



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KAKAMEGA
Civil Case 16 of 2006

SABASTIAN MALOBA NYANGWESO PLAINTIFF

V E R S U S

STEPHEN OTIENO NYONGESA DEFENDANT

J U D G M E N T

The pleadings and evidence in this suit show that the plaintiff is the personal representative of the estate of the late Mohamed Ateya Makanda who died on 31.12.1998 leaving land parcel No. North Wanga/Indangalasia/723 which is an excision of the original land title No. North/Wanga/Indangalasia/13 which was owned by one Mohamed Ateya Makanda, now deceased who subdivided it into three parcels Nos. N/Wanga/Indangalasia/723, 724 and 728 before he died in 1998 and transferred land title No. N/Wanga/Indangalasia/723 on 29.5.1996 and land title No. N/Wanga/Indangalasia/724 on 24-2-1994 to Nyongesa Opuli Nabula and land title No. N/Wanga/Indangalasia/728 to another party. On 11-2-2002, land title No. N/Wanga/Indangalasia/724 was transferred to Stephen Otieno Nyongesa, the defendant herein.

The plaintiff avers that he is the next of kin of the late Mohamed Ateya Makanda and is entitled to inherit the parcels of land title Nos. N/Wanga/Indangalasia/723 & 724 as the latter was his uncle and had promised him that he would give the said parcel of land to him (the plaintiff) as a gift upon his death. It was the plaintiff's allegation that Nyongesa Opuli Mkanda exploited the ignorance of the late Mohamed Ateya Makanda to defraud him when he caused him to subdivide his original land title No. N/Wanga/Indangalasia/13 into three portions known as N/Wanga/Indangalasia/723, 724 & 728 and fraudulently caused parcels Nos. N/Wanga/Indangalasia/723 & 724 to be registered in his Nyongesa Opuli Nabula's name.

When the plaintiff gave evidence before me on 12-3-2007, he testified that his father and the late Mohamed Ateya Makanda were brothers and that made the plaintiff the nephew of the late Mohamed Ateya Makanda. He told the court that the latter was predeceased by his wife with whom they had no child. According to the plaintiff he was the rightful heir. He took out succession proceedings on the estate of Mohammed Ateya Makanda and had a Grant of Letters of Administration intestate made to him on 23rd July, 2003 in the HC. Succession Cause No.209 of 2003 at Kakamega. Ostensibly, that succession cause is still pending. The said Grant which was produced as exhibit No.1 shows that Mohamed Ateya Makanda died on 31st December, 1998.

The plaintiff testified that he lived with the late Mohamed Ateya Makanda on the original No. N/Wanga/Indangalasia/13 before it was subdivided as aforesaid and that the plaintiff used to till a portion of it. The plaintiff further testified that before Mohamed Ateya Makanda died, he called Messrs Nyongesa Makanda, Daniel Omuka and Thomas Wanga told them in the presence of the plaintiff that upon his death the plaintiff should inherit his land save for the portion he had sold. The plaintiff told the

court that he conducted the funeral of the late Mohamed Ateya Makanda in 1998 and that two years later, the defendant, Stephen Otieno Nyongesa and his mother Consolata served the plaintiff with a letter requiring him to vacate the land. The defendant and his mother were known to the plaintiff. The mother had complained against the plaintiff in the year 2001 for trespass on the land and the plaintiff had been charged with trespass contrary to section 5(1) of the Trespass Act Cap 294 in Mumias Criminal Case No.343 of 2001. The particulars of the charge were that the plaintiff with Nyangweso Makanda Maluba and Stephen Barasa Nyangweso jointly with intent to annoy trespassed into land parcel No. N/Wanga/Indangalasia/724 of Consolata Awino Nyongesa by cultivating the land and planting crops without her consent. It was after this trespass case, testified the plaintiff, that the plaintiff discovered that the land title No. N/Wanga/Indangalasia/13 had been subdivided as aforesaid. He told the court in his evidence that land parcels Nos. N/Wanga/Indangalasia/723 & 724 ought to go to him as the heir.

In cross-examination, the plaintiff conceded that the late Mohamed Ateya Makanda subdivided the original land title No. N/Wanga/Indangalasia/13 into three portions before he died and sold one portion and transferred portion No. N/Wanga/Indangalasia/723 on 29-5-1996 as a gift to Nyongesa Opuli Nebula and parcel No. N/Wanga/Indangalasia/724 to Nyongesa Opuli Nebula also as a gift on 24-2-1994. The plaintiff conceded that the late Mohamed Ateya Makanda never told him about Nyongesa Opuli Nebula. Although in the plaint the plaintiff claims to be entitled to land parcels No. N/Wanga/Indangalasia/723 & 724, in evidence he told the court that he claims only land title No. N/Wanga/Indangalasia/724.

The plaintiff called two witnesses. The first witness, Nyangweso Makanda (PW2), a farmer from Indangalasia in Butere/Mumias District told the court that the plaintiff was his son and that Mohamed Ateya Makanda deceased was his brother. Save for this, PW2's evidence did not add anything to what the plaintiff had told the court. The second witness, Daniel Omuka Malela, also, from Indangalasia in Butere/Mumias District told the court that the plaintiff was the son of his PW3's uncle because his (plaintiff's) father is the PW3's mother's younger brother. He told the court that the plaintiff lived with Mohamed Ateya Makanda on the original land title No. N/Wanga/Indangalasia/13 before he died and that before he died the said Mohamed Ateya Makanda sold 5 acres of land and 1 ½ acres to his cousin, Nyongesa Opuli Nebula.

The defendant gave evidence and told the court that Nyongesa Opuli Nebula was his father and that Mohamed Ateya Makanda was his grandfather who gave his father the two parcels of land No. N/Wanga/Indangalasia/723 and 724 after the Land Control Board had given its consent. He clarified that Mohamed Ateya Makanda was not his real grandfather and that he was his father's uncle. He told the court that his father Nyongesa Opuli Nebula, died in 1995 and that he is the one who tills the land parcels Nos. N/Wanga/Indangalasia/723 and 724 on which he has planted sugar cane and maize crops. The gifts of these two parcels of land to his father were given openly without secrecy and that the plaintiff was not in possession of and did not till the said parcels of land.

On the basis of this evidence and having regard to the pleadings, has the plaintiff made out a case on the balance of probabilities for the order he seeks? The evidence placed before the court shows and it is my finding that-

- (i) That Mohamed Ateya Makanda owned land title No. North/Wanga/Indangalasia/13 originally.
- (ii) That during his lifetime, Mohamed Ateya Makanda subdivided land title No. North/Wanga/Indangalasia/13 into several parcels which included parcels Numbers N/Wanga/Indangalasia/723 & 724.
- (iii) That Mohamed Ateya Makanda transferred to Nyongesa Opuli Nebula land parcels No. N/Wanga/Indangalasia/724 on 24-2-1994 as a gift and parcel No. N/Wanga/Indangalasia 723 on 29-5-1996.
- (iv) As at the time Mohamed Ateya Makanda died in 1998, he had divested himself of the parcels of land claimed by the in the suit herein and his estate did not comprise any of the said parcels of land.

- (v) That the parcels of land No. N/Wanga/Indangalasia/724 was transferred by Nyongesa Opuli Nebula to his son, Stephen Otieno Nyongesa, the defendant, on 11-2-2002.
- (vi) That there was not sufficient evidence of gift by the late Mohamed Ateya Makanda to the plaintiff in respect of land parcels Nos. N/Wanga/Indangalasia/723 & 724 and in any case, as it was not perfected and effected by paramount of consent of the Land Control Board and transfer, it became void and unenforceable.
- (vii) That the plaintiff did not adduce evidence to establish a claim for adverse possession.
- (viii) That the plaintiff did not adduce sufficient evidence to establish the alleged fraud nor did he show that he was entitled in law to the claim for the land he sought.
- (ix) That there was no evidence that the plaintiff was the heir to the late Mohamed Ateya Makanda, and even if he was, the latter was entitled to dispose of his land as he did during his lifetime and as at the time of his death in 1998, he had left no land which he could pass onto the plaintiff.
- (x) That the Grant of Letters of Administration Intestate made to the plaintiff on 23-07-2003 in the estate of Mohamed Ateya Makanda did not entitle the plaintiff to interfere or deal with land title No. N/Wanga/Indangalasia/724 as it did not belong to the said deceased at the time of his death and the said land could not constitute part of the estate of the deceased
- (xi) As regards the parcel of land No. N/Wanga/Indangalasia/723 which was registered in the name of Nyongesa Opuli Nebula who did on succession proceedings relating to the estate of Nyongesa Opuli Nebula shall determine the successors in title.

I am not impressed by the plaintiff's case. The claim lacks legal basis and evidence to buttress it. It is devoid of merit.

In view of the findings I have made as above, it is my decision that the plaintiff has not made out a case for the order he seeks. I dismiss the suit with costs to the defendant.

Delivered, dated and signed at Kakamega this 8th day of November, 2007

G. B. M. KARIUKI

J U D G E