



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LANDS COURT OF KENYA

AT KISII

ELC CASE NO. 384 OF 2015

ELIJAH NYABUTO OKEYO.....PLAINTIFF

-VERSUS-

MESHACK OMARI& 9 OTHERS.....DEFENDANTS

JUDGMENT

1. On 20th August, 2015, the Plaintiff filed this suit vide a plaint dated the 17th August, 2015 against the Defendant seeking *inter alia* the following orders;

(i) An order of eviction of the Defendants and their agents from land parcel no NYARIBARI CHACHE/B/B/BOBURIA/1070 (hereinafter referred to as “the suit property”).

(ii) An order of permanent injunction restraining the Defendants by themselves, their agents or any persons claiming under them from further trespassing, re-entry use and/or in any other manner dealing with the suit property or interfering with the Plaintiff’s possession, use and enjoyment of the suit property.

(iii) Costs of this suit.

2. The Defendant filed an amended Defense and Counterclaim on 1st November, 2016. In the counterclaim the Defendant seeks:

a) Cancellation of the title deed issued to the Plaintiff over the suit property.

b) Declaration that the 2nd to 10th Defendants acquired prescriptive rights over the suit property via adverse possession

c) Costs and interests of the suit.

3. The matter was heard and both parties closed their cases after the testimonies of all witnesses on 13th July, 2020.

4. Thereafter parties were directed to file their written submissions. The Plaintiff filed their submissions on 20th November, 2020 while the Defendant filed their submissions on 26th January, 2021.

THE PLAINTIFF’S CASE

5. The Plaintiff claims he is the registered owner of the suit property measuring approximately 2.2 Ha, having inherited the same from his grandmother, Gesare Nyamaiko.

6. He avers that he has never obtained the title deed to it because the 2nd Defendant placed a caution thereto in 2001.

7. He avers that the Defendants started trespassing into the suit property in the year 2010 when he had been transferred to Narok and constructed thereto structures.

8. He alleges that the Defendants have purported to sell a portion of the suit property to third parties being the 1st Defendant. The 1st Defendant has constructed a house thereon and has refused to move out.

9. It is his testimony that the Defendants have their own parcel of land No. **NYARIBARI CHACHE/B/B/BOBURIA/680** bordering his and that the two parcels are separated by a road. Further he testified that although the Defendants have stayed on the suit property for more than 12 years, he has never given them any permission to occupy the suit property. He denies that there has never been any form of arbitration between him and the Defendants regarding the suit property.

10. He contends that Kisii High Court Succession Cause Number, 203 of 1999 was instituted by him wherein he petitioned for Letters of Administration and proceeded to have the property transmitted to him. He hence prays that the Defendants be evicted.

THE DEFENDANTS CASE

11. The 2nd, 3rd, 4th, 5th, 6th, 7th, 9th and 10th Defendants aver that they are descendants of the late Motuka Obare who they allege was the original owner of the suit property.

12. In her testimony, the 4th Defendant averred that except the 1st and 8th Defendants who are not known to her, the other Defendants reside on the suit property.

13. The 3rd, 4th, 5th, 6th, 7th, 9th and 10th allege that Plaintiff without their knowledge filed a Succession Cause NO. 203 of 1999 at Kisii High Court wherein he sought to have the suit property transmitted to him.

14. The 3rd, 4th, 5th, 6th, 7th, 9th and 10th aver that, the 2nd Defendant, one **David Motuka Mayaka** filed an objection in the Succession Cause. The said objection was referred to arbitration at the Kisii Land Registrar's office.

15. The 3rd, 4th, 5th, 6th, 7th, 9th and 10th Defendants presented before court an award dated 22nd June, 2005 which determined that the suit property was wrongly allocated to Gesare Nyamaiko during the Adjudication process.

16. The 3rd, 4th, 5th, 6th, 7th, 9th and 10th Defendants further aver that apart from getting the award in their favour, they have been residing on the suit property since their childhood. It is their contention therefore that by virtue of the continued and uninterrupted occupation of the suit property they have acquired rights over the suit property by way of adverse possession.

17. The 3rd, 4th, 5th, 6th, 7th, 9th and 10th Defendants therefore pray for cancellation of the title of the Plaintiff to the suit property and a declaration that they have acquired title to the suit property by way of adverse possession.

ISSUES FOR DETERMINATION

18. From my analysis of the pleadings, documentary evidence, testimonies of witnesses of both parties and submissions filed by both parties, I deduce the following as the main issues of determination;

- a) Whether the Plaintiff has a valid title over the suit property.
- b) Whether the Defendants have a valid claim for adverse possession against the Plaintiff.

ANALYSIS AND DETERMINATION OF THE ISSUES

Whether the Plaintiff is the absolute registered owner of the suit property

19. According to the Plaintiff, he is the sole registered owner of the suit property while the Defendant's land which borders his is No. NYARIBARI CHACHE/B/B/BOBURIA/680. It is his contention that the Defendants only invaded the suit property in 2010 when he had been transferred to Narok.

20. The Defendants on their part do not deny that the Plaintiff is the registered owner of the suit property. They however claim the suit property was wrongfully registered in the name of the late Gesare Nyamaiko, the Plaintiff's grandmother during the Adjudication process. They further allege that the Plaintiff filed a succession cause in respect of the late Gesare Nyamaiko without their knowledge and had the suit property transmitted to him as the sole heir of the late Gesare Nyamaiko. They claim that (2nd Defendant who is now dead) did challenge the succession cause on behalf of the other Defendants by filing an objection in 2001. The said objection was referred to arbitration. The arbitration was determined in his favor.

21. A keen look at the court proceedings reveals that during cross examination the Plaintiff averred that he had four brothers whom he never named. He claimed that he carried out the succession process on behalf of his brothers whom he included as beneficiaries. He also averred that he was only registered on the title to the suit property as an Administrator. However, a copy of the green card attached to the Plaintiff's pleadings betrays him because it shows that he got registered as the owner of the suit property through transmission as opposed to his claim that he registered as an administrator. It goes without saying that the succession cause that gave rise to the Plaintiff being registered as the owner of the suit property was marred with a secrecy. This was actually one of the findings in the Arbitration proceedings alluded to herein above.

22. One wonders why he proceeded to file the succession cause as the only heir of the estate of his late grandmother ignoring his brothers and other heirs. It is also curious to note that instead of filing this suit when he obtained the Letters of Administration to challenge the occupation of the Defendants, he opted to secretly have the suit property transmitted to him. He only showed up in court in 2015 seeking an

eviction order against the Defendants whom he had full knowledge had taken control of the property he had transmitted to himself. He also admitted that he does not have the title deed to the property since the 2nd Defendant placed a caution on it in 2001. It is exactly 20 years since the caution was registered and he has never bothered to move any court to have the same removed for all those years. In his own testimony, he has never lived on the suit property nor cultivated it. This is corroborated by the Surveyor's testimony and the Arbitrator's finding which confirmed that neither him nor members of his extended family have ever resided on the suit property. He cites hostility on the part of the Defendant's as the only reason why he and the heirs of his late grandmother have never taken possession of the suit property. However, he failed to tender any evidence in support of his claim.

23. While submitting on the whether the Defendants acquired the property through the Arbitration award, learned counsel for the Plaintiff out rightly denied that Arbitration proceedings were tendered before court for scrutiny. This is not true because the Arbitration proceedings dated 2nd June, 2005 were tendered before this court as one of the Defendants exhibits. The award clearly highlights the decision arrived at by the arbitrators. Counsel also failed to submit on the contents of the arbitration proceedings and award thereto. Even though there is no evidence that the Defendants have ever taken steps to execute the award, the same still stands as no appeal was preferred against it.

24. Having found that there existed an arbitral award in favor of the Defendants which, I am inclined to find that the Plaintiff is not validly registered as the owner of the suit property. His title to the property is therefore null and void.

Whether the Defendants have a valid claim for adverse possession against the Plaintiff

25. After Arriving at the finding that the Plaintiff's ownership of the suit property, No. NYARIBARI CHACHE/B/B/BOBURIA 1071 is null and void, the claim for adverse possession by the Defendant cannot stand since a claim for adverse possession only arises where the ownership of a property by the other party is uncontested. Taking this argument further, it is a cardinal principle of law that one cannot give a better title than he has.

26. In the light of the aforesaid, I dismiss the Plaintiff's claims as against the Defendants. On the other hand, and to meet the end of justice, the 2nd – 10th Defendant's Counterclaim succeeds, not on the basis of their claim for adverse possession but for the reason that there is an arbitral award in their favour. Consequently, I invoke the power of the court under section 80 of the Land Registration Act and make the following final orders:

- a) An Order is hereby issued cancelling of the Plaintiff's title to land parcel No. NYARIBARI CHACHE/B/B/BOBURIA 1071.
- b) An order is hereby issued compelling the Plaintiff to sign all transfer documents transferring the suit property, Parcel No. NYARIBARI CHACHE/B/B/BOBURIA 1071 to the 3rd, 4th, 5th, 6th, 7th, 9th and 10th Defendants within a period of sixty (60) days from the date hereof. Should the Plaintiff fail to do so, the Executive Officer of the Honourable Court is hereby ordered to sign the documents facilitating the transfer of the said section of the suit property to the Plaintiff by the Land Registrar at Kisii
- c) The costs of the suit shall be borne by the Defendants. The Plaintiffs.

Dated, signed and delivered at Kisii this 27th day of April 2021.

J.M ONYANGO

JUDGE