



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 125 OF 2015

ARTHUR SHIKANGA MULAMA

(Suing on behalf of the estate of

DEBORAH CHITILWA AMAHWA.....PLAINTIFF

VERSUS

ELPHAS NANDI.....DEFENDANT

JUDGMENT

1. The plaintiff vide a plaint dated **28/9/2015** and filed in court on **30/9/2015** instituted the present suit against the defendant seeking for judgment against him for:-

(a) A declaration order that 5 acres out of L.R No. 7393 belong to the estate of Deborah Chitilwa Amahwa.

(b) An order of injunction restraining the Defendant from interfering with the 5 acres out of L.R No. 7393 belonging to the estate of Deborah Chitilwa Amahwa.

(c) Costs of the suit.

(d) Any other relief or relief that this court deems fit and just to grant.

2. In the plaint, the plaintiff states that he is the legal representative of the estate of the late **Deborah Chitilwa Amahwa** having obtained Grant *ad Litem* vide **Kakamega High Court, Succession Cause No. 508 of 2011**. He further states that the late **Deborah Chitilwa Amahwa** purchased land measuring **5 acres** out of **LR No. 7393** from one **Matthew Mulabu Lubobi** (now deceased), the first purchaser who had bought **10 acres** from the original owner **Ezekiel Wanyonyi Neyole**; that the late **Deborah Chitilwa Amahwa** was survived by her only daughter **Carole Asiya Amiani** (deceased) and granddaughter **Percis Ruth Khavokanga**; that in **August 2015**, the government surveyor was doing demarcation in the settlement scheme for all the beneficiaries including those in **L.R. No. 7393** and the plaintiff realized that the defendant had forcefully entered into the portion of land belonging to the deceased **Deborah Chitilwa Amahwa** and by extension her only surviving grand-child namely, **Percis Ruth Khavokanga**. The orders mentioned hereinabove were therefore sought.

3. The defendant entered appearance, and filed a statement of defence dated **30/10/2015** on the same date. The defendant denied the contents of the plaint and averred that **Percis Ruth Khakanga** cannot be a beneficiary but a dependant who if she has any claim on the estate, such claim can only be ascertained by a court in a succession cause and not through averments in the plaint by the plaintiff; that the estate of the late **Deborah Chitilwa Amahwa** was distributed in **Succession Cause No. 206 of 1997** and a Certificate of Confirmation issued finalizing the succession to her estate; that the heirs in the **Succession Cause No. 206 of 1997** were only **David Amahwa Mulama** and **Carole Asiya Amiami**. According to the defendant no action can lie against him as claimed in the plaint or at all.

4. The plaintiff testified on **23/7/2018** and stated that he is the son of the late **David Amahwa**, the administrator of the estate of the late **Deborah Chitilwa Amahwa**; that he took out a Grant *ad Litem* dated **20/7/2011** which he produced as **P. Exhibit 1**; that in **Succession Cause No. 206 of 1997**, a Grant was issued in favour of his late father as the administrator of the estate of the late **Deborah Chitilwa Amahwa**; that the late **Deborah** bought **5 acres** out of **L.R. No. 7393** as per the sale agreement produced as **P. Exhibit 3**; that when the late **Deborah Chitilwa Amahwa** was sick, she wrote a will appointing **David Amahwa** as the executor as evidenced by **P. Exhibit 4**; that the late **Deborah** was utilizing the suit land and when she got sick her brother, **David Amahwa** started utilizing the same; that after his demise, **Carole**, the daughter of the late **Deborah** used it until her demise.

5. **PW1** further averred that it was after surveyors visited the suit land that he realized that the defendant had encroached on it; that the

defendant claimed that he had bought the said land from one **John Amahwa**, **PW1's** uncle; that the said **John Amahwa** was not an administrator and as such had no capacity to sell the suit land; that the suit land should revert to the grandchild of the late **Deborah** who needs medical funds.

6. On cross-examination, **PW1** stated that his uncle **John** sold land **LR. No. 7393** and that **P. Exhibit 4** mentioned **LR. No. 7394**. On re-examination, **PW1** maintained that when the late **Deborah** bought the land, the land had not yet been allocated a number as the same was still under SFT.

7. **PW-2** was one **Fred Neyole Wanyonyi**. He stated that he is the son of the late **Ezekiel Wanyonyi** the original owner of **LR. No. 7393**. He stated that he is one of the administrators of the estate of his father. He testified that the late **Deborah** and one **Mr. Matthew** bought **10 acres** from his late father and then shared it with each taking **5 acres**. He stated that the defendant is his neighbour and had bought land from his late father; he stated that he was told by **PW1** sometime in **2014** that the defendant had encroached on the suit land belonging to the late **Deborah**.

8. That marked the close of the plaintiff's case.

9. The defendant on his part testified in furtherance of his case as **DW1**. He stated that he bought the suit land in dispute from the late **John Shikanga**, brother to the late **Deborah**; that he purchased the **5 acres** next to his **10 acre** farm in Baraka Farm **LR. No. 7393** in **2008**; he produced the Sale Agreement as **D. Exhibit 1**; that the said John was authorized by his sister one **Eunice Ambutsi** who was in charge of the late Deborah's affairs.

10. **DW-2** was **Isaac Wafula Lusweti**. He testified that he was the former Assistant Chief, Sirende Sub-location; His testimony was that he was actively involved in the transaction leading to the sale of the suit land to the defendant. According to **DW2**, the suit land belonged to a **Eunice**, sister to **Deborah** who was abroad at the time and who had donated a power of attorney to the late **John Shikanga** to sell the suit land on her behalf.

11. **DW-3** was **Abigael Mmbone Shikanga** the wife to **DW1**. She adopted her witness statement filed on **3/8/2018** as her evidence-in-chief and reiterated that her family bought the land with the knowledge that it belonged to the late Deborah's sister, Eunice and her husband.

12. With the above evidence, the defendant closed his case.

Submissions

13. The court directed the parties to file submissions but a perusal of the court file reveals that only the submissions of the plaintiff are on the record.

Determination

14. I have considered the plaintiff's case as pleaded and the defendant's defence and the evidence tendered in support thereof. The plaintiff's claim against the defendant is based on an allegation of encroachment by the defendant.

15. The issues that arise for determination are as follows:

a. Did Deborah buy 5 acres out of LR No 7393- Trans Nzoia and if so did the defendant trespass on that land?

b. What orders should issue?

16. Though the evidence of the plaintiff is that the late Deborah bought the suit land in **1986**, the land is not registered in her name and the court has to examine on the documentary evidence available to find out whether they support the alleged purchase.

17. The plaintiff produced a photocopy of an agreement dated **18/5/1986** between one Deborah Chitilwa Amahwa and Mathews Mulabu Lubobi who according to the document are brother and sister. The agreement cites Mathews Mulabu Lubobi as the person who had purchased the **10 acres** from one Ezekiel Wanyonyi Neyole. It is not expressed to be a sale agreement. Its terms allow for fencing, occupation and utilization of the land in equal shares. It also expresses itself to be an agreement that Deborah Chitilwa Amahwa would hold **5 acres** and Mathews Mulabu Lubobi would hold an equal amount of land *"jointly until such time, such holding of 5 acres is duly subdivided,"* and that until the separate title deed is issued for the said portion of **10 acres** the parties *"will own the said 10 acres jointly and in equal shares as mentioned above."* No consideration features on the said agreement. Yet despite all these observations the plaintiff stated in his evidence as follows:

"This is an agreement. It shows Deborah bought the land 7393 from another person. She bought 5 acres. I produce the copy of agreement as P. Exhibit 3."

18. In this court's view **P. Exhibit 3** is not a sale agreement as there was no consideration paid by Deborah for the land. Further, the very loose language employed in the document in which Deborah is meant to *"hold"* some of the land does not appear to me to entitle Deborah to any title to any portion of the land. In this court's view the plaintiff has not proved purchase of the suit land by Deborah. Further the said Deborah does not feature in the list of heirs (purchasers) of the property of Ezekiel Wanyonyi produced as **P. Exhibit 6**. In this court's view also, the evidence of **PW2** that Deborah bought the land together with Mathews is also not corroborated by **PEXh3**, the agreement. Besides, **PW2** does not appear to know the full details of Deborah's connection with the suit land as he testified that:

“I was never involved in selling the portion sold to Deborah. The records say Deborah is the owner.”

19. However it is noteworthy that he produced no records other than **P. Exhibit 6** (in which Deborah does not feature) to prove that in the records, Deborah is reflected as the owner, and therefore he failed miserably in the attempt.

20. Consequently as **P. Exhibit 3** has not been proved to be a sale agreement there would be no need to examine the merits of the issue raised by the defendant in **paragraph 5** of the defence dated **30/10/2015** to the effect that the agreement has been caught up by the law on limitation of actions.

21. Furthermore, in the plaint, the Plaintiff has expressed himself to be bringing this suit *“on behalf of the estate of Deborah Chitilwa Amahwa”* and no alias has been provided as is usually the case where a deceased had other names.

22. The certificate of confirmation of grant produced as **P. Exhibit 2** does not reflect that it is in respect of Deborah Chitilwa Amahwa's estate. It refers to one *“Deborah Musinya, deceased.”* The very document that the plaintiff has produced in court to demonstrate authority to bring the suit on behalf of the estate of the deceased *“Deborah Chitilwa Amahwa”* is a limited grant of letters of administration *ad litem* in respect of the estate of one *“Deborah Musinya.”*

23. In this court's view *“Deborah Musinya”* and *“Deborah Chitilwa Amahwa”* must be considered to be two different persons unless and until it is proved that those names refer to one and the same person, and that that person had any connection with the suit land. Neither of those facts has been proved by the plaintiff who naturally shouldered the burden of proof; while the difference in the names purportedly used to refer to the deceased is quite self-evident from the plaint and the various exhibits produced, in **P. Exhibit 2**, (the Certificate of Confirmation of Grant in respect of one *“Deborah Musinya”*) the suit land does not feature at all and that certificate has only two assets listed therein, that is:-

a. Shares account no 1/32582 with Housing Finance Co Ltd.

b. Shares account no 0007953 with National Bank.

24. No proper explanation has been given by the plaintiff for that omission.

25. In that document also, one *“David Amahwa Mulama”* inherited the Housing Finance Co Ltd shares while one *“Carole Asiya Amiani”* inherited the National Bank shares.

26. The defendant on the other hand, has admitted to buying the land in **2008** from one **John Shikanga** who had been authorized by **Eunice** to sell. John is said to be brother to David Amahwa Mulama (the plaintiff's father), Deborah and Eunice.

27. I am not therefore satisfied that the plaintiff has demonstrated to this court on a balance of probabilities that Deborah bought land out of **LR. No. 9373**.

28. The plaintiff's evidence was that he purchased the land from John who is a brother Eunice Ambutsi, the latter who was not called to testify in court. According to the evidence, to the plaintiff's and his wife's knowledge, the land belonged to Eunice Ambutsi and she had donated a power of attorney to John Shikanga to sell it to the plaintiff. According to him, he first leased the land from John. He had come to know John as his neighbour. The sale agreement with John was not controverted, the only issue raised with it being that John had no capacity to sell. The defendant also proved that he paid **Kshs. 1,560,000/=** for the land by a bankers cheque and that he had utilized it for **8 years** without demur by any member of the family by the time suit was filed. A curious angle was raised by the evidence of the defence. The family comprising of John Shikanga, Eunice and David each had a share in the land and they wanted to sell the land and therefore John merely sold the land on behalf of his two sisters and two brothers.

29. This court notes that the undisputed agreement produced as **D. Exhibit 1** states in part that :-

“The vendor's sister who has a share in the property and family have consented to this transaction.”

Upon cross-examination of **PW1** it turned out that the vendor's sister who had been consulted was Eunice Ambutsi.

30. DW2 who was the local chief then testified that he believed the suit land belonged to Eunice and that that was the information he had obtained from John. The evidence of **PW2** is credible in that the suit land fell under his jurisdiction and he is very likely to know what transpired there. He advised John to get a power of attorney from Eunice who willingly gave one thus enabling John to sell the suit land. The certified copy of the purported “power of attorney” produced by **DW2** as **D. Exhibit 2** is an informal document dated **5/11/2007** addressed to the chief through his assistant, and it appears to have a copy of the identity card of Eunice Ambutsi somehow embossed on its left hand corner. Its terms are that Eunice had ceded the “power of attorney” to Mr. John A. Shikanga to deal with the “Land parcel No. 7393/6/3(5) (5 acres)” without any inhibition. It states that *“John will get 1 acre and the other two brothers and two sisters will also get one each.”* It appears to have been sealed with the seal of a foreign Notary Public based in Arizona. **DW2** testified that he also spoke with Eunice Ambutsi over the phone regarding the sale of the suit land by John and that he witnessed the execution of the agreement between **PW1** and John. I find that the said “power of attorney” could have come from no other person than Eunice Ambutsi.

31. Of all witnesses the one I found least likely to have a motive for telling untruths is **DW3**, John's widow. She admitted that she and John knew that the land belonged to “Zipporah” which this court takes to mean Deborah, but also, according to her, that Eunice had directed Deborah to purchase **5 acres** from Mathews and therefore the land belonged to Eunice and she leased the land and cared for Deborah who

was unwell. This court can only construe her evidence to mean that the land belonged to Eunice and not to Deborah, and that while using it Deborah was only holding it in trust for Eunice. She was also a witness to the sale agreement between her husband and the plaintiff.

32. This court having found no evidence tabled before it to show that the land was bought by and belonged to Deborah, also finds that the whole family led by Eunice Ambutsi who is not a party to this suit agreed to sell the land to the defendant and received the proceeds thereof and put the defendant in possession which he held for 8 long years before this suit was lodged.

33. Consequently the defendant can not be said to have trespassed upon the suit land. The plaintiff is a nephew of John, the person directly involved in the sale on behalf of the family and who was authorized by his sister, Eunice. It is quite noteworthy that the plaintiff's father David Amahwa inherited a share of the property of Deborah. If the suit land had belonged to Deborah, it is unclear why the plaintiff's father failed to include the suit land for confirmation in the Certificate of Confirmation of Grant to Deborah's estate. It is also unclear as to why he was in a position to inherit part of the property of Deborah while his son is now saying that there was a proper heir to that estate who was not included in the Certificate of Confirmation of Grant. All this casts doubt on the real intentions of the plaintiff who is coming to court 8 long years after the consensual sale of the land. He challenges the transaction his uncle entered into with the defendant. No evidence of the existence of **Percis Ruth Khavokanga**, Deborah's alleged granddaughter was given orally either in this suit or by way of exhibits from the succession causes mentioned by the plaintiff. The plaintiff never showed that he had her authority to institute the suit. Perchance she exists this court agrees with the factual statement in the defendant's statement of defence that her claim would be only established through a succession cause, which has not been demonstrated to have been done.

34. In the end I find that the suit land was sold to the defendant after an agreement between the various members of the family to which John and Eunice belong. Only those members who were mentioned as involved in the sale and sharing of the proceeds could have confirmed the plaintiff's claim but as the plaintiff delayed suing for too long, this suit found several of them deceased. The ones said to be still alive were either not summoned to give evidence, or gave the plaintiff's claim a wide berth. Consequently, this court is bound to draw an inference that their evidence would have been adverse to the plaintiff's claim. (See the case of **Nganga -vs- R [1981] eKLR 483** as well as **Kenya Akiba Micro Finance Ltd -vs- Ezekiel Chebii & 14 Others HCCC No. 644 of 2005**).

35. I am therefore not satisfied that the plaintiff has proved that the defendant entered a property owned by the estate of the late Deborah, or that he entered the suit land unlawfully such that the entry may amount to trespass. The land was sold to him and he acquired a valid and registrable interest therein.

36. The upshot of the foregoing is that the plaintiff's suit has no merit and it is hereby dismissed with costs to the defendant.

It is so ordered.

Dated, signed and delivered at Kitale via electronic mail on this 11th day of February, 2021.

MWANGI NJOROGE

JUDGE, ELC, KITALE.