



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC 01 OF 2016

WASHINGTON ODIYO ABOGE..... PLAINTIFF

VERSUS

FRANCIS OBINY ATENG.....DEFENDANT

JUDGEMENT

Washington Odiyo Aboge (**hereinafter referred to as the plaintiff**) has come to court against Francis Obiny Ateng (**hereinafter referred to as the defendant**) on behalf of the estate of the deceased Nunda Aboge also known as Elias Nunda Aboge a.k.a Nunda Aboge Kuwuor claiming that **both parties are not related and do not have a common family tree that would bring them to share a portion o land parcel known as WAWIDHI/ALL/AYUCHA/416.**

The defendant subsequently sub-divided the land parcel WAWIDHI/ALL/AYUCHA/416 INTO TWO PORTIONS, ORIGINAL 416 AND 423. The newly registered parcel no. 423 was given to ne ALFRED DULO OCHORO.

By the year 1989 the defendant registered the case into his name and continued on the said land casing a lot of mental and physical torture to the plaintiff and the family.

The plaintiff sought the intervention of the local leaders who have since failed and the plaintiff seeks the court orders in this matters.

There is much urgency in the case because the defendant is subdividing the portion of the land into several pieces and selling the same.

The Plaintiff has informed the local leaders who have since tried to stop the defendant, but the defendant is always avoiding the leaders.

The plaintiff will adduce evidence that the defendant lost several cases before the elders and the tribunal and the case was all awarded to the plaintiff.

The plaintiff prays for an order of eviction against the defendant. The defendant has to be deregistered from the piece of land. He prays for costs of the suit.

The Defendant on his part states that: **The defendant denies in toto the plaintiff's allegations at paragraph 3 that the plaintiff is the administrator of the estate of the deceased NUNDA ABOGE and therefore suing the defendant in such capacity as the administrator n shall put the plaintiff is strict proof thereof.**

The defendant avers that he deceased NUNDA ABOGE was survived by a spouse and children and the plaintiff cannot claim to be the administrator of the deceased's estate and therefore sue on their behalf in accordance with the law.

The defendant denies the plaintiff's allegation at paragraph 4 that the parties are not related and do not have a common family tree that would bring them to share a portion of land parcel known as WAWIDHI/ALL/AYUCHA/416.

The defendant denies that he subdivided the aforementioned suit parcel into parcels 416 and 423 and further denies that parcel 423 was given to one ALFRED DULO CHORO as alleged at paragraph 5 of the plaint.

The defendant avers that he never continued to stay on the suit parcel and denies causing mental and physical torture to the plaintiff and the family as he was never in personal ownership of the suit parcel.

That if at all the defendant continued to stay on the suit parcel as alleged by the plaintiff then he is protected by adverse possession as provided under the law and has therefore obtained indefeasible title to the suit parcel.

That if at all the plaintiff was the owner of the suit parcel which is hereby denied, the plaintiff desires to use this suit to illegally obtain and take personal possession of the same and defraud the suit parcel from the defendant.

The defendant denies the plaintiff's allegations at paragraph 7 of the plaint that the plaintiff sought the intervention of the local leaders who have since failed and that now the plaintiff seeks court orders in this matter.

The defendant avers that the suit parcel belongs to him as the same was legally given to him subject to the decision of the land appeals tribunal and avers that he granted a portion of the suit parcel to the decision of the land appeals tribunal and avers that he granted a portion of the suit parcel where the deceased NUDNA ABOGE was buried to the family of the deceased.

The defendant avers that there is no subdivision of the suit parcel taking place as he is the legally registered owner of the suit parcel and had the right to deal with the same in any manner he so wished.

The Defendant states that the suit parcel belongs to him and hence holds indefeasible title to the same and not the plaintiff in person and that it was an agreement between the defendant and the deceased family that the latter only owns a portion where the deceased NUDNA ABOGE was buried.

The defendant shall raise a PRELIMINARY OBJECTION at its earliest opportunity and notice is hereby given to the plaintiff as this suit is barred by the stature of limitation for the plaintiff making reference to the suit allegedly arising in the year 1986.

The Defendant prays that the suit be dismissed with costs.

When the matter came up for hearing, the plaintiff (PW1) stated that the land belonged to his father Aboge Owuor. His brother Nunda Kowuor won the case but Obiny was given the title. Nunda Aboge was buried on the land that was awarded to him by the Tribunal.

PW2, Isack Onyango Opande states that he grew up knowing that the land belonged to Aboge Owuor.

On cross examination by the defendant he states that he never saw Aboge. He relied on what he was told by Odinyo.

PW3 Richard Ouma Odero was born in 1980. He is a grandson of Aboge Owuor.

On cross examination by defendant he states that in 1983 he was 3 years old.

The plaintiff closed his case and when called upon to give evidence, the defendant stated that his title deed is okay. He won the land through an appeal. He produced the proceedings of the appeal. He defeated Nundu in court.

DW2, was John Okoth Nunda, the son to Nunda Aboge Kuwuor the complaint during adjudication.

When the land was awarded to Francis Obiny Ateng. He states that the plaintiff can't be the administrator of the estate of his father when he is alive. The grant issued to Washington Odiyo Aboge is illegal. He is the administrator of the estate of Nunda Aboge Kuwuor.

I have considered the evidence on record and do find obviously that the limited grant of letters of administration ad litem issued to the plaintiff is a nullity as DW2 already has a full grant to the estate granted earlier than the limited grant. In essence to plaintiff has no capacity to claim on behalf of the estate of Nunda Kuwuor when the DW2 is alive and holding the full grant of letters of administration.

Secondly, the defendant was registered the proprietor of the land on 18/2/1991 and yet this claim was lodged in court on 4/1/2016 about 29 years after the defendant was registered. I do find the claim to be stale.

Section 7 of the limitation of action Act provides:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

Nunda Kuwuor Aboge the person through whom never claimed the land from the defendant.

This suit has no basis and the same is dismissed for being statute barred and that the plaintiff lacks capacity to claim on behalf of Nunda Nunda Aboge Kuwuor. Costs to the Defendant. Orders accordingly.

DATED, DELIVERED and SIGNED THIS 22nd DAY OF MAY, 2020.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

This judgment is hereby delivered to the parties by electronic mail due to the measures restricting court operations due to COVID -19 pandemic and in light of directions issued by the Honourable Chief Justice on 15TH March 2019 and with the consent of the parties.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE