bogitaa/790 in the name of Denis Nyabunde (deceased).**
 - iii. **The costs of the suit to the plaintiffs.**

Judgment dated, signed and delivered at Kisii this 12th day of February, 2016.

J. M MUTUNGI

JUDGE

In the presence of:

..... for the plaintiff

..... for the defendant

J. M. MUTUNGI

JUDGE