



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C. CASE NO. 5 OF 2017

(FORMERLY SIAKAGO CIVIL CASE NO. 48 OF 2013)

JULIANA MBUYA NJIRU.....PLAINTIFF

VERSUS

1. PITHON NJIRU NGIRI.....1ST DEFENDANT

2. NGUYU KARANJA.....2ND DEFENDANT

3. ADRIANO MATHURI NGONDI.....3RD DEFENDANT

(Survived by MARGARET MBUCU MATHURI)

JUDGEMENT

A. Introduction

1. By a plaint dated 15th April 2011, amended on 3rd November 2017 and further amended on 11th February 2019 the Plaintiff sought the following reliefs against the Defendants:

a. The Plaintiff be entitled to be registered as the owner of the said parcel of land No. Embu/Kithunthiri/1484 in place of the Defendants and there be cancellation of the Defendant's title thereof.

b. A declaration that the Plaintiff has acquired title to land parcel No. Embu/Kithunthiri/1484 by adverse possession.

c. A declaration that the undated decision of Gachoka Land Disputes Tribunal and the subsequent decree adopting the same in Siakago Senior Principal Magistrate's Court Land Disputes Tribunal Case No. 39 of 2011 were null and void for contravening clear provisions of the law.

d. The Plaintiff be awarded costs of the suit.

e. Any other or further relief.

B. The Plaintiff's case

2. The Plaintiff pleaded that she was the wife of the late Njiru Mwathi (hereafter *the deceased*) who was the proprietor of *Title No. Embu/Kithunthiri/318* (hereafter *parcel 318*). It was further pleaded that the Defendants had fraudulently curved out *Title No. Embu/Kithunthiri/1484* (hereafter *parcel 1484*) from parcel 318 without the consent of the deceased and had it registered in their names. The Plaintiff set out 5 particulars of fraud against the Defendants in paragraph 4 of the further amended plaint.

3. With respect to the alternative claim for adverse possession, it was pleaded that the Plaintiff had been in open, continuous and exclusive possession of parcel 1484 since 1983 hence the Defendants' title thereto had been extinguished by operation of law. It was pleaded that the Plaintiff had developed parcel 1484 by erecting houses and cultivating crops thereon.

4. The relief for a declaration that the award of the Gachoka Land Disputes Tribunal (hereafter *Tribunal*) was null and void was really hanging in the air. It was not disclosed in the plaint who had lodged the claim before the Tribunal and against whom, what award was given by the Tribunal, and the effect, if any, of the said award upon the instant suit.

C. The Defendants' case

5. The Defendants filed a defence and counterclaim dated 31st May 2011 and amended on 5th December 2017 denying the Plaintiff's claim in its entirety. The allegations and particulars of fraud were denied by the Defendants. The Defendants specifically averred that they had bought parcel 1484 from the deceased for valuable consideration. It was further pleaded that the sale transaction was undertaken with the full knowledge of the Plaintiff.

6. The Defendants denied the Plaintiff's alternative claim for adverse possession. It was denied that the Plaintiff had exclusive and uninterrupted possession on account of previous proceedings before the Tribunal full particulars whereof were said to be within the knowledge of the Plaintiff. The Defendants further contended that the Plaintiff's claim for adverse possession was not tenable since the **Limitation of Actions Act (Cap. 22)** had not been invoked.

7. By their counterclaim, the Defendants asserted their ownership of parcel 1484 and pleaded that the Plaintiff was merely a trespasser thereon. They further pleaded that the deceased had lodged a claim before the Tribunal seeking the said property but lost the case. The Defendants, therefore, sought the following reliefs against the Plaintiff in the counterclaim:

a. The Plaintiff's suit be dismissed with costs to the Defendant together with interest for such period of time and at such rate as the court may determine.

b. A declaration to the effect that the defendant in the counterclaim herein is a trespasser and has no lawful authority to dwell, occupy and or use the suit land property being land parcel No. Embu/Kithunthiri/1484 and therefore ought to vacate and or give vacant possession to the Plaintiffs in the counterclaim.

c. That the Officer Commanding Station (O.C.S) Kiritiri Police Station be hereby ordered to effect the orders of this honourable court.

d. Costs for this suit and interest thereon for such period of time and at such rate as the court may determine.

e. Such other or further relief as this honourable court may deem just to grant.

D. The Plaintiff's reply and defence to counterclaim

8. By a reply to defence and defence to counterclaim dated 24th February 2017 the Plaintiff denied that the Tribunal had determined any dispute amongst the parties. The Plaintiff further reiterated that she had made out her claim for adverse possession. She asked the court to dismiss the counterclaim and allow her suit as prayed in the plaint.

E. The summary of evidence at the trial

a. The Plaintiff's evidence

9. When the suit came up for trial, the Plaintiff testified as PW1 and called 4 other witnesses in support of her case two of whom were her relatives. The Plaintiff adopted her witness statement dated 25th June 2019 as her sworn testimony. It was her case that the deceased was allocated parcel 318 which was 10 acres by his clan. It was her evidence that the Defendants had fraudulently sub-divided parcel 318 to create parcel 1484. She maintained that she was not aware if her late husband had ever sold any portion of their land.

10. During cross examination by the Defendants' advocate, she conceded that her dwelling house was erected on parcel 318 and that it was her adult sons who were in possession of parcel 1484. She stated that it was her son, Justin, who was in occupation.

11. The rest of the Plaintiff's witnesses supported the Plaintiff's case that the deceased never sold any portion of his land. They stated that they were not aware of any sale by the deceased. The Plaintiff's son who testified as PW3 stated that he was not aware of any sale agreement between Defendants and his Mwathe and suggested that the one in the Defendants' possession could be a forgery.

b. The Defendants' evidence

12. The 1st and 2nd Defendants testified at the trial and called 4 more witnesses in support of their case. The 1st Defendant adopted his witness statement dated 30th October 2019 as his sworn testimony. His evidence was to the effect that he bought parcel No. 1484 from the deceased in 1973 before the land adjudication process was concluded. They bought the said property together with the 2nd and 3rd Defendants hence the land was registered jointly in their names. He denied any fraud in the acquisition of parcel 1484 and maintained that it was bought for valuable consideration.

13. The 2nd Defendant adopted her witness statement dated 26th August 2019 as her evidence in chief. Her evidence was to the effect that it was her late husband who had bought the suit property from the deceased for valuable consideration jointly with the other Defendants.

14. The rest of the Defendants' witnesses supported the defence of purchase for valuable consideration. For instance, DW5 who was a former Assistant Chief informed the court that he was called upon by the Chief of Mavuria location to resolve the land dispute amongst the parties herein. He concluded that there was indeed a valid sale agreement at the material time. On the other hand, DW7 testified that he was present during the land demarcation and adjudication process when the Defendants were shown the boundaries of their land. It was his

evidence that the deceased was present during the demarcation exercise.

F. Directions on submissions

15. When the hearing was concluded on 20th November 2019 the Plaintiff was given 30 days to file her written submissions whereas the Defendants were granted 30 days from the lapse of the Plaintiff's period to file theirs. The record, however, shows that the Plaintiff filed her submissions on 4th February 2020 whereas the Defendants filed theirs on 14th February 2020.

G. Issues for determination

16. It would appear from the material on record that the parties did not file an agreed statement of issues for determination. As such, the court shall frame the issues for determination as provided for by law. Under **Order 15 Rule 2** of the **Civil Procedure Rules** the court may frame issues from the following:

- a. *The allegations contained in the pleadings.*
- b. *The documents produced by the parties.*
- c. *The statements made on oath by and on behalf of the parties.*

17. The court has considered the pleadings, documents and the evidence of the parties on record. The court is of the opinion that the following issues arise for determination:

- a. *Whether the Plaintiff's suit is res judicata.*
- b. *Whether the Defendants acquired the suit property fraudulently.*
- c. *Whether the Plaintiff has proved her alternative claim for adverse possession.*
- d. *Whether the Defendants have proved their counterclaim.*
- e. *Whether the Plaintiff is entitled to the reliefs sought in the suit.*
- f. *Whether the Defendants are entitled to the reliefs sought in the counterclaim.*
- g. *Who shall bear the costs of the suit and counterclaim.*

18. The court has noted that the Defendants have in their submissions raised the issue of the Plaintiff's capacity to file suit on behalf of the estate of deceased. The court has noted that the issue of the Plaintiff's capacity was not raised in the Defendants' defence or counterclaim. It was raised for the first time during cross-examination hence it cannot be a legitimate issue for determination with respect to the claim for recovery of the suit property. It would appear further that the Plaintiff has filed the alternative claim for adverse possession in her own right and not as a personal representative of the estate of the deceased. For the same reason, the issue of whether or not the Plaintiff's suit is statute barred cannot be a legitimate question for determination since it was never pleaded in the defence.

19. The Plaintiff also appeared to challenge the process of land adjudication with respect to the Defendants' acquisition of parcel 1484. It was contended that the Land Adjudication Officer did not undertake the demarcation and adjudication process in accordance with **Sections 10 and 14** of the **Land Adjudication Act (Cap. 284)**. The court is of the opinion that the issue cannot be a legitimate question for determination since it was never pleaded in the plaint. Moreover, all grievances arising during the adjudication process ought to be resolved within the framework and timelines stipulated in the **Land Adjudication Act**.

H. Analysis and determinations

20. The court has considered the evidence on record and the submissions of the parties on the 1st issue. The Defendants contended that the instant suit was *res judicata* because the same issues have previously been adjudicated by the Tribunal, the Provincial Appeal's Committee and the Magistrate's court by the deceased where he lost. The Plaintiff simply denied that the dispute amongst the parties had been conclusively settled.

21. The doctrine of *res judicata* is founded upon **Section 7** of the **Civil Procedure Act (Cap. 21)** which stipulates as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

(1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

(2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

22. The elements of *res judicata* were considered by the Court of Appeal in the case of **Uhuru Highway Development Ltd V Central Bank of Kenya & 2 Others – Nairobi Civil Appeal No. 36 of 1996** and the case of **Nicholas Njeru V Attorney General & 8 Others [2013] eKLR**. In the latter case, the court identified the following elements:

a. The matter must be directly and substantially in issue in the two suits.

b. The parties must be the same or parties under whom they claim, litigating under the same title.

c. The matter must have been finally decided in the previous suit.

d. The matter must have been adjudicated by a court of competent jurisdiction.

23. The court is not satisfied that the instant suit is *res judicata* for two reasons. First, there is no evidence on record to demonstrate that the claim for adverse possession was adjudicated in the previous proceedings before the Tribunal. Moreover, it is doubtful if the Tribunal could have been competent to entertain such claim. Secondly, it is doubtful if the Tribunal was a court of competent jurisdiction within the meaning of **Section 7 of the Civil Procedure Act**. The material on record indicates that the claim before the Tribunal was filed by the deceased for recovery of the suit property from the Defendants who were already registered as proprietors at the material time. Accordingly, the Tribunal had no jurisdiction to entertain the claim. The 1st issue is, therefore, answered in the negative.

24. The court has considered the evidence and submissions on record on the 2nd issue. The Plaintiff contended that the suit property was acquired by the Defendants fraudulently because she was not aware of any sale of the property by the deceased. The Plaintiff enumerated the following five (5) particulars of fraud in her further amended plaint:

a. Fraudulently curving out land parcel No. Embu/kithunthiri/1484 from land parcel No. Embu/Kithunthiri/318.

b. Obtaining the letter of consent after the suit land namely land parcel No. Embu/Kithunthiri/1484 had already been transferred into the names of the Defendants.

c. Purporting that the Plaintiff's husband had sold the suit land to them when indeed the same was not true.

d. Purporting that land parcel No. Embu/Kithunthiri/1484 is independent of land parcel No. Embu/Kithunthiri/318.

e. Curving land parcel No. Embu/Kithunthiri/1484 from Embu/Kithunthiri/318 without proper documentation.

25. The manner of pleading and proving allegations of fraud were considered in the case of **Vijay Morjaria V Nansingh M. Darbar & Another [2000] eKLR**. In the said case, Tunoi J.A. (as he then was) held as follows:

“It is well established that fraud must be specifically pleaded and that particulars of fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that those acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts”.

26. As to the standard of proof required in such matters the same was considered in the case of **Koinange & 13 Others V Koinange [1986] KLR 23** and the case of **Evans Otieno Nyakwara V Cleophas Bwana Ongaro [2015] eKLR**. In the latter case, Majanja J held, *inter alia*, that:

“In this case, it is the Respondent who filed the defence and counterclaim and alleged that the document relied upon by the Plaintiff was a forgery. It was therefore incumbent upon him to prove this fact by marshalling the necessary evidence to support his case. The burden of proof to prove fraud lay upon the Respondent. As regards the standard of proof, I would do no better than quote Central Bank of Kenya Ltd Vs Trust Bank Ltd and 4 Others Nai Civil Appeal No. 215 of 1996 (UR) where the Court of Appeal, in considering the standard of proof required where fraud is alleged, stated that;

“The Appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of *prima facie* proof was much heavier on the Appellant in this case than in an ordinary civil case”.

27. From the evidence on record, the court finds no evidence to demonstrate that parcel 1484 was curved out of parcel 318 as claimed by the Plaintiff. The evidence on record indicates that both parcels are first registrations. They appear to have been so registered upon conclusion of the land adjudication process. So, the particulars of fraud listed in paragraph 4 (a) (d) & (e) have not been demonstrated to the required standard. The truth of the matter is that the deceased sold a portion of the 10 acres of clan land he was allocated before land demarcation and adjudication was completed. He retained about 5 acres which was ultimately registered as parcel 318 whereas the portion he sold out was registered in the name of the Defendants as parcel 1484. That is what the evidence on record reveals. That is what the evidence which was tendered before the Tribunal also revealed.

28. Although the Plaintiff denied knowledge of the deceased having sold parcel 1484 to the Defendants, there is evidence on record to the contrary. The court has perused the record of proceedings for removal of a caution against parcel 1484 before the Land Registrar. The proceedings of the Land Registrar indicate that the Plaintiff had cautioned parcel 1484 because the deceased had sold it without consulting her. The Plaintiff had apparently sworn a statutory declaration accompanying the caution stating as much. It is for that reason that the Registrar concluded that the Plaintiff had no registrable interest in the suit property.

29. The court is satisfied on the basis of the sale agreement of 1973 which the Defendants produced that, indeed, the deceased had sold the suit property to the Defendants for valuable consideration before the process of land demarcation and adjudication was concluded. The court believes the Defendants’ witness who were involved in one way or another in the matter of sale and the demarcation of the land. The court also believes the Defendants’ evidence that it is the deceased who took them to the Land Adjudication Offices to enable them to obtain registration of parcel 1484 in their name.

30. The Plaintiff contended that the consent of the Land Control Board for transfer of parcel 1484 was irregularly obtained by the Defendants in 1983 long after transfer of the suit property. The Defendants explained that the letter of consent dated 16th November 1983 was for sub-division of the suit property amongst the Defendants themselves and not for transfer from the deceased. The court accepts the Defendant’s explanation since the document speaks for itself. The consent was for sub-division of the suit property into 3 equal portions.

31. In the premises, the court finds that none of the particulars of fraud pleaded by the Plaintiff have been proved to the required standard or at all. It is also strange that the deceased never pursued the matter of the alleged fraudulent acquisition of the suit property after losing before the Tribunal. There is no indication that a report of the alleged fraud made to law enforcement and investigative agencies. It is also strange that the Plaintiff did not take legal action for recovery of the suit property until 2011 which was about 26 years after discovery of the alleged fraud in 1985 when she went to collect the title deed for parcel 318. The 2nd issue is accordingly answered in the negative.

32. The 3rd issue is on the alternative claim for adverse possession. The Plaintiff contended that had been in open, continuous and exclusive possession of the suit property for a period exceeding 12 years hence she had acquired adverse possession thereof. The Defendants, on the other hand, contended otherwise. In particular, they contended that her possession had been interrupted through previous proceedings before the Tribunal and the Magistrates’ court.

33. In the case of **Kasuve Vs Mwaani Investment Ltd & 4 Others [2004] 1KLR 184** the elements of adverse possession were summarized as follows:

“...and in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossession of the owner or by the discontinuation of possession by the owner on his own volition, Wanja Vs Sakwa No. 2 [1984] KLR 284. A title by adverse possession can be acquired under the Limitation of Actions Act for part of the land...”

34. The court has considered the evidence and submissions on record on the 3rd issue. The point of contention at the trial was whether the Plaintiff was the one who had been in possession of the suit property or his adult sons. There was conflicting evidence amongst the Plaintiff’s own witness on whether it was one son or two sons of the Plaintiff who were in occupation of the suit property. The Plaintiff claimed that two of his married sons were the ones occupying and utilizing the suit property. However, PW2 stated during cross examination that only one son known as Justus was in occupation of the suit property. The Plaintiff herself conceded during cross-examination that her house was on parcel 318 and not the suit property.

35. The material on record indicates that the Plaintiff was all along married to the deceased who had unsuccessfully sought to recover the suit property before the Tribunal. The deceased died in 2012 according to his son who testified as PW3. So, if the late Mwahe died in 2012 how could the Plaintiff claim to have been in exclusive possession of the suit property during his lifetime? There was no evidence to demonstrate that the Plaintiff’s possession was separate and distinct from that of her late husband. In the opinion of the court, any user, cultivation or occupation of the suit property could only have been in her capacity as wife of the deceased.

36. The court is further of the opinion that the deceased was the person really in possession of the suit property during his lifetime. That is why he allowed his sons to settle on the suit property. The Plaintiff’s distinct possession could only have begun with effect from the death of Mwahe in 2012 and not earlier. A computation of time for purposes of the Limitation of actions would indicate that Plaintiff’s alternative claim for adverse possession was prematurely filed in 2011 whereas her possession could only have started running in 2012 upon the death of the deceased. The situation would, of course, have been different if the Plaintiff had filed suit as a personal representative of the estate of the deceased. But as it appears from the pleadings and the evidence on record she did not file the suit in a representative capacity. She decided to file suit in her own right. That was her greatest undoing.

37. The court, therefore, finds that the Plaintiff has failed to demonstrate at least one critical element of adverse possession. She has failed to

demonstrate continuous and exclusive possession of the suit property for the minimum statutory period of at least 12 years. In view of this holding, it is not necessary to determine whether or not there was interruption of possession. However, the court is of the opinion that there could possibly be no interruption because the previous claim before the Tribunal was not filed by the Defendants. It was not a claim by the Defendants to vindicate their property rights but a claim by the deceased to recover the suit property which was registered in the name of the Defendants. Accordingly, the 3rd issue is answered in the negative.

38. The 4th issue is whether the Defendants have proved their counterclaim. Although the Defendants' counterclaim was not meticulously drawn, it is discernible that what they are seeking is an order of eviction against the Plaintiff and her family members. An order for dismissal of the Plaintiff's claim is not a legitimate counterclaim. A declaration to the effect that the Plaintiff is a trespasser on the suit property is not an efficacious remedy in the circumstances of this case since it would not serve any useful purpose if granted. A declaratory order merely declares the adjudicated rights of the parties and stops at that. Separate proceedings may be required to inject life into the declared rights.

39. The court has fully considered the evidence and the submissions on record on the counterclaim. There is no doubt that the registered proprietors of the suit property were purchasers for value long before the adjudication process was concluded. There is no doubt that they were lawfully registered as proprietors subsequently. There is clear evidence that the deceased unsuccessfully challenged the Defendants' ownership of the suit property before the Tribunal. The evidence on record indicates that when the deceased came to the end of the road, the Plaintiff (his wife) filed the instant suit seeking recovery of the suit property on account of alleged fraud coupled with an alternative claim for adverse possession.

40. Although the Plaintiff created the impression that she or the deceased had been defrauded of the suit property by the Defendants, the reality is that it is the Plaintiff who was seeking to defraud the Defendants of the suit property which they obtained for valuable consideration. There is evidence on record to demonstrate that the Plaintiff cautioned the suit property because she was not consulted by the deceased during its sale.

41. The court is thus satisfied that the Defendants are entitled to keep the suit property. The Plaintiffs, her agents and his family members have no right to continue in occupation of the suit property. The Plaintiff has no legal basis for occupation since her claim for recovery and adverse possession thereof have not been demonstrated. Accordingly, the court finds and holds that the Defendants have proved their counterclaim on a balance of probabilities as required by law.

42. The 5th issue is whether the Plaintiff is entitled to the reliefs sought in the suit. The court has found that the Plaintiff has failed to prove any fraud against the Defendants in their acquisition of the suit property. The court has also found that the Plaintiff has failed to prove her claim for adverse possession. It would, therefore, follow that the Plaintiff is not entitled to the reliefs sought in the further amended plaint or any one of them.

43. The 6th issue is whether the Defendants are entitled to the reliefs sought in their counterclaim. Since the court has found that the Defendants have proved their counterclaim, it would follow that the Defendants are entitled to some reliefs. However, the only relief which is tenable in the circumstances is an eviction order.

44. The 7th and final issue is on costs of the suit and counterclaim. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. As such, a successful litigant should normally be awarded costs of an action unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons Ltd V Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason to deprive the successful litigants of the costs of the action.

I. Conclusion and disposal orders

45. The upshot of the foregoing is that the court finds and holds that the Plaintiff has failed to prove her case to the required standard. The court also finds and holds that the Defendants have proved their counterclaim to the required standard as required by law. Accordingly, the court makes the following orders for disposal of the suit and counterclaim:

a) The Plaintiff's suit be and is hereby dismissed in its entirety.

b) The Defendants' counterclaim be and is hereby allowed in the following terms only:

i. An eviction order be and is hereby issued for the eviction of the Plaintiff, her agents, servants or family members from Title No. Embu/Kithinthuri/1484.

ii. The Plaintiff shall have a grace period of 30 days within which to vacate in default of which execution may ensue following due process.

iii. The rest of the reliefs in the counterclaim are hereby declined.

c) The Plaintiff shall bear costs of the suit and counterclaim to be taxed and certified by the Taxing Officer of the court.

46. It is so adjudged.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 27TH DAY of FEBRUARY, 2020.

In the presence of Mr. Andande holding brief for Ms. Rose Njeru for the Plaintiff and Mr. Ithiga holding brief for Mr. Mugambi Njeru for the Defendants.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

27.02.2020