



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 53 OF 2011

ROBERT TANUI (Suing as the legal representative of the estate of SAWE BUSIENI).....
.....PLAINTIFF

VERSUS

ELSEBA JEBICHI MENGECH.....1ST DEFENDANT
CHRISCA REAL ESTATES.....2ND DEFENDANT
RAPHAEL ARAP CHEPKWONY.....3RD DEFENDANT
ANGELINE CHEPLEMOI.....4TH DEFENDANT

RULING

Robert Tanui filed this suit on 17/3/2011 as the legal representative of the estate of Sawe Busienei, seeking orders inter alia, that:-

- (1) A declaration do issue that the deceased Sawe is the owner of Nakuru Municipality Block 13/312;**
- (2) That the sale of the property by Raphael Arap Chepkwony and Angeline Cheplemoi, 3rd and 4th defendants to the 1st defendant is null and void and**
- (3) A permanent injunction to restrain the defendants from interfering with the suit land.**

Filed simultaneously with the suit is the Notice of Motion of the same date in which he sought a permanent injunction to restrain the respondents from disposing or interfering with the plaintiffs' ownership/possession and plaintiffs' quiet use and occupation of the suit land till the suit is heard and determined.

The application is premised on grounds found in the body of the application and the supporting affidavit of the applicant. It is the applicant's contention that the suit land belongs to his father, the late Sawe Busienei, having been granted the Occupation Licence by the Municipal Council of Nakuru in the 1970s (RT3); communication in respect of the land was addressed to the deceased (RT4) and when Sawe died in 1998, the Council was still processing the title in respect of the land. (RT5a & 5b); that the land is still registered in Sawe's name (RT6) at the Council. Sometime this year, he found a note on the property from the 3rd and 4th respondents addressed to the tenants in the plot directing them to make payments to them (RT7) alleging that the plot belongs to the estate of one Mary Chemarus (RT8). The applicant was surprised as he had been in charge of collection of rents since the death of his father and that the said Mary Chemarus and the 3rd and 4th respondents are strangers to him and they did not avail any documents to prove ownership. The applicant's counsel found out that the 3rd and 4th respondents had instituted a

cause relating to Mary Chemarus' estate and the suit plot is named as part of her estate (RT9). The applicant filed summons for revocation of the grant issued in respect of Mary Chemarus' estate (RT11). When the matter was still pending, the 3rd and 4th respondents went to the premises in company with the 1st and 2nd respondents for purposes of taking over the property. The 2nd defendant, an agent, claimed to have been acting for the respondents. The applicant resisted and on 14/3/2011 the respondent returned with police, arrested the caretaker, Zakayo Kosgey who was not charged. That though the land was given to Lucy Chemengich Yebei, he has not been able to transfer it to the said land due to these proceedings. He claims to have overwhelming chances of success since the late Sawe has been on the property for over 20 years, having occupied it since the 1970s.

Three affidavits were sworn in opposition to the application. Elseba Jebichi Mengich, 1st defendant in her affidavit dated 5/4/2011, deponed that in 2011 she started negotiations with the 3rd and 4th respondents for the sale of NKU MUNICIPALITY 13/312. She agreed to buy the land after seeing the Certificate of Confirmation of Grant (EJM1) and bought the land on 26/2/2011 (EJM2) and when she went to take possession on 1/3/2011, she met resistance; that she has already paid Kshs.600,000/- and she prays to be allowed to take possession.

Raphael Arap Chepkwony, the 3rd respondent also swore an affidavit dated 19/3/2011 in which he deponed that the said land belonged to his 'father' Mary Chemarus who had married Tapnyabei- in a **"woman to woman"** marriage. Mary moved the respondent and his brother to Litein and Mary adopted a daughter, Norah who got married to Sawe Busienei who lived in a nearby plot. Mary died in 1966 and was buried by Sawe Busienei, but they were never informed of the death; that Sawe then took possession of the plot 312 without their knowledge or consent. When Sawe died in 1998 his sons continued to collect rents from the Plot 312 Bondeni. In 2008, he filed Succession Case 237/08 with his wife, 4th respondent and they were issued with grant on 27/9/2010. They later found that the applicant and his brother Tanui had filed another succession cause, 123/2009 over the same suit land. That on 28/2/2011 Raphael and his wife sold the suit land for Kshs.1 million (RC2) to the 1st respondent.

Joseph Mojong who claims to be an elder in Nakuru swore an affidavit dated 19/5/2011 to the effect that in the year 2009, the D.O. Nakuru asked him to chair a panel of elders to arbitrate between the family of Mary Cheramus and of Sawe Busienei Tanui (both deceased) respecting Nakuru Municipality Block 13/312. He explained that Mary Cheramus did not have children, was unmarried but had a European friend from whom she inherited the suit land; That Mary married Tapnyabei in a "woman to woman" marriage and they got two sons, Raphael Chepkwony (3rd respondent) and Daniel Kebenei; She later adopted a daughter Norah who got married to Sawe Buseinei. That Mary settled her two sons in Litein while she remained on the suit plot till her death in 1966 while her daughter Norah and her husband Sawe lived in a nearby plot; that when Mary died, she was buried by Sawe without the knowledge of the sons and Sawe then died in 1998 and his sons who include the applicant herein, continued to collect rents from the suit plot and filed Succession Cause 123/09 which was confirmed to one Lucy Chepngetich Yebei to whom the applicants had sold the plot. According to Mojong the elders reached a verdict that Block 312 belongs to the sons of Mary Chemarus that is Raphael and Daniel but that Sawe the son-in-law could not inherit from his mother-in-law.

I have now considered the arguments put forth by both parties to this dispute. Even though Mojong claims that the elders reached a verdict that the disputed plot belonged to the sons of Mary Chemarus, I have seen the minutes of the said meeting dated 20/8/2009 and it is apparent that the applicant and his brother sons of Sawe were not present. It is not clear whether they were notified of that meeting or not or whether they are aware of the decision of the elders.

It is apparent from the documents exhibited by the applicant that Sawe Busienei was in his possession of the disputed plot since the 1970s. A letter addressed to him in 1974 does confirm that fact. All correspondence from the Municipal Council of Nakuru and payment of rates were addressed to him. It has been admitted that the sons of Sawe continued to collect rents even upto this year. The 3rd respondent depones that does not claim to have any document in relation to ownership of the plot nor does he claim to have ever collected rents from the said plot from the time his mother, Mary died in 1966 till 28th

February 2011 when they sold the plot. Mojong deponed that the sons of Mary were not informed of the death of Mary. It is not clear when the 3rd defendant came to know of the mother's death because it is not until 2008 that he filed Succession Cause 237/08. And why would it take the 3rd respondent over 40 years to know of his mother's death? There is no evidence that the 3rd respondent ever sought to collect rent from the disputed plot nor did he ask the court to assist stop the applicant from collection of the rents from the disputed plot. I cannot fathom how the 3rd defendant could have taken so long, from 1966 upto 2008 to claim the mother's property.

The respondent took out letters of administration in respect of Mary Cheraus' estate in 2008 and the confirmed grant was issued to the 3rd and 4th respondent on 21/9/2010 in which plot 312 was confirmed to them. On the other hand, the applicant had filed Succession Cause 123/09 and the grant was confirmed on 30/11/2010. The applicant had the plot transferred to Lucy Yebei to whom they had allegedly sold the plot. Similarly, the respondents claim to have sold the plot to Jebichi (1st defendant) in February 2011. The 3rd and 4th defendants have no documents that they would issue to the purported buyer nor did the applicants have any save that the Council had promised to issue the title to Sawe by letter of 19/10/1993. Since no copy of title was exhibited, it seems none was issued and so none of the parties held the title to the land to be able to transfer the land. I have noted that the purported sale of the plot to the 1st defendant has been done when the dispute in respect of the plot is simmering. It cannot have been done in good faith.

Mojong alluded to the elders' verdict that the land belongs to the sons of Mary Chemarus. Nothing has been said of what happened to Norah, the daughter of Mary and wife to Sawe. Under **Cap 160 Laws of Kenya**, all children of the deceased have a right to inherit the deceased's estate. At this stage, this court cannot tell how Sawe came to be in possession of the late Mary Chemarus's estate. Did Mary give it to her daughter Norah? Those questions can only be answered at a full hearing to determine who the rightful owner of the disputed plot is.

Since both parties claim the suit plot, though it is apparent that the family of Sawe has been in possession since 1966, that is, over 45 years, the balance of convenience tilts in favour of the applicant. The court will grant an order of injunction as prayed in prayer 3 of the Notice of Motion pending hearing of the suit. In addition, the applicants are also restrained from disposing, selling or transferring the plot to anybody pending hearing of this suit. The applicants are also directed to collect and deposit the rents from the suit plot in court forthwith pending the hearing and determination of this suit. Costs of this application will be in the cause.

DATED and DELIVERED this 30th day of September, 2011.

R.P.V. WENDOH
JUDGE

PRESENT:

Ms Nasimiyu for the plaintiff.

Mr. Muthonyi for the defendants.

Kennedy – Court Clerk.