



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

E.L.C CASE NO. 191B OF 2016

GRACE NYABOKE KEGEGE

ABIGAEL KEMUNTO KEGEGE (Suing as the legal Administrators of

the estate of DANIEL KEGEGE ONYINGE -Deceased)...PLAINTIFFS

VERSUS

ANDREW OKERO NYAKANGO (Sued as the legal administrator of

NYAKANGO ONDIMA -Deceased).....DEFENDANT

JUDGMENT

INTRODUCTION

1. The Plaintiffs commenced this suit by way of Originating Summons seeking the following reliefs:

- a. A declaration that the Defendant's rights to recover a portion of land measuring 50 feet by 100 feet (approximately 0.05Ha) out of L.R No. WEST MUGIRANGO/NYAMAIYA/3222 is barred under the Limitation of Actions Act Chapter 222 of the Laws of Kenya and his title thereto extinguished on the grounds that the Plaintiffs herein have openly, peacefully and continuously been in occupation and possession of the aforesaid portion of the suit property for a period exceeding 17 years.
- b. There be an order that the Plaintiffs be registered as the proprietors of a portion measuring 50 feet by 100 feet (approximately 0.05Ha) out of L.R No. WEST MUGIRANGO/NYAMAIYA/3222 in place of Nyakango Ondima, now deceased and/or his estate.
- c. There be an order restraining the Defendant either by himself, agents, servants and/or employees from interfering with the Plaintiff's peaceful possession and occupation of the said portion of the suit property, that is L.R No. WEST MUGIRANGO/NYAMAIYA/3222 in any manner whatsoever and/or howsoever.
- d. The Deputy Registrar and/or the Executive Officer of the Honourable High Court, or such other authorized officer, be directed and/or ordered to execute the Transfer Instruments and all attendant documents to facilitate the transfer and registration of a portion measuring 50 feet by 100 feet (approximately 0.05Ha) out of L.R No. WEST MUGIRANGO/NYAMAIYA/3222 in favour of the Plaintiffs.
- e. Costs of this Originating Summons be borne by the Defendant.
- f. Such further and/or other orders be made as the court may deem fit and expedient in the circumstances.

2. The Defendant filed his Replying Affidavit on 29th July 2016 denying the Plaintiffs' claim. In particular, he denies that the Plaintiffs' deceased husband entered into a valid sale agreement for a parcel of land measuring 50ft by 100ft out of L.R No. WEST MUGIRANGO/NYAMAIYA/3222. He avers the validity of the sale agreement has expired and the same is null and void as he did not obtain the consent of the Land Control Board within 6 months. He denies that the Plaintiffs have been in possession of the said portion of land openly, peacefully, continuously and without interruption for a period of 17 years. He avers that the Plaintiffs have no registrable interest in the suit property and therefore the court cannot grant them the orders sought.

3. The court directed that the suit be canvassed by way of viva voce evidence and the same was fixed for hearing on 7th October 2019 when

both parties testified.

PLAINTIFF'S CASE

4. The 1st Plaintiff testified that she and the 2nd Plaintiff who is her daughter are the administrators of the estate of Daniel Kegege Onyinge-deceased. She stated that during his lifetime, the deceased entered into a land sale agreement with the Defendant who is the administrator of the estate of Nyakango Ondima for the sale of a portion of land measuring 50ft by 100ft out of L.R No. WEST MUGIRANGO/NYAMAIYA/3222. She produced a hand written sale agreement dated 11.9.1998 together with acknowledgements of payment of the purchase price totaling Kshs. 70,000. She stated that after her husband bought the land they took possession thereof and constructed a house where they have been living since then.

5. She stated that she has never obtained a title deed in respect of the suit property as the Defendant has failed to process the same. She stated that when she conducted an official search, she discovered that the suit property was registered in the name of Nyakango Ondima who is the Defendant's late father.

6. Upon cross-examination, she stated that she had lived on the suit property peacefully and without interruption since 1998 and the only problem was that the defendant had refused to transfer it to her. She said she was not sure if the Defendant was the administrator of the deceased's estate though she knew that he was the only son of the deceased.

DEFENDANT'S CASE

7. The Defendant testified that in 1998 he entered into an agreement with Daniel Kegege Onyinge- deceased for the sale of a parcel of land measuring 50ft by 100ft at an agreed price of Kshs. 70,000 together with one cow. He said he was paid the sum of Kshs. 70,000 but the deceased was transferred and he never gave him the cow. In the meantime, he had given the deceased vacant possession of the land after he was paid the first installment. He said that Daniel later went to his home in 2002 and they agreed that he would sponsor the Defendant for a mechanic's course in addition to buying him a cow but Daniel died before he honoured the agreement with regard to the training.

8. He stated that he later learnt that the 1st Plaintiff had sold the suit property to one Martin Ongwae before it was transferred to her late husband. He said that he chased Martin away and this resulted in the Defendant's son being charged with the offence of assault vide Nyamira CM Cr Case No. 1183 of 2014. In a statement recorded by the said Martin Ongwae in the assault case, he stated that he had purchased the suit property from the Plaintiff in 2004 and he had been in occupation thereof for a period of ten years. He stated that since his father died in 1994, he had never filed succession proceedings.

9. In cross –examination he admitted that he sold the suit property to the 1st Plaintiff's husband but stated that he was not paid in accordance with the sale agreement. He said he was not willing to transfer the land to the Plaintiffs as the contract had been frustrated by effluxion of time. He stated that if he had been paid in full, he would have transferred the suit property to the Plaintiffs after obtaining a grant of letters of administration. He stated that he was not using the portion of land sold to the deceased because this case was still pending in court. He said he was bitter that the 1st Plaintiff had caused criminal proceedings to be instituted against him and his son yet she had not paid the purchase price in full.

10. After the close of the hearing both parties filed their submissions which I have considered.

11. In his submissions counsel for the Plaintiff submitted that the Plaintiffs had proved their claim of adverse possession against the Defendants since they had occupied the portion of land measuring 50ft by 100ft for a period of more than 12 years. Counsel relied on the case of **Edwin G.K Thiong'o & Another v Gichuru Kinuthia & 2 Others (2015) eKLR** where the Court of Appeal held as follows:

“By adverse possession is meant a possession which is hostile, under a claim or colour of title, actual, open, uninterrupted, notorious, exclusive and continuous. Where such possession is continued for the requisite period of 12 years it confers an indefeasible title upon the possessor (colour of title is that which is the title in appearance, but in reality). Adverse possession is made out by the co-existence of two distinct ingredients: the first, such a title that will afford colour; and the second such possession under it will be adverse to the right of the true owner. The adverse character of the possession must be proved as a fact; it cannot be assumed as a matter of law from mere exclusive possession however long continued”.

12. He also relied on the case of **Watandao Mwangambo Wasanga v Nagaruko Mwangome & 10 Others (2014) eKLR** where the court held that:

“In order to acquire by the statute of limitation title to land which has a known owner, that owner must have lost his rights to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intends to use it”.

13. On the other hand, the Defendant submitted that the defendant had no capacity to be sued as he is not the legal administrator of the estate of Nyakango Ondima's estate since he has never taken out letters of administration after his father died in October 1995. He submitted that the Defendant raised this issue in his Replying Affidavit and the burden was therefore placed upon the Plaintiff to prove the contrary. He submitted that the Certificate of Official search in the Plaintiff's List of documents clearly shows that the suit property is still registered in the name of Nyakango Ondima. He submitted that the contract between the Defendant and the late Daniel Kegege Onyinge was unlawful as it contravened the provisions of section 45 of the Law of Succession Act which forbids intermeddling with the free property of a deceased person.

14. He further submitted that the Plaintiffs' occupation of the suit property was not peaceful and uninterrupted for a period of over 12 years

as the 1st Plaintiff testified in Criminal case no. 1183 of 2014 that she had sold the land to one Martin Ongwae in 2004 which was less than 12 years after the purchase of the land in 1998. He submitted that in any event the deceased did not honour his part of the contract as he failed to buy the Defendant a cow and take him to a mechanics training as agreed.

ISSUES FOR DETERMINATION:

15. The following issues arise for determination:

i. Whether the Defendant has the capacity to be sued

ii. Whether the Plaintiffs are entitled to an order of adverse possession in respect of a parcel of land measuring 50ft by 100ft out of L.R No. WEST MUGIRANGO/NYAMAIYA/3222

ANALYSIS AND DETERMINATION

16. In the Originating Summons the Defendant is described as the legal administrator of the estate of Nyakango Ondima (deceased). However, in his testimony, the Defendant categorically stated that since his father died in 1995, he has never instituted succession proceedings and he is therefore not the administrator of his late father's estate. To compound the situation, the suit property is still registered in the name of Nyakango Ondima (deceased). This means that at the time the 1st Plaintiff's husband entered into a sale agreement with the Defendant, the Defendant had no capacity to sell the land.

17. In the case of **John Makokha Mukenya v Roselyn Mayaku Shiundu (2018) eKLR** the court held that the Defendant who had not taken out a grant of letters of administration in respect of the registered owner of the suit property lacked the locus standi to be sued. Similarly, in this case, the Defendant confessed that at the time he sold the suit property he did not have a grant of letters of administration in respect of his late father's estate and the purported sale of the suit property amounted to intermeddling with the estate of deceased person contrary to section 45 of the Law of Succession Act. On this ground alone, the Plaintiffs' suit must fail.

18. I shall nevertheless examine the second issue which is whether the Plaintiffs are entitled to the suit property by way adverse possession. **In the case of Kasuve vs Mwaani Investments Limited & 4 Others [2004] 1KLR** the Court of Appeal set out what one needs to prove in a case of adverse possession;

...In order to be entitled to land by adverse possession, the claimant must prove that she has been in **exclusive possession** of land **openly** and as of right and **without interruption** for 12 years, **either after dispossessing the owner** or by **discontinuation of possession by the owner on his own volition...**(emphasis ours).

19. The 1st Plaintiff testified that her late husband bought the suit property from the Defendant in 1998 and was put in possession thereof in 1999. She testified that they had remained in possession since then. This evidence was however refuted by the Defendant who testified that the 1st Plaintiff had sold the suit property to one Martin Ongwae in 2004 and the Defendant chased the said Martin Ongwae from the suit property in 2014. This resulted in an assault case where the 1st Plaintiff recorded a statement to the effect that she had sold the suit property to Martin Ongwae in 2004.

20. It is therefore clear that by the time the Plaintiffs filed suit, they were no longer in possession of the suit property and had not been in possession thereof for a period in excess of 12 years. But even assuming that they had been in possession for more than 12 years, the question that would arise is against whom was time running? It is trite law that time can only run against the registered owner. In this case the Defendant is not the registered owner of the suit property as it is still registered in his late father's name. The Defendant therefore has no title that can be extinguished in favour of the plaintiffs.

21. For the foregoing reasons, I find and hold that the Plaintiffs have failed to prove their case on a balance of probabilities and I dismiss it with costs to the Defendant

Dated, signed and delivered at Kisii via zoom this 20th day of May, 2020.

J.M ONYANGO

JUDGE