



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

ENVIRONMENT AND LAND NO. 51 OF 2016

CHRISTOPHER GUTO NYANGOYA.....1ST PLAINTIFF

ALLOYS MOKUA NYANGOYA.....2ND PLAINTIFF

-VERSUS-

JOSEPH SOROBI OYUGI.....1ST DEFENDANT

HELLEN KWAMBOKA DAVID.....2ND DEFENDANT

JOSEPH MORUMBWA ANDREW.....3RD DEFENDANT

JUDGMENT

INTRODUCTION

1. On 9th March 2015, the 1st Plaintiff filed this suit vide a plaint dated the same day against the Defendants jointly and/or severally seeking *inter alia* the following orders;

- i. A declaration that the 1st Plaintiff is the lawful bonafide and registered proprietor of the land known as **LR NO NYARIBARI CHACHE/B/B/BOBURIA 10460** and that the 2nd Plaintiff is the lawful, bonafide and registered proprietor of the parcel of land known as **LR NO. NYARIBARI CHACHE /B/B/BOBURIA/10459 and 10461**.
- ii. An order of injunction restraining the Defendants either by themselves, agents, servants, or anyone claiming under the defendants from re-entering, trespassing onto, laying a claim to, cultivating, leasing, building onto; entering and/or in any manner dealing with the parcels of land known as **LR NUMBER NYARIBARI CHACHE/B/B BOBURIA/ 10459, 10460 and 10461**.
- iii. An order of eviction evicting the Defendants their agents and/or servants from **LR NO NYARIBARI CHACHE/B/B/BOBORIA 10459, 10460 and 10461**.
- iv. A declaration that the 2nd and 3rd Defendants are holding the parcels of land known as **LR NOS NYARIBARI CHACHE/B/B/BOBURIA/5760, 5761 and 5762** in trust for the Plaintiffs.
- v. In the alternative the Plaintiffs pray for a declaration that the registration of the Defendants as proprietors of the parcels of land known as **LR NOS. NYARIBARI CHACHE/B/B/BOBURIA 5760, 5761 and 5762** is illegal and that the titles be cancelled and in their place, the plaintiffs be registered as proprietors.
- vi. Costs incidental to this suit.
- vii. Interest on a, b, c, above at court rate.
- viii. Any other further relief that this Honourable court may deem fit and just to grant.

2. This matter was during the proceeding consolidated with another matter, **ELC CASE NO. 501 OF 2015** wherein the 2nd Defendant sued

the 2nd Plaintiff seeking a declaration that parcel no. **LR No. NYARIBARI CHACHE/B/B/BOBURIA 5760** belonged to her hence she sought an order for eviction against him.

3. The consolidated matters were then fixed for hearing where upon the parties herein tendered their respective evidence and thereafter the Court directed parties to file their written submissions in support of their respective arguments.

4. During the hearing directions were taken with regard to the hearing of the consolidated files. The Plaintiff in **ELC NO. 501 OF 2015** was treated as the 2nd Defendant while the Defendant was treated as the 2nd Plaintiff

THE PLAINTIFFS' CASE

5. The Plaintiffs are the sons of the late **John Nyangoya Momayi** who died on **21st May 1980** and who was the registered proprietor of the land known as **LR NO. NYARIBARI CHACHE/B/B BOBURIA/2529**.

6. The 1st Plaintiff had not been residing on any portion of the said property while the 2nd Plaintiff had been occupying the entire land.

7. The 1st Plaintiff claim that some time on 13th February, 1997, the 2nd and 3rd Defendants caused a portion of the suit land to be registered in their names.

8. The 1st Plaintiff alleges that sometimes in 2013 when he appointed a Surveyor to conduct some subdivision on the parcel of land he occupies, he realized that the 2nd and 3rd Defendants had sub-divided the Suit Property and registered the same in their names.

9. The 1st Plaintiff alleges that the subdivision of the said parcel of land **LR NO. NYARIBARI CHACHE/B/B BOBURIA/2529** were occasioned through fraud on the part of the Defendants.

10. The 2nd Plaintiff averred that he remembered carrying out succession vide kisii **HIGH COURT SUCCESSION CAUSE NO. 40 OF 1994** and obtained a grant of the Letters of Administration. The said grant was never confirmed hence it is his contention that the subdivisions might have been occasioned by the 2nd Defendant's late husband who was working as a Surveyor in Kisii.

11. The subdivisions were as follows;

a. **LR NO. NYARIBARI CHACHE/B/B BOBURIA/10459** to the 2nd Plaintiff

b. **LR NO. NYARIBARI CHACHE/B/B BOBURIA/10460** to the 2nd Plaintiff

c. **LR NO. NYARIBARI CHACHE/B/B BOBURIA/10461** to 2nd Plaintiff

d.

e. **LR NO. NYARIBARI CHACHE/B/B BOBURIA/10462** to Evans Osiemo Kamanda.

f. **LR NO. NYARIBARI CHACHE/B/B BOBURIA/5761** to the 2nd Plaintiff.

g. **LR NO. NYARIBARI CHACHE/B/B BOBURIA/5767** to David Momanyi Okemwa.

h. **LR NO. NYARIBARI CHACHE/B/B BOBURIA/5760-** to 2nd Defendant

i. **LR NO. NYARIBARI CHACHE/B/B BOBURIA/5762** to the 3rd Defendant.

12. The 1st Plaintiff averred that the 2nd and 3rd Defendants approached the 2nd Plaintiff so that that he could lease to them the various portions of the Suit Property.

13. The 1st Plaintiff stated that the husband of the 2nd Defendant wanted to purchase the portion leased to him but he died before he purchased the same.

14. The 2nd Plaintiff alleges that the 3rd Defendant who died in 2001 attempted to purchase **LR NO. NYARIBARI CHACHE/B/B BOBURIA/5762** now registered to his name but did not manage.

15. The 1st Plaintiff claims that the 1st Defendant on his part leased a portion of the suit land to the 2nd Plaintiff but has refused to move out.

16. The 2nd Plaintiff alleges that the 1st Defendant did not purchase any land from him and contends that the same was only leased to him.

17. The 1st Plaintiff alleges that the 2nd Plaintiff being illiterate was always being misled into signing documents he did not understand, and

as a result, he together with his brother lost their ancestral land to the 1st and 2nd Defendants. Consequently, the Defendants denied and/or deprived the Plaintiffs of their entitlement over and in respect of the Suit Properties.

THE DEFENDANTS CASE

18. The 1st Defendant claims that in 1997 the 2nd Plaintiff who was the registered proprietor of Land Parcel No. **NYARIBARICHACHE/B/B/BOBURIA/5761** sold to him a portion of the said parcel measuring 70feet by 160 feet at a consideration of Kshs. 50,000. That after sometime the 2nd Plaintiff added him another portion measuring 222feet by 70 feet which he continues to enjoy quiet possession of to date. He avers that the 2nd Plaintiff voluntarily and willingly sold to him the land and thus should be ordered to transfer the portion he sold to the 2nd Plaintiff voluntarily. He further claims that even though he never obtained the consent of the Lands Control Board as legally required he has nevertheless acquired the same by way of adverse possession, having stayed on the said parcel since 1997.

19. The 2nd Defendant claims that she is the registered proprietor of land parcel known as **LR NO. NYARIBARI CHACHE /B/B/BOBURIA/5760** wherein the title was issued to her in 1997 after the same was transferred to her by her late husband who was the registered owner thereof. It was also her testimony that at the time the land was purchased from the 2nd Plaintiff who later obtained Letters of Administration vide Succession Cause No. 40 of 1994. The 2nd Plaintiff subsequently carried out the subdivisions transferring the foregoing portion to him. She further claims that she has been in occupation of the said portion since acquiring it up to sometime in 2015 when the 2nd Plaintiff trespassed onto it prompting her to sue him.

20. The 1st and 2nd Defendants aver that the 3rd Defendant is wrongly enjoined in the suit since he died way back on 1st September, 2001 although he is the Registered owner of land Parcel number **LR. NO. NYARIBARICHACHE/B/B/BOBURIA/ 5762**.

21. They both claim that they bought their portions legally from the 2nd plaintiff and acquired good title

PLAINTIFF'S SUBMISSIONS

22. Counsel for the Plaintiff's submitted that the title of the 2nd Defendant is impeachable by dint of the provisions of Section 26 (1) (a) of the Land Registration Act, 2012 and therefore It cannot be allowed to stand and must be cancelled.

23. To bring his argument in to perspective, he submitted that from the evidence that was tendered in court, when land parcel **LR NO. NYARIBARI CHACHE /B/B/BOBURIA/5760** is alleged to have been sold to the 2nd Defendant's husband by the 2nd Plaintiff in 1997, the 2nd Plaintiff was not the registered owner thereof. This is because his father the late **JOHN NYANGOYA MOMAYI** who was the registered owner of the said parcel was alive. He argues therefore that the Plaintiff could not sell any portion of land or transfer the same to the husband of the 2nd Defendant since he had nothing to sell. It is his contention that any transaction or document arising from the alleged sale of land in 1977 is null and void.

24. He submitted that the 2nd Defendant did not tender any evidence that controverted the Plaintiff's averments that her Title land parcel known as **LR NO. NYARIBARI CHACHE /B/B/BOBURIA/5760** was not acquired through fraud, or misrepresentation and/ or was acquired illegally, unprocedurally or through a corrupt scheme.

25. He went on to argue that since according to the court record it was confirmed that the husband of the 2nd Defendant was a surveyor working in Kisii, there was a high possibility that he illegally acquired the said title.

26. To support his argument, he relied on the case of **Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & Another, Eldoret ELC Case No. 609 B of 2012** where the court stated as follows: -

"...it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions."

27. With regard to the case against the 1st Defendant, the Plaintiff submitted that from their evidence, the 1st Defendant took advantage of the fact that the 2nd Plaintiff was illiterate and could not understand the nature of the agreement he was entering into with the 1st Defendant. As a result he contends that the said agreement was not made in good faith hence it is not enforceable.

28. He argued that the evidence led by the Plaintiff confirmed that the portion of land was leased to 1st Defendant hence any element of absolute purchase and transfer could not arise. It is his contention that if at all any document has been issued to the 1st Defendant, then the same was fraudulently done by the 1st Defendant. Counsel for the Plaintiff argues that between the 1st Defendant and 2nd Plaintiff the agreement is not enforceable. It is his further argument that the 2nd Plaintiff was not able to understand the terms of the agreement hence the same was not made in good faith. It is his case that the same was made with ill intentions of defrauding the Plaintiffs, hence any transaction between them should be declared null and void.

29. In conclusion the Plaintiff submitted that since the 1st and 2nd Defendants were in occupation of the suit land they illegally acquired, an order should be granted for them to render vacant possession to the Plaintiffs within a specified timeline in default of which they should be

evicted. He relied on the case of **CHEVRON (K) LTD V HARRISON CHARO WASHUTU (2016) eKLR** wherein the Court of Appeal rendered itself as follows:

“ the power of the court to do substantive justice is today wider than before. We see no harm to make appropriate orders flowing from a finding that the Respondent’s occupation of the suit property was adverse to that of the appellant and that the latter’s was so extinguished.”...like in the above authority, we make the order that the appellant shall transfer to the respondent the property at the latter’s expense within 30 days from the date hereof, failing which the Registrar of the High Court at Malindi shall execute on behalf of the appellant the necessary transfer documents.

THE DEFENDANTS SUBMISSIONS

30. Counsel for the Defendants basically submitted by responding to the issues raised by the counsel for the plaintiff. On the issue of the 2nd Defendant acquiring the suit property unprocedurally and or through corrupt means, he retaliated that, the 2nd Defendant had obtained good title after the same was transferred to her by her husband who had bought the same from the 2nd Plaintiff. He submitted that the 2nd Plaintiff had obtained letters of administration vide **KISII HC. SUCCESSION CAUSE NO. 40 OF 1994** and it is through him that the subdivisions were generated.

31. He went further to submit that no other evidence was presented by the Plaintiffs that proved that the title issued to the 2nd defendant was obtained fraudulently.

32. On the issue that the case against the 1st Defendant he submitted that, he the 1st defendant had presented uncontroverted evidence on how he obtained a section forming part of parcel **LR NO. NYARIBARI CHACHE /B/B/BOBURIA/5761** measuring 222feet by 70 feet on a willing seller willing buyer basis some time in 1997. He submitted that even though the 1st defendant did not get consent from the Land Controls Board as legally required to validate the sale, he had since occupied the suit property continuously, openly and uninterruptedly for a period of more than 12 years hence he had acquired the same by adverse possession. He requested the court to order that the 2nd plaintiff be compelled to transfer the said portion forming part of parcel 5761 to him.

ISSUE, ANALYSIS AND DETERMINATION

33. From the onset before delving into an analysis of the issues raised in this suit and my determination of the same, it is important to point out that the suit against the 3rd Defendant who died has abated.

34. In this suit, I deduce the following as the issues for determination;

a. whether the 2nd Defendant acquired parcel NO. NYARIBARI CHACHE /B/B/BOBURIA/5760 through fraud, or misrepresentation and/ or whether the same was acquired illegally, unprocedurally or through a corrupt scheme.

b. whether the 2nd defendant has obtained a portion of the parcel of land known as L.R NO. NYARIBARI CHACHE /B/B/BOBURIA/5760 measuring 222 by 70 feet legally and in the alternative whether he has acquired the same by adverse possession.

Whether the 2nd defendant acquired Parcel No. NYARIBARI CHACHE /B/B/BOBURIA/5760 through fraud, or misrepresentation and/ or whether the same was acquired illegally, unprocedurally or through a corrupt scheme.

35. The 2nd Plaintiff alleges that he some time in 1977 leased to the husband of the 2nd Defendant the portion the 2nd Defendant claims to have a valid title over. He avers that he did not transfer the same to him because by the time he was leasing the property to him, his father was alive and therefore he had no right to sell or transfer the property to the 2nd Defendant. He alleges that he only realized that the 2nd Defendant and the 3rd defendants had subdivided his late father’s property and obtained titles thereto in 2013 when he engaged a surveyor to conduct subdivision of his portion of the property which he was selling. He claims that there was no succession done to occasion the said subdivisions. He alleges that the sub division giving rise to the portion registered in the name of the 2nd Defendant might possibly have been occasioned by the 2nd Defendant’s late husband who by then was a Surveyor in Kisii. Counsel for the 2nd Plaintiff submitted that the title obtained by the 2nd Defendant violated the provision of section 26 (1) of the Land Registration Act, 2012.

36. Clearly the 2nd Plaintiff did not deny there being a contract or an arrangement to give possession to the 2nd Defendant’s husband. To him it was a lease Agreement and not a sale agreement. In fact, his brother, the 1st Plaintiff, alleged that his brother’s main problem was illiteracy and he signed documents that he did not comprehend. Counsel further submitted that while he appreciates that,, there was an agreement between the two, the same was not valid as the 2nd Defendant’s father who was the registered owner was alive. This therefore meant that the agreement was null and void.

37. Therefore the main issue is not whether the sale agreement was valid but rather whether the subsequent transfer of the land to the name of the 2nd Defendant’s husband was proper. The Plaintiffs testified that the sub-divisions were done on 13th February, 1997 through corrupt dealings probably by the 2nd defendant’s late husband who was a Surveyor at Kisii. The 2nd Defendant claims that the transfer arose from the subdivisions done by the 2nd Plaintiff who had obtained administrative powers vide succession cause 40 of 1994 as evidenced by grant of letters of administration produced as exhibit before court.

38. It is surprising to note that the Plaintiff’s did not challenge the grant obtained in 1994 which gave the 2nd Plaintiff the right to administer

the estate of his late father and distribute the same to his heirs and to persons who laid any beneficial interest over it.

39. Pushed to the corner, the 2nd Plaintiff acknowledges having carried out succession in 1994 but claimed that his grant had not been confirmed so as to give him the power to effect the said subdivisions.

40. From the forgoing it is clear from the allegations of the Plaintiffs that the subdivisions were done 1997, 20 years after an agreement whether for sale or lease was entered between the 2nd Defendant's husband and the 2nd plaintiff. Even without considering whether the same met the requirements of section 26 of the Land Registration Act as submitted herein above, the same is **voided** by **Section 6 the Land Control Act** that makes it mandatory for such transactions to get the consent of the Lands Control Board before the expiry of 6 months from the date of their execution.

41. However, even though the agreement was voided by reasons raised above, the Plaintiffs did not adduce any evidence that they ever challenged the 2nd Defendant's husband illegal occupation of the property before 1997 when the illegal sub divisions are alleged to have been occasioned. They also did not tender any evidence to show that they indeed challenged the occupation of the wife of the 2nd Defendant up to 2016 when they filed this suit.

42. It is shocking that while the 1st Plaintiff denies that the Grant of Letters of Administration issued to him in 1994 vide succession cause no, 40 of 1994 to administer the estate of his father has never been confirmed he nevertheless confirmed that they are currently the registered owners of Land Parcel number **LR. NO. NYARIBARICHACHE/B/B/BOBURIA/ 10459, 10460 and 10461**. The said sub divisions were effected by the 1st Plaintiff between 2013 to 2014 as per their documents filed in court.

43. Worse still the Plaintiffs aver in paragraph 11 of their plaint that in 2013 1st Plaintiff did effect a transfer of LR NO. NYARIBARI CHACHE/B/B BOBURIA/10462 to Evans Osiemo Kamanda. The question that comes to my mind therefore is, if it is true that the Grant of Letters of Administration was never confirmed, how did the 2nd Plaintiff get the powers to conduct the said sub divisions? How can he blame the 2nd Defendant's husband for occasioning sub divisions illegally while at the same time he carried out transfers and sub divisions without his grant being confirmed? Without the confirmation of grant, it is expected that the suit property would be intact and remain in the name of Plaintiff's father. Given that there is no evidence that the grant has been confirmed and that the 2nd Plaintiff has been active in subdividing the suit property, I find it hard to conclude that his grant was not confirmed and that he is not the one who effected the sub division and submissions transfer of the property to the 2nd Defendant or to his late husband.

44. Having found the 2nd Defendant and her husband were in occupation of the suit property since 1977 when the 2nd Defendant's husband entered into a sale agreement I have since ruled to have been null and void for lack of consent from the Land Control Board, I find that the 2nd Defendant has been in adverse possession and has therefore acquired title as against the Plaintiffs.

Whether the 1st defendant obtained a portion of the Parcel of land No. NYARIBARI CHACHE /B/B/BOBURIA/5761 measuring 222feet by 70 feet legally and in the alternative whether he has acquired the same by adverse possession.

45. It is important to discuss the requirements that need to be considered in making a determination of adverse possession. For one to succeed in a claim of adverse possession he must satisfy the following criteria stated in the case of **Maweu Vs. Liu Ranching and Farming Cooperative Society 1985 Klr 430** where the court held;

“Thus, to prove title by adverse possession, it was not sufficient to show that some acts of adverse possession had been committed. It was also to prove that possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances”.

46. In his submissions Counsel for the 1st Defendant has conceded that the agreement that existed between the 1st and the 2nd Defendant was voided by the requirement by the Land Controls Act that such a transaction needs to be consented to by the local Land Control Board six months after its execution. The 1st Defendant only claim over the suit property remained that of adverse possession. It is uncontroverted evidence that he has been in occupation of the suit property since 1997 when the two entered into in the now impugned agreement. He has therefore met all the requirements to be declared an adverse possessor of the portion he currently occupies against the 2nd Plaintiff.

47. In the light of the foregoing, I dismiss the plaintiff's claim as against the Defendants and make the following orders;

i. The 2nd defendant is hereby declared as the lawful bonafide and registered proprietor of the land parcel known as **LR NO NYARIBARI CHACHE/B/B/BOBURIA 5760**.

ii. An order of injunction is hereby issued restraining the Plaintiffs either by themselves, agents, servants, or anyone claiming under the defendants from re-entering, trespassing onto, laying a claim to, cultivating, leasing, building onto; entering with and/or in any manner dealing with the parcels of land known as **LR NO NYARIBARI CHACHE/B/B/BOBURIA 5760**.

iii. An order of eviction is hereby issued evicting the Plaintiff their agents and/or servants from **LR NO NYARIBARI CHACHE/B/B/BOBURIA 5760**.

iv. The 2nd Defendant is hereby declared to have obtained a portion of LR NO NYARIBARI CHACHE/B/B/BOBURIA 5761 measuring 220feet by 70feet by adverse possession and thus the 2nd Plaintiff is hereby ordered to execute the necessary documents in order to effect the said portion to the 2nd Defendant. Failing which within a period of 30 days, the Deputy Registrar, Kisii High

court shall sign the said documents.

v. Each party to bear their own costs.

Dated, signed and delivered at Kisii this 10th day of February, 2021.

J.M ONYANGO

JUDGE