



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
CIVIL APPEAL NO. 34 OF 2009

GRACE OBUYA OKUMU
.....PLAINTIFF
-VERSUS-
PHILIP ONYANGO OGINDO.....
.....1ST DEFENDANT
PAUL TINGA OKATCH.....
.....2ND DEFENDANT
BENARD OGINDO OKATCH.....
.....3RD DEFENDANT
BATHLOMEW OCHIMBO NGAI.....
.....4TH DEFENDANT

JUDGMENT

The plaintiff, **Grace Obuya Okumu** is the widow and Administratrix of the estate of her late husband, **Obadia Ambar Okumu**, though in a limited way. That is to say that a limited grant of letters of administration Ad Litem was issued to her for purposes of filing this suit by the Senior Resident magistrate’s court at Homabay in succession cause number 11 of 2009. She commenced this suit against the defendants jointly and severally for Kshs. 444,140/- as special damages, a declaration that the defendants or any person claiming title through them was not entitled to enter into or use the parcel of land known as Kanyanda/Kanyadier/220 **“the suit premises”**, that the defendants do render vacant possession of the same to her, damages for trespass at the rate of Kshs. 2000/- per day from the date of trespass until possession is given back to her, aggravated damages, injunction restraining them from entering or using the suit premises, costs and interest.

From the plaint it appears that the plaintiff’s husband hereinafter referred to as **“the deceased”** bought the suit premises from one, **Akeyo and Marienga Anduko** on or about 28th April, 1977 at a consideration of Kshs. 7,425/=. The suit premises measured 12 ½ acres. This was before the suit premises were adjudicated. Following various objections raised land adjudication committee by various parties interested in the suit premises, the same was eventually registered in the name of the deceased. On or about 17th December, 2008, the deceased passed on and the plaintiff caused the suit premises by way of objection to be transferred and registered in the names of her adult sons, namely, **Barnas Okumu Asora, Benjamin Ochieng Waore Okumu, George Yashon Ombado Okumu and Peter Robert Odhiambo Okumu**. However on or about 18th January, 2009, the defendant’s jointly with others whom she has not sued unlawfully trespassed in to the suit premises and chased away the plaintiff and her hired

workers. In the process they destroyed the fixtures therein and the building materials that the plaintiff had bought, assembled and brought to the suit premises with a view of putting up a house. The damage caused by the defendants as aforesaid was estimated at Kshs. 444,140/= whose particulars the plaintiff gave in the plaint. By reason of the defendants' acts aforesaid, the plaintiff had been subjected to humiliation, suffered great anguish and mental distress. She had in the process suffered loss, damage and therefore prayed for aggravated damages for trespass. Since then and despite repeated requests by the District Land Adjudication office as well as the Provincial Administration and the plaintiff, for the defendants to end their trespass and give up possession of the suit premises to the plaintiff and return her items taken away as aforesaid, the defendants had flatly refused to do so and had continued to threaten and intimidate the plaintiff.

The suit was defended. Through their joint statement of defence filed in court on 9th April, 2009, the defendants averred that the plaintiff had no *locus standi* to bring this suit and therefore the suit as filed was misconceived, incompetent and non-starter. Further they contended that the alleged sale agreements entered into between the deceased, **Akeyo** and **Marienga Anduku** did not exist and if they were, then they were forgeries, invalid, null, void and in law incapable of enforcement. They went on to aver that the plaintiff or her sons had never taken possession of the suit premises which for over 30 years had been in their exclusive, effective and quite possession, occupation, and use. They therefore denied trespass and or that they seized and damaged the plaintiff's property. Finally they pleaded that, by virtue of their occupation aforesaid, the plaintiff's right over the same had been extinguished in any event and her claim barred by the provisions of the Limitation of Actions Act and that the 3rd defendant had the legal right to the suit premises by way of adverse possession.

The hearing of the case commenced before me on 17th May, 2010. In support of her case, the plaintiff testified and called three other witnesses namely **Edgar Erick Ojala**, Land Adjudication officer, **Emmauel Korir**, an administration police officer and **Erick Ouma Nyambok**, a carpenter. Their evidence in summary was in terms that the deceased who was the husband of the plaintiff bought the suit premises which were then un adjudicated land from **Gor Akeyo** and **Marienga Anduku** in 1977 by virtue of two sale agreements which were tendered in evidence. The deceased duly paid the purchase price. At the conclusion of land adjudication in the area, the suit premises came to be known as **Kanyada/Kanyadier/200**. However the title deed initially came out in the names of **Sila Ogutu**. The deceased then took out objection proceedings under the Land Adjudication Act against **Sila Ogutu** which saw him win at one stage only for such win to be short-lived for in turn **Sila Ogutu** would also win. The see-saw battle went all the way to the minister for lands by way of appeal who eventually ruled in favour of the deceased. The deceased later passed on and the plaintiff filed a late objection to the District Land Adjudication officer who allowed it which culminated in the suit premises being transferred and registered in the names of the plaintiff's adult sons; **Barnabas Okumu**, **Benjamin Ochieng Waore Okumu**, **George Yashon Ombadho Okumu** and **Peter Ayus Robert Odhiambo** as joint proprietors. On 18th January, 2008, the plaintiff together with her hired workers who included, the carpenter PW4, went to the suit premises to put up a house. In the process of doing so, they were however stopped in their tracks by several people, among them the defendants, who chased them away calling them dogs. As a result they lost several items that included building materials to the rowdy group aforesaid. The particulars of the items lost as pleaded in paragraph 9 of the plaint were proved by the plaintiff by tendering in evidence a bundle of documents in support thereof. PW4, a carpenter, too lost his tools of trade which he had been unable to recover as at the time of hearing of the suit. He had been contracted by the plaintiff to fence and put up a house on the suit premises. He was prevented from executing the contract by the defendants. Both the plaintiff and PW4 testified that they positively identified the defendants among the crowd that attacked them on the suit premises on the material day claiming that the suit premises belonged to them. Following the incident, the plaintiff went and reported the same to administration police post at Marindi. PW3, an administration police officer from the post, was dispatched to the suit premises but found nobody at the scene. However he found the plaintiff in a neighbour's home. He advised her to report the matter to HomaBay police station. The following day, he was again instructed to proceed to the suit premises by HomaBay police station to establish the situation of the ground. He did so and this time around, he found people clearing bushes. The plaintiff too complained to the land adjudication officer, PW2 that some people were trespassing on the suit premises. He visited the suit premises and noted that a portion of the same had been cleared. However

nobody was present. He took photographs showing where the plaintiff intended to put up a house, portion cleared and uncleared portions of the suit premises. He tendered the same in evidence. Later he wrote a letter dated 28th January, 2009 to the chief giving the status of the suit premises. Since the area was still under Land Adjudication he issued a consent to the plaintiff to institute these proceedings as is a requirement under the Land Adjudication Act. He confirmed though that the suit premises had been adjudicated and registered in the names of the plaintiff's sons aforesaid.

The 3rd defendant testified on his own behalf and on behalf of the other defendants. He also called one witness, **Sila Oguttu Nyadibo**. In summary their evidence was that the suit premises belonged to their clan. During land adjudication in the area, the clan members allowed DW2, **Sila Oguttu**, to have the same upon adjudication registered in his name to hold it in trust for the clan who would later share it out among themselves, the 1st, 2nd and 4th defendants included. The clan never approved nor was it aware of the alleged sale of the suit premises by **Gor Akeyo** and **Marienga Anduko** to the deceased. The 3rd defendant had constructed a house on the suit premises in 1968 and since then he had been in active, effective quite possession and occupation thereof. On the other hand the deceased had never occupied the suit premises. They denied having destroyed, damaged and or taken away items as claimed by the plaintiff in paragraph 9 of the plaint. As far as they were concerned, they merely stopped the plaintiff and her workers from interfering with their land as they were not aware of their interest in the same. After they stopped them, the plaintiff and her workers left with the building materials and other items. Finally, the defendants denied the capacity or *locus standi* of the plaintiff in filing this suit against them.

At the conclusion of the evidence, **Mr. Okoth**, learned counsel for the plaintiff and **Mr. Ochillo**, learned counsel for the defendant agreed to file and exchange written submissions. This was subsequently done and I have carefully read and considered them as well as cited authorities.

The defendants framed the issues for determination in this suit as follows:-

- ***Whether the plaintiff have the locus standi to mount this suit.***
- ***Who has been in occupation of the suit premises.***
- ***Whether the defendants seized and damaged the plaintiff's goods.***
- ***Whether the plaintiff is entitled to damages both general and special.***

Costs and interest.

The plaintiff however did not frame the issues. She was contented with going along with the issues as framed by the defendants.

However in my view, the fate of this suit shall be sealed based on my finding on the 1st issue framed as aforesaid.

It is common ground that the plaintiff's husband passed on. Before he passed on the suit premises were registered in his name though later transferred and registered in the names of his 4 sons who are all adults. It is also common ground that the plaintiff mounted this suit as the administratrix of the estate of the deceased pursuant to a limited grant issued by the Senior Resident magistrate's court at HomaBay. It is also common ground going by the evidence on record that the building materials allegedly carried away by the defendants were purchased by the deceased. So that all said and done, the plaintiff was suing for and on behalf of the estate of the deceased. She said so in her pleadings as well as in her evidence. One would therefore expect that a grant that appointed her as the administratrix of the estate of the deceased would be tendered in evidence. No such grant was however tendered in evidence in this case. Much as the said grant is in the bundle of documents tendered in evidence, the same is of no consequence since the plaintiff never made any reference to it in her evidence in chief, or even in re-examination. Infact it is not among the exhibits formally tendered in evidence by the plaintiff. So that on the evidence on record, much as the plaintiff had pleaded that she was suing as an administratrix of the estate of the deceased, there is nothing tendered in evidence in prove of that fact. Much as there is a bundle of documents in which a limited grant of letters of Administration Ad litem features, the entire bundle was not admitted in evidence. Out of that bundle, only the following documents were tendered in evidence and admitted as

exhibits.

- The death certificates of the deceased.
 - The agreements of sale of land.
 - Proceedings of Land Adjudication Committee.
 - The decision on the appeal by the deceased.
 - The decision on the objection by **Sila Oguttu**.
 - The decision of the minister on appeal by the deceased.
 - The decision of the minister on appeal by **Sila Oguttu** and
- The letter by the plaintiff to the adjudication officer.

From the foregoing it is therefore apparent that the limited grant was not among the exhibits tendered in evidence. Accordingly her capacity and or **locus standi** to initiate these proceedings as pleaded in the plaint has not been established. It remains an allegation unbacked by any evidence. An averment in a plaint remains a mere allegation unless and until it is backed by evidence.

Further, even if this court was to assume that indeed there was such limited grant as per the bundle of documents, the same is invalid in law. A limited grant of letters of administration Ad Litem cannot in law be issued by a subordinate court within whose jurisdiction there is a high court. This is the essence of the proviso to section 48 of the **Law of Succession Act**. It is worded thus:-

“...Notwithstanding any other written law limits jurisdiction, but subject to the provisions of section 49, a resident magistrate shall have jurisdiction to entertain any application other than an application under section 76 and decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed one hundred thousand shillings

Provided that for the purpose of this section any place where both the High Court and a resident magistrate’s court are available, the High Court shall have exclusive jurisdiction to make all grants of representation and determine all disputes under this Act....”

The limited grant referred to in this case was issued by the Senior Resident Magistrate’s Court at Homabay court on 4th February, 2009. That court falls under the jurisdiction of this court. In accordance with the proviso aforesaid that limited grant should have been exclusively issued by this court and not the said subordinate court. In other words such Limited grant could only have been issued on a petition to this High court and not in the Senior Resident Magistrate’s court at Homabay. To the extent that the purported grant of letters of administration Ad Litem was issued by the subordinate court without jurisdiction, it is nullity and of no legal consequence and could not have been used to mount this suit. As correctly submitted by the defendants, this is a jurisdictional issue and can therefore not be cured by the new concept of **“double O” or “O2” or Oxygen** principle of overriding objective in civil litigation. Though this issue was raised in the defendants’ submissions which were served on the plaintiff, her counsel did not see the need to respond to the same directly. In fact he made no reference at all to the issue. If anything, he appears to have given it a wide berth. Was it in the knowledge that in law he had no response at all? Perhaps!

Further, the plaintiff in her testimony categorically stated that the suit premises were subsequent to the death of the deceased and on her late objection transferred and registered in the names of her 4 adult sons. She made the application going by her evidence on 17th December, 2008. This was long before she filed this suit. For avoidance of doubt, this suit was in fact filed on 20th February, 2009. She admitted under cross-examination that all her 4 sons aforesaid were adults. Yet she filed this suit on their behalf. There is no evidence that the said sons were incapacitated in law as to be unable to mount the suit on their own. Nor did they donate power of Attorney to their mother to sue on their behalf. The plaintiff as it is, has no legal or equitable interest in the suit premises to entitle her to sue. The suit premises having been transferred and registered in the names of her 4 adult sons, it ceased to be part of the estate of the deceased for which she could claim and or sue for in her capacity as the administratrix of the deceased’s estate in a limited manner. It matters not that the limited grant she obtained was for purposes of mounting

this suit. When cross-examined on the issue she stated “...*I did not want them to sue in their personal capacity because my husband wrote a letter on 24th December, 2002 instructing me to deal with his estate and nobody else....*” This cannot justify the bending of the well known and respected rules of procedure in filing of suits and with particular regard to parties to the suit and capacity to sue. In any event and as already indicated, the suit premises no longer formed part of the estate of the deceased the same having been transferred and registered in the names of other people.

Strangely, the plaintiff has argued that the transfer and subsequent registration of the suit premises into the names of her 4 adult sons in the absence of a confirmed grant of letters of administration intestate was illegal, null and void in law and cannot give the 4 sons right to sue as proprietors, nor can they issue any power of attorney to her. This argument though fanciful is neither here or there. First, it is the plaintiff who voluntarily initiated the process of having the suit premises transferred to her sons much as she knew that the process may be tainted with illegality. She cannot now turn around and seek to benefit from her own mischief by proclaiming illegality of the entire process. Secondly, having belatedly realized that what she did was wrong, she did not testify as to her efforts underway to cancel and or rectify the register to accord with the reality in law she now espouses. I would have expected the plaintiff to say that she had undertaken certain measures to rectify the illegality aforesaid which was committed at her urging. No such evidence was forthcoming. In the premises therefore the 4 sons are the registered proprietors of the suit premises vested with all the rights in terms of sections 27 and 28 of the **Registered Land Act**. They are the only ones in law who can sue over the suit premises in the event that their interest in the suit premises was threatened and not the plaintiff, their mother.

In the result, I find that the plaintiff had no capacity nor the necessary *locus standi* to mount this suit. Accordingly it is struck out with costs to the defendants

Judgment dated, signed and delivered at Kisii this 16th September, 2010.

ASIKE-MAKHANDIA
JUDGE