



Magwa & another (Suing as Legal Representatives of the Estate of John Moroga - Deceased) v Nchore & 5 others (Environment & Land Case 1068 of 2016) [2024] KEELC 693 (KLR) (14 February 2024) (Judgment)

Neutral citation: [2024] KEELC 693 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 1068 OF 2016**

**M SILA, J
FEBRUARY 14, 2024**

BETWEEN

**ROISI MORAA MAGWA 1ST PLAINTIFF
CHARLES MIRUKA OGEA 2ND PLAINTIFF
SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF JOHN MOROGA -
DECEASED**

AND

**CHARLES BINYANYA NCHORE 1ST DEFENDANT
DANIEL NCHORE 2ND DEFENDANT
NYABUTO SIRA 3RD DEFENDANT
KEFAH SIRA 4TH DEFENDANT
ROBERT KENGERE 5TH DEFENDANT
CHARLES OGISE 6TH DEFENDANT**

JUDGMENT

(Plaintiffs filing suit on behalf of the estate of a deceased; deceased being proprietor of the suit land at the time of death; defendants purchasing portions of the land from one of his widows and sons and taking possession; plaintiffs demonstrating that no succession cause had been filed and thus defendants purchased from persons who had no capacity to sell; defendants engaged in intermeddling of the estate of the deceased; judgment given in favour of the plaintiffs and defendants ordered to give vacant possession).



1. This suit was commenced through a plaint which was filed on 16 November 2012 against seven defendants. The plaintiffs sue as administrators ad litem of the estate of John Moroga (deceased). In their plaint, they aver that the deceased was the registered proprietor of the land parcel Bassi/Boitangare/697. They complained that the defendants had illegally entered the suit land and taken possession of portions of it and are intermeddling with the estate of the deceased. In the suit, the plaintiffs seek orders for the eviction of the defendants from the suit land and costs.
2. The 1st, 2nd, 3rd, 4th, and 6th defendants filed a joint statement of defence. In it, they averred that they are in the suit land as of right, as they are bona fide purchasers for value, and they reserved their right to file a counterclaim. I have however not seen any counterclaim filed.
3. The 7th defendant appointed a separate counsel and filed defence in which he also averred that he is in occupation of the suit land after purchasing a portion from the registered proprietor.
4. In the course of time, some of the defendants died and on 12 July 2023, Mr. Sagwe, learned counsel for the plaintiffs did state that the plaintiffs will only proceed as against the 2nd and 3rd defendants. I marked the case against the other defendants as withdrawn.
5. It is on the basis of the above that the matter proceeded for hearing.
6. PW-1 was the 1st plaintiff. She testified that she is the wife of the deceased and that she wants the defendants out of the land. She testified that the deceased had two wives. She is the first wife and the second wife was one Mellen who is deceased. They both had children who are on the land. Cross-examined, she denied that her sons (Jason and James) and her co-wife sold portions of the land to the 2nd and 3rd defendants. She also denied that the land is subdivided into two portions, one for herself and one for her co-wife, and that the 2nd and 3rd defendants are cultivating Mellen's portion.
7. PW- 2 was the 2nd plaintiff. He is brother to the deceased. He affirmed that the deceased had two wives, that is the 1st plaintiff, and Mellen who is now deceased. He testified that the 1st plaintiff is on the land with her children and so too the defendants who do some cultivation on it. He was not aware that they purchased the land. Cross-examined, he testified that the land is divided amongst the two wives and their sons and everybody cultivates their assigned portion. He denied that the 2nd and 3rd defendants have been retained in the case because they are not of the same clan as the plaintiffs.
8. PW- 3 was Peter Oguto Otoki a relative of the plaintiffs. His evidence was that the deceased left the land and no succession has been done. He stated that the land is yet to be divided and there are no boundaries separating the two houses of the 1st plaintiff and her deceased co-wife. He did state that after Mellen died the children subdivided the land amongst themselves and sold some of it. He stated that Mellen sold some land to the 3rd defendant and as consideration he purchased motorbikes for her children.
9. With the above evidence, the plaintiffs closed their case.
10. The 2nd defendant testified that he is a teacher. He was aware that the suit land is registered in the name of the deceased. He stated that he purchased a portion of it from Mellen on 4 April 2009. Mellen died later in the same year. This portion measured 82 X 128 feet and he purchased it at Kshs. 95,000/=. The second portion, measuring 115 X 230 feet he again purchased in the year 2009 from Jason Marube Magwa and James Mogire Magwa who are sons of the 1st plaintiff. He testified that he lived well until 2011 when he was informed that some people were destroying his crops and he lodged a criminal case for malicious damage to property at Ogembo Law Courts where the culprits were found guilty. It is after that criminal case that this suit was filed. He contended that those who sold to him the land have no issue and what has caused the case is external influence. He produced the sale agreements as his



- exhibits. Cross-examined, he affirmed that he did a search before entering into the sale agreements and the search showed the owner as John Moroga who was then deceased.
11. The 3rd defendant is also a teacher. He testified that he purchased land on 27 October 2009 from Josphat Marube Magwa, a son of Mellen, measuring 75 X 217 feet. He bought him a motorbike as consideration for the sale. They wrote a sale agreement before the Chief which he produced as an exhibit. He planted sugarcane on the land. He had a first harvest but before he could harvest the second time, he was called and informed that some people have come to the land and were harvesting his cane. He made a report and the people were arrested and charged in Ogembo Court. They were found guilty and paid the fine. Thereafter this case was filed. He testified that he has otherwise been living well with the family on the land. In 2013, he renewed his sale agreement with the seller before his advocate on record. Cross-examined, he affirmed that he did a search which revealed the name of John Moroga as the registered owner of the land and he was aware that he was deceased. He affirmed that he purchased the land from a son of the deceased before succession was done.
 12. DW- 3 was Kennedy Magwa Nyagucha. He is a son of the 1st plaintiff. He testified that it is true that the 2nd and 3rd defendants bought portions of the land. He had no problem with them being on the land. Cross-examined, he affirmed that it was his brothers who sold portions of the land to the 2nd and 3rd defendants. On his part, he sold some land to the 1st defendant. He admitted that title was in the name of his deceased father and they have not filed a succession cause.
 13. With the above evidence, the defendants closed their case. I gave directions for filing of submissions and also directed the parties to mediation. The mediation was not successful.
 14. I have taken note of the pleadings, the evidence, and the submissions filed.
 15. The case of the plaintiffs is simple. They aver that the defendants purchased land of a deceased person without first having the land submitted to succession. The defence of the defendants is that they purchased land from beneficiaries of the deceased. I am afraid that the defence of the defendants holds no water since no portion of the land has been ascertained to any particular person as beneficiary given that the land is yet to be subjected to a succession process. The defendants knew that the land was registered in the name of the deceased but still went ahead to buy portions of it from persons who had no title to the land. The defendants can only have themselves to blame as they purchased land from persons who had no capacity to sell.
 16. It does not matter that the 2nd and 3rd defendants purchased land from the wife of the deceased or his children. What is important is that the persons who sold land to them had no capacity to sell. They could only have capacity to sell after the land was subjected to a succession process and distributed to them. It is indeed only upon a distribution that one can state with certainty who a beneficiary of the land is, and what portion is assigned to him. Before that is done a person could as well be selling an asset which may never be distributed to him and which he will never own. We cannot assume that wives and sons are selling portions of what will eventually belong to them before succession is filed and distribution of the land is done.
 17. What the 2nd and 3rd defendants engaged in was an intermeddling of the property of a deceased which is barred by Section 45 of the [*Law of Succession Act*](#), Cap 160, Laws of Kenya, which provides as follows: -
 45. No intermeddling with property of deceased person
 - (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take



possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

- (2) Any person who contravenes the provisions of this section shall-
- (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
 - (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

18. It will be observed from the above that no person is permitted to dispose of the property of a deceased person unless he has been expressly authorized by law or through a grant of representation. The 2nd and 3rd defendants have not demonstrated any law which authorized the vendors to sell portions of the land of the deceased to them. They agree that no succession has been done thus there is no grant of representation. The long and short of it is that they purchased land from persons who had no authority to sell. They cannot therefore allege that they are rightfully in possession of the suit land.
19. From the foregoing it will be seen that I find merit in the case of the plaintiff and I allow it. I give the 2nd and 3rd defendants 90 days to give vacant possession to the plaintiffs' failure to which the plaintiffs are at liberty to apply for an order of eviction. The plaintiffs will also have the costs of the suit.
20. I have made no orders for or against the 1st, 4th, 5th, 6th and 7th defendants since the case against them was withdrawn.
21. Judgment accordingly.

DATED AND DELIVERED THIS 14 DAY OF FEBRUARY 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

In the presence of: -

Mr. Sagwe for the plaintiffs

Mr. Aminga for the defendants

Court Assistant – Lawrence Chomba

