



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL CASE NO. 70 OF 2004

BENARD WAMALWA NAMUNWA

DANIEL WANJALA NAMUNWAPLAINTIFFS

VERSUS

GEOFFREY KIVEU JAREDDEFENDANT

JUDGEMENT

[1] The plaintiffs claim against the defendant is for an order of rectification of the register by deleting the defendant's name in respect of entry number 2 of 9-4-80 in respect of title number Ndivisi/Ndivisi/766, cancellation of entry number 3 on the said title made on 15/4/1982 and an order for cancellation of resultant title numbers Ndivisi/Ndivisi 1169 and 1170.

The same having been procured and/or registered fraudulently.

[2] The plaintiff avers that on diverse dates in the year 1980 the defendant capitalizing on the plaintiffs illiteracy, approached the plaintiffs herein who were desirous of carrying out succession proceedings in the respect of the estate of their late father NAMUNWA MUHITU ALIAS NAMUNWA MWITU and intimated to them that he would assist them carry out the Succession process and that upon successful completion of that process and on reconciliation of costs therein the plaintiffs would sell a portion of land comprising (3) three acres to the defendants at a consideration to be agreed upon. The plaintiff aver that they agreed to that arrangement but upon the completion of succession cause no 5 of 1980, the defendant without their knowledge and/or consent caused himself to be registered as one of the beneficiaries of the estate of the deceased and irregularly got himself to be registered as the owner of three(3) acres of land parcel No. Ndivisi/Ndivisi/1166/766.

[3] The defendant in his defence said that land title number Ndivisi/Ndivisi/766 was lawfully registered in the name Namunwa Muhitu who died about 7/8/1970. He said that upon the death of the plaintiffs father, the plaintiff sold 3 acres of the said land to one Wilbor Maliro. That subsequently, on or about 1979 the plaintiffs differed with the said Wilbor Maliro and the parties by mutual consent rescinded the contract, whereupon the plaintiffs offered the land to the defendant who owned an adjoining piece of land, to wit, land parcel Ndivisi/Ndivisi 723 at a purchase price of Kshs.3,500.00 It is stated that the defendant accepted the offer on condition that a succession in respect of the late plaintiffs father is carried out, with the defendant as a beneficiary in respect of the 3 acres, and that payment and refund of Mr. Maliro's money be made in court at the time of succession.

[4] That a succession cause no. 5 of 1980 was done at the magistrate's court at Webuye and the suit land was distributed as follows:

Daniel Wanjala Namunwa	6 acres
Benard Wamalwa Namunwa	5.4 acres
Geoffrey Kweu Jared	3 acres

A certificate of succession was issued on 8/3/80 and registered by the Bungoma District Land Registrar on 9/4/1980 against Ndivisi/Ndivisi/766. A partition was done in January 1981 that created:

- (a) Ndivisi/Ndivisi/1170 - 3 acres in the name of the defendant
- (b) Ndivisi/Ndivisi/1169 - 11 acres registered in the name of the plaintiffs.

The defendant avers that the said transaction was sanctioned and approved by the relevant Land Control Board.

Further, it is argued that the defendants have sub divided their Ndivisi/Ndivisi/1169 and sold part of it to one Mathias Wamalwa Walumbe.

The defendant categorically denied the particulars of fraud. The defendant avers that this suit is statute barred under the Limitations of Actions Act. The defendant avers that this suit does not lie for two reasons.

- (a) That in absence of a claim against the Land Registrar Bungoma challenging the registrar's decision or action no suit lies.
- (b) Further that the claim cannot lie when the orders made in Webuye District Magistrates Succession Cause No. 5 of 1980, remain uncontested and binding and that the suit herein is resjudicata.

[5] Daniel Wanjala Namunwa gave evidence that one Benard Wanjala Namunwa deceased was his brother. He said that the defendant is his neighbour. He said that Ndivisi/Ndivisi/766 belonged to Namunwa Muhitu deceased. He said he was to sell 1 Acre to the defendant but before doing so they had to carry out the Succession of his father's estate. That once the property got into his name he would sell to the defendant.

He produced proceedings in Succession Cause No. 5 of 1980. He said that they had not agreed that the defendant should get 3 acres.

He denied having ever signed the mutations. That there was no survey done. He said that the surveyor asked him to sign mutations. He produced the mutations.

He denied ever agreeing to sell the land to the defendant for Kshs.3,500.00 That there was no agreement for sale and that he was refunding Wilbor his money. He produced an agreement P exhibit 7 and alleged that the defendant was a witness for the refund of money. He asked the court to order the rectification of the register and have the land revert to him so that they can share it out.

[6] On cross examination, he agreed that he had leased the land to Wilbor. That the defendant is mentioned in paragraph 6.

He admitted that he was the administrator in the Webuye Succession Cause. He admitted that according to the confirmation in that cause he got 6 acres Bernard 5.4 acres and defendant 3 acres. He confirmed that he signed mutation forms on 13/6/80. He said that he never went to the D.O. for Land Control Consent to sub divide. That the surveyor has never planted any boundary features. That he has never gone to the land office to transfer land to the defendant.

[7] Daniel Musee Namunwa said that he lives in Ndivisi area. He said he knew the 2nd plaintiff as brother to his father. That his father is Bernard Wamalwa. He died on 25/9/2007. He said his father had sued the defendant that he was substituted in this suit in the place of his father. He produced a limited grant dated 17/11/2008.

He supported what the 1st witness had said. He said that what he knew is what he was told by his father.

[8] The defendant Geoffrey Kiveu Jared said he knew the plaintiffs for over 50 years. He produced his statement which basically says what his defence has said.

He produced an agreement dated 2/4/80, proceedings from Webuye Magistrate's Court Succession No. 5 of 1980, a succession certificate made on 9/4/80, an application for partition and mutation forms, an application for land control for partition, the consent granted and a survey map. He said he received first demand letter on 27/3/2004 from Omundi & Co. Advocates. He produced the demand in court. He said he obtained this land in the right way and paid Kshs.3,500.00 for the three(3) acres. He said each acre was Kshs.1,000.00. However the 2nd plaintiff had taken money from someone and the matter was in court and that is why they paid Kshs.500 extra. The total was therefore Kshs.3,500.00 He said he processed the title in 1982. That he has extensively developed the land by erecting a 6 bedroom permanent house and he has planted various variety of trees, food crops and has cows on the land.

[9] The issues for determination are

- (a) Whether there was fraud on the part of the defendant in acquiring 3 acres from Ndivisi/Ndivisi/766.
- (b) Whether this suit is time barred.
- (c) Whether this suit is maintainable in view of Webuye Succession Cause No. 5 of 1980.
- (d) Whether the plaintiffs are entitled to the orders sought.

By an agreement dated 2/4/1980 for refund of money by Daniel M. Namunwa the 2nd defendant to Mr. Wilbor Maliro.

The defendant was a witness of the refund of Kshs.3,500.00 In that said agreement paragraph 5 says

"The refund of crops is made by Mr. Kweu since the crops are in his farm and Mr. Maliro does not want to step on that farm anymore from this day of Agreement"

Paragraph 6 of the agreement says Kiveu will pay Kshs.1407/25 at the beginning of May 1980(3rd May) 1980 in this court.

The second defendant has signed this agreement.

On 8/3/80 before the magistrate at Webuye Succession Cause 5 of 1980 Daniel Wanjala and Bernard Wamalwa and Jared Kiveu appeared. The second defendant told the court

"I have to get 6 acres of the land 14.4 acres. Bernard to get 5.4 acres and Jaret to get 3 acres"

Then Bernard the 2nd plaintiff herein stated

"I agree with what Daniel has stated"

The court made an order that the land to be shared between 3 people.

- (1) Daniel Wanjala Namunwa 6 acres
- (2) Bernard Wamalwa 5.4 acres
- (3) Geoffrey Kiveu Jared 3 acres

The mutation form dated 26/1/'81 is made by Daniel Wanjala P.O. Box 529 Webuye and Jared Kiveu P.O. Box 529 Webuye. The same is signed by Daniel Wanjala on 24/5/1980 on page 2.

On page four of the same, it is signed by Daniel Wanjala, Geoffrey Kiveu Jared and one Jared Maikuma(father of buyer).

A letter of consent dated 8/4/82 for partition of Ndivisi/Ndivisi/766 was issued to the parties namely Daniel W. Namunwa, Bernard W. Namunwa and Geoffrey Kiveu Jared

Consideration is named as "on Succession" it is signed by Chairman Land Control Board Webuye. The title of Ndivisi/Ndivisi/766 was closed on sub division on 15/4/82 and new titles issued as No. 1169 and 1170.

[10] Having perused all the documents above quoted, the same having been produced in this case and none of them having been proved not to be genuine, I am satisfied that the plaintiffs were all along taking part in all the steps of sub division of Ndivisi/Ndivisi/766. There was no fraud on the part of the defendant at all. The defendant acquired his 3 acres from Ndivisi/Ndivisi/766 legally.

The plaintiffs having all along been aware, and having taken full part in the sub division of 766 aforesaid cannot be saved by pleading fraud in their pleadings to evade Limitation of actions. In any case, no fraud was proved at all before me.

The second reason why this suit is not maintainable is because the Limitation of Actions was running against the plaintiffs since partition of this land in 1982. This suit is therefore time barred by Section 7 of the Limitation of Actions Act. The same having been brought 22 years after the cause of action arose.

Section 7 of the Limitations Act Cap 22 provides as follows;

" An action may not be brought by a person to recover land after the end of 12 years from the date on which the right of action accrued to him, or, if it first accrued to some person through whom, he claims, to that person."

The third reason why this suit is not maintainable is because of the Webuye Magistrate's Succession Cause No. 5 of 1980. In this cause, the parties to this case took active part in the said cause. The estate of Namunwa Muhitu the registered owner of Ndivisi/Ndivisi/766 was the subject matter. The plaintiffs and defendant were identified as the beneficiaries and they shared the only asset of the deceased Ndivisi/Ndivisi/766 in the following shares.

- Daniel Wanjala Namunwa 6 acres
- Bernard Wamalwa 5.4 acres
- Geoffrey Kweu Jared 3 acres

The grant was confirmed, registered in the land office Bungoma, the consent of the Webuye Land Control Board granted and the land partitioned and titles issued. The succession cause was complete and was acted on by the parties herein.

Under Section 76 of Cap 160 The Law of Succession Act, there is no limitation on revocation of a grant of representation. It does not matter whether it is confirmed or not. It can be revoked if it is obtained

fraudulently by making a false statement or by concealment from the court of something material to the case.

If the plaintiffs claim is of fraud, then, they should have used Section 76 of Cap 160 Laws of Kenya. The filing of a fresh civil case is misconceived and an abuse of the process of the court. Even if there were no other reasons to oppose this suit, for this reason alone, this suit should be dismissed. For all those reasons stated herein, the plaintiffs are not, entitled to the orders sought. Their claim is unsustainable, has no merits and is dismissed with costs to the defendant.

Dated this 23rd day of September 2015

S.MUKUNYA - JUDGE