



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
ELC CIVIL SUIT NO.123 OF 2012
formerly NAKURU HCCC NO.107 OF 2010

JANE NJERI MUNIU.....PLAINTIFF

=VERSUS=

SIMON KIARIE NJAU.....DEFENDANT

JUDGMENT

Background

1. The dispute herein relates to a parcel of land known as **Nyandarua/Tulaga/2309** (hereinafter referred to as “the suit property”) excised from **Nyandarua/Tulaga/4328** located in Nyandarua County.
2. The plaintiff contends that she is the legal owner of the suit property. she explains that her claim is premised on an agreement executed between her husband, **Francis Kamau** (hereinafter referred as Kamau-deceased) and the defendant's nephew, **Karanja Njau** (hereinafter referred to as Karanja-deceased). The agreement was to the effect that the two men would exchange their parcels of land. Kamau would take suit property situated at Tulaga and Karanja would take Kamau's parcel of land at Kipipiri. Because the suit property was of higher value than the Kipipiri land, Kamau would in addition to the land in Kipipiri, give Karanja Kshs. 90,000/=.
3. It is the plaintiff's case that upon signing of the sale agreement by the two men, she took possession of the suit property, fenced it off and began cultivating thereon. Following the death of her husband Kamau, the defendant unlawfully entered into the suit property and interfered with the plaintiff's interest therein by cutting trees and tampering with the other developments thereon to wit, borehole and houses.
4. The plaintiff further states that owing to the defendant's said unlawful acts on the suit property, she has suffered and continues to suffer loss and damage namely, deprivation of use and enjoyment of the suit property. The plaintiff contends that all her efforts to have the defendant vacate the suit property have been in vain.
5. For the foregoing reason, the plaintiff prays for judgment against the defendant for an order of permanent injunction to restrain him, his servants, agents and/or through any other person whomsoever from remaining on the suit property and a declaration to the effect that she is the legal owner of the suit property. She also seeks damages for trespass to land, cost of the suit and interest.
6. Through his statement of defence, the defendant denies that the plaintiff is the owner of the suit property and explains that the arrangement previously entered into between Kamau and Karanja was frustrated by subsequent events. In that regard, the defendant explains that following the demise of

Kamau and Karanja, the families of the two deceased persons decided to cancel and reverse the agreement entered into between Kamau and Karanja. The court heard that pursuant to the subsequent agreement entered into between the families of Kamau and Karanja, the parties to the agreement which is the basis of this suit, reverted to their original position. That is to say, Kamau's land remained the land in Kipipiri in the hands of his family, while that of Karanja remained the land in Tulaga (the suit property) in the hands of his family. The additional consideration which Kamau had paid in respect of the suit property was refunded to his family members, particularly his mother, D.W.2.

7. In view of the foregoing, the defendant argues that the plaintiff's suit is malicious, misconceived and an abuse of the court process.

8. In support of her case the plaintiff availed three witnesses, herself included.

EVIDENCE

The plaintiff's case

9. **P.W.1, Samuel Mbange Wanyeki**, a retired chief of Njabini Location, testified that the plaintiff was a wife to Kamau (deceased). He recalled that on **31st August, 2000** the plaintiff's husband Kamau (deceased) and Njau Kiarie (Karanja – deceased's brother) came to his office wishing to exchange land. They recorded a sale agreement to that effect. The court heard that the exchange was between Peter Karanja Njau and the plaintiff's husband. The parties agreed to exchange 1 acre of Tulaga **Plot No. 4328** for 1 acre of Kipipiri **Plot No.2011**. According to the agreement the parties were to restrict themselves to the parcels as stated in the agreement-Karanja was to go to Kipipiri and Kamau to Tulaga. He confirmed that the the owner of the parcel at Kipipiri was to add to the owner of the land at Tulaga, Kshs.90,000/=.

10. He further testified that Peter Karanja did not appear before P.W.1 because he had just passed on. Instead, his family appeared. Parties did not inform him of any previous agreement executed between them. Later he learnt that Karanja was not buried on Kipipiri land. He stated that he was not aware of the agreement dated **3rd March, 2003** in which the families attempted to cancel the earlier agreement.

11. The plaintiff, **Jane Njeri Muriu, P.W.2**, informed the court that her husband died in 2002. She stated that before her husband passed on, they lived together in Nairobi. However, at the time of giving her testimony in this case, she was living at her father's home in Kinangop. Concerning the suit property, she informed the court that the property belonged to Karanja Kiarie Nyamogurie and that her husband exchanged it with his parcel of land in Kipipiri. For him to get the land in Tulaga, her husband in addition paid Kshs. 90,000/=. Although she was present when the agreement for exchange of the properties herein was executed, she was not a signatory thereof.

12. She contended that after the agreement was executed, she took possession of the suit property but in 2003, the defendant chased her out of the suit property. Explaining that the suit property is currently not being used, she stated that she did not return to the land in Kipipiri because it belongs to Karanja (deceased).

13. After Karanja died, his family members decided that he be buried in Kipipiri. To prove that fact she produced the agreement dated **31st August, 2000** together with its translated version as **Pexbt 1**. Thereafter Karanja's family agreed that the land Karanja (deceased) exchanged with her late husband be given to Karanja's (deceased) brothers and sister. However, family disputes arose over the agreement executed between her husband and Karanja (deceased). The dispute was taken to the members of the provincial administration who were unable to resolve it. The area District Officer (D.O), advised them to go to the Land Disputes Tribunal. To attest that fact she produced a letter which the D.O wrote to them as **Pexbt 2** dated **27th May, 2003** and another dated **28th April, 2008** by the District Commissioner (D.C) North Kinangop.

14. The District Tribunal found in her favour but these proceedings therefrom were quashed in judicial review proceedings filed subsequently. She urged the court to confirm her as the owner of the suit

property and award her mesne profits in addition to the costs of the suit.

15. Concerning allegations that there were family tensions following the death of Karanja, she denied having had knowledge of any tension between the two families. She maintained that she took possession of the suit property and fenced it off and stated that she was not aware of the agreement entered into between the two families concerning the revocation of the agreement entered into between the late Kamau and the late Karanja.

16. She further testified that she does not agree with the agreement entered into between the families of **3rd March, 2003** because she was not involved in the arrangements to return the land and did not receive the Kshs.90,000/= alleged to have been returned in the said agreement.

17. **P.W.3, John Muniu Mwangi**, the plaintiff's father testified that after the exchange of the parcels of land herein, the plaintiff and her husband took possession of the suit property and fenced it off, that he visited them severally and even took workers there.

18. As for the Kipipiri land, he stated that Karanja moved there and even built a house thereon. When Karanja died, his family members agreed that he be buried at Kipipiri where he had built a house and that Karanja's brothers and sisters would occupy his land. Both families were represented in the agreement executed on **31st August, 2000**.

19. He explained that the plaintiff continued to use the suit property even after her husband died in 2002. In due course, the defendant chased her from the land claiming that it was his land. He confirmed that the dispute which ensued between the plaintiff and the defendant was taken to the provincial administration for resolution. However, they were unable to resolve it. The contending parties were referred to the land disputes tribunal which ruled in favour of the plaintiff.

20. Concerning the death of Karanja, he stated that he did not know why he died or where was buried. He informed the court that he heard rumours that Karanja killed Kamau's brother.

21. With regard to the agreement subsequently entered into between the families of the late Kamau and the late Karanja, he denied having knowledge that the two families later met and revoked or cancelled the agreement for exchange of the parcels of land hereto.

The defence case

22. **D.W.1, Simon Kiarie Njau**, whose witness statement and the documents annexed thereto was adopted in evidence, informed court that the suit property belonged to his father. He acknowledged that the plaintiff's husband and his nephew, the late Karanja had entered into an agreement hereto to exchange their respective parcels. He informed the court that the said agreement was reversed by family members and that he was the one who was entrusted with the reversal of the two parcels of land. He explained that the agreement was reversed after the Kipipiri people complained that their son (Karanja) had killed their son (Mwangi) and demanded that they revert to the original position as they could not tolerate living together with members the other family.

23. He admitted that the reversal was done by family members in the absence of the late Karanja and the late Kamau or their wives. Karanja's father was also absent. The court heard that Kamau's mother, father and uncle were present. He also admitted that as a family, they had given the suit property to the late Karanja. The court further heard that the Kipipiri land was in the name of Moses Kuria (the late Kamau's father and that rumour had it that Karanja had killed the son of Moses Kuria (Mwangi). Because of this, Karanja was killed by way of mob justice about three months later.

24. It was D.W.1's testimony that the reversal of the agreement hereto was done about a year later by the two families. The court also heard that neither the late Kamau nor his wife (the plaintiff) was cultivating on the suit property. D.W.1 further denied having chased away the plaintiff. He stated that after the reversal of the agreement hereto, he refunded the Kshs. 90,000/= that the plaintiff's husband had paid in

respect of the suit property to plaintiff's in laws.

25. According to the defendant, the Tulaga family never claimed the land in Kipipiri. Although the defendant claims to have no interest in the suit property, he maintained that the suit property belongs to his father.

26. **D.W.2, Mary Nyambura Kuria**, informed the court that the plaintiff was a second wife to her late son, Kamau. She acknowledged that the late Kamau had entered into an agreement with the late Karanja to exchange their parcels of land, each measuring one acre. She also acknowledged that because the suit property was more expensive than the parcel at Kipipiri, the late Kamau gave the late Karanja Kshs.90,000/= in addition for the suit property.

27. After differences arose, following the killing of one of her sons and also Karanja, her family sat and agreed to break their relationship with the Tulaga family. The said differences led to the reversal of the agreement hereto. Consequently, the Tulaga family refunded the Kshs.90,000/= that the plaintiff's husband had paid for the suit property to her and the families reverted to their original position. She stated that since the plaintiff is a wife of her late son, she had set aside 1 acre for her in Kipipiri and she could take possession of it any time she was ready.

28. Concerning the reversal of the agreement entered into between the plaintiff's late husband and the late Karanja, D.W. 2 stated that when they met as the two families to reverse the agreement, they informed the plaintiff to come to the meeting but she refused.

29. On whether the plaintiff had taken possession of the suit property, she stated that she did not know whether her late son and the plaintiff were using the suit property because they were living in Nairobi.

30. With regard to their failure to reverse the agreement when the plaintiff's husband was still alive, she explained that they could not do so because he was living in Nairobi. The court heard that Immediately after Mwangi died, the Kipipiri family called the plaintiff to come and take up the Kipipiri land. The reason for doing that was because as a family, they did not want anything to do with the Karanja family after the murder of their son, Mwangi by Karanja.

31. D.W.2 made it clear to the court that because of what had happened between the two families, even if the court were to order the families to honour the agreement made between Kamau (deceased) and Karanja (deceased), she would find it hard to comply because of the prevailing circumstances in that she could not bring herself to live with a family member of people who had murdered her son.

32. At the close of the case, counsel for the plaintiff filed submissions which I have read and considered. Despite having been given enough time to file his submissions, at the time of writing this judgment, the defendant had not filed his.

33. In the submissions filed on behalf of the plaintiff, it is admitted that the plaintiff's late husband and the late Karanja entered into an agreement which was later reversed by their family members. On behalf of the plaintiff, the following issues have been framed for the court's determination concerning the subsequent agreement:-

1. Whether the signatories to the 2nd agreement had the authority to sign the agreement?
2. Whether the signatories to the 2nd agreement had obtained letters of administration in respect of the estate of the two deceased signatories of the earlier agreement; and
3. Whether the plaintiff was involved in the impugned agreement and if not, why?

34. It was submitted that because the parties to the second agreement had not obtained letters of administration in respect of the estates of the deceased persons herein (read Kamau and Karanja respectively), the second agreement was unlawful *ab initio*. The court was urged to find the plaintiff's case merited and to grant the orders therein sought.

Analysis and determination of the issues:

35. Concerning the first issue, even though the family members had good reason(s) to do what they did, since the suit properties constituted estates of deceased persons, under **Section 2** as read with **Section 80** of the Law of Succession Act, Chapter 160 Laws of Kenya, the family members had no *locus standi* (legal capacity) to deal with the said parcels of land and/or vary the agreement executed between the late Kamau and the late Karanja.

Section 2 of the Law Succession Act (hereinafter referred to as the Act) provides as follows:-

“2(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.”

36. The said section defines “estate” as, “**the free property of a deceased person**”. On the other hand, “**free property**”, in relation to a deceased person, is defined as “**the property of which that person was legally competent freely to dispose of during his lifetime, and in respect of which his interest had not been terminated by his death**”.

37. A reading of the foregoing provisions of the law against the circumstances obtaining in this case, leaves no doubt that the suit property herein constituted a free property of the late Kamau. In the same way, the parcel of land in Kipipiri constituted a free property of the late Karanja. I say so because, the two deceased persons were legally competent to freely dispose of their properties. Their interest therein was not terminated by their demise.

38. **Section 45** of the Law of Succession Act, Cap 160 prohibits dealings with the free property of a deceased person. The section provides as follows:-

“45(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.

Under **subsection (2)**, any person who contravenes the provisions of **section 45(1)** 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 administrative officer that any person has died, he shall, unless aware that a report has already been made, forthwith report the fact of the death to the assistant chief of the sub-location or to the chief or administrative officer of the area where the deceased had his last known place of residence.

39. Under **Section 82** of the Act, it is the personal representatives who had power to do certain things in respect of the estate of a deceased person. In this regard see the said section which, *inter alia*, provides:-

“82. Personal representatives shall, subject only to any limitations imposed by their grant, have the following powers-

(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate;

(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best;

Provided that.....”

40. Whereas the advocates to the parties herein did not raise any questions concerning the capacity of the parties herein to sue or be sued in respect of the estates of the deceased persons herein, by purporting to deal with the estates either by way of revocation of the agreement hereto, it is clear that the parties herein have violated the provisions of **Section 45** of the aforesaid Act.

41. It is also clear from **Section 82** of the same Act, that the plaintiff had no *locus standi* to bring the suit herein in respect of the estate of her husband without first obtaining letters of administration in respect thereof. Equally, the defendant had no legal capacity to defend the suit property.

42. In view of the foregoing, this court finds the suit to be bad in law and dismisses it with no order as to costs.

Dated and signed at Nyeri this 12th day of February 2015

L.N. WAITHAKA

JUDGE

Delivered by Justice A. Mshila at Nakuru this 19th day of February 2015

A. MSHILA

JUDGE