



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

ENVIRONMENT AND LAND COURT

ELC NO 35A OF 2016

NAFTALI NYANGENA OGESI.....PLAINTIFF

VERSUS

DAVID OGEKA OMWONYWA.....1ST DEFENDANT

LILIAN BITUTU KIMORI.....2ND DEFENDANT

THE LAND REGISTRAR, KISII.....3RD DEFENDANT

JUDGMENT

INTRODUCTION

1. The Plaintiff instituted this suit by way of plaint against the Defendants seeking the following orders;

- a. A declaration that the Plaintiff is the owner of a portion measuring 50 by 100 square feet which was to be curved out of a parcel of land known as CENTRAL KITUTU/MWABUNDUSI/937 offshoot of CENTRAL KITUTU/MWABUNDUSI/ 587.
- b. A declaration that in the absence of Letters of administration duly processed and obtained, the 1st Defendant had no capacity to subdivide, offer for sale or sell the property known as CENTRAL KITUTU/ MWABUNDUSI/ 937 or subsequent subdivisions in particular CENTRAL KITUTU/MWABUNDUSI/ 2182.
- c. A declaration that the subdivision of CENTRAL KITUTU/MWABUNDUSI/ 937 into CENTRAL KITUTU/MWABUNDUSI/ 1259, CENTRAL KITUTU/MWABUNDUSI/ 1259 and CENTRAL KITUTU/MWABUNDUSI/ 1258 into CENTRAL KITUTU MWABUNDUSI/ 2101 and CENTRAL KITUTU MWABUNDUSI/ 2102; and CENTRAL KITUTU MWABUNDUSI/ 2101 into CENTRAL KITUTU MWABUNDUSI/ 2182 without following the prerequisites of the law of Succession is null and void ab initio.
- d. An order evicting the 2nd Defendant from the Plaintiff's portion measuring 50 by 100 square feet currently/fraudulently registered as CENTRAL KITUTU MWABUNDUSI/ 2182 and with an order vesting actual possession of the subject property/portion in the Plaintiff.
- e. An order of cancellation of title deeds issued in respect of the estate of the late Ondieki Nyakundi in regard to property CENTRAL KITUTU/MWABUNDUSI/937 into CENTRAL KITUTU/MWABUNDUSI 1259, CENTRAL KITUTU/MWABUNDUSI/1259 and CENTRAL KITUTU MWABUNDUSI/ 1258 into CENTRAL KITUTU/MWABUNDUSI/2101 and CENTRAL KITUTU/MWABUNDUSI/2102; and CENTRAL KITUTU/MWABUNDUSI/2101 into CENTRAL KITUTU/MWABUNDUSI/2182 irregularly issued without the prerequisites of succession and issuance of letters of administration.
- f. Costs of the suit.

2. The defendants filed their defence denying the Plaintiff's claim and have alleged that the plaintiff is not entitled to the prayers sought as he is not entitled to any share of the land.

PLAINTIFF'S CASE

3. The Plaintiff claims that on 19th July 1994 he entered into a land sale agreement whereby he purchased a piece of land measuring 50 feet by 100 feet from Ondieki Matara (deceased). The Plaintiff avers that the said parcel of land was to be carved out of L.R No. CENTRAL KITUTU/MWABUNDUSI/ 587 which was registered in the name of the deceased. The Plaintiff avers that upon the purchase of the said portion from the deceased, the Plaintiff took possession thereof pending subdivision and issuance of title. The Plaintiff avers that the said parcel of land is currently fraudulently registered as CENTRAL KITUTU MWABUNDUSI/ 2182 in the name of the 2nd Defendant.

4. It is the Plaintiff's case that prior to the deceased's demise, the deceased had authorized and commenced subdivision of the property CENTRAL KITUTU/MWABUNDUSI/587 into two parcels; CENTRAL KITUTU/MWABUNDUSI/937 and CENTRAL KITUTU/MWABUNDUSI/938 occasioning the Plaintiff's portion measuring 50 feet by 100 feet to fall within parcel CENTRAL KITUTU MWABUNDUSI/ 937. He avers that the deceased was in the process of obtaining consent to subdivide CENTRAL KITUTU/MWABUNDUSI/937 and transfer the Plaintiff's portion to him, but unfortunately, the deceased suffered a sudden illness leading to his demise before the said sub-division was effected.

5. It is the Plaintiff's case that the 1st Defendant or any of the deceased's beneficiaries ought to have taken out letters of administration in respect of the deceased's estate and incorporated the Plaintiff as a beneficiary by dint of the existing purchaser's interest. Instead, the 1st Defendant without processing or obtaining letters of administration in respect of the deceased's estate intermeddled with the deceased's estate by carrying out fraudulent transactions in respect of CENTRAL KITUTU/MWABUNDUSI/937. The Defendant made the following irregular subdivisions:

i. Subdivision of CENTRAL KITUTU/MWABUNDUSI/937 into Central KITUTU/MWABUNDUSI/1259, CENTRAL KITUTU MWABUNDUSI/1259;

ii. Subdivision of CENTRAL KITUTU/MWABUNDUSI/1258 into CENTRAL KITUTU/MWABUNDUSI/2101 and CENTRAL KITUTU MWABUNDUSI/2102.

iii. Subdivision of CENTRAL KITUTU MWABUNDUSI/2102 into CENTRAL KITUTU MWABUNDUSI/2182.

6. As a result of the irregular subdivisions facilitated and condoned by the 3rd Defendant, the Plaintiff's portion of land now falls within title No. CENTRAL KITUTU MWABUNDUSI/2182. The Plaintiff avers that the 1st Defendant fraudulently and illegally sold land parcel No. CENTRAL KITUTU MWABUNDUSI/2182 to the 2nd Defendant thereby depriving the Plaintiff of the right to the said parcel of land.

7. The 1st and 2nd Defendants filed a statement of defence on 22nd April 2016 denying the Plaintiff's claim. They denied the allegation that the Plaintiff took possession of any part of L.R No. CENTRAL KITUTU/MWABUNDUSI/ 587. They averred that the Plaintiff did not pay the full consideration for the portion measuring 50 feet by 100 feet out of CENTRAL KITUTU/MWABUNDUSI/587.

8. The Defendants claim that the deceased before his death had subdivided L.R CENTRAL KITUTU MWABUNDUSI/937 into 3 portions namely:

CENTRAL KITUTU/MWABUNDUSI/1258, CENTRAL KITUTU/MWABUNDUSI/1259 AND CENTRAL KITUTU/MWABUNDUSI/1260 and transferred the portions before his demise and therefore land parcel No. CENTRAL KITUTU/MWABUNDUSI/937 could not be the subject of succession proceedings as alleged by the plaintiff.

9. The 2nd Defendant avers that he is bona fide purchaser for value of parcel No. CENTRAL KITUTU/MWABUNDUSI/2182 and that he had no knowledge of the earlier transaction that took place. The Defendants contend that the Plaintiff is not entitled to the prayers sought as he is not entitled to any share of the suit property.

PLAINTIFF'S CASE

10. Naftali Nyangena Ogesi (PW1) testified that he entered into a sale agreement with the deceased on 19th July, 1994 and took possession of the portion of land measuring 50 feet by 100 feet. He recalled that they attended the Land Control Board at Kisii and consent for the subdivision was granted, whereby the original parcel of land known as CENTRAL KITUTU/MWABUNDUSI/ parcel 587 was subdivided into L.R No. CENTRAL KITUTU/MWABUNDUSI/937 & 938. He testified that the portion sold to him lies in parcel CENTRAL KITUTU/MWABUNDUSI/937 which was retained by Ondieki Matara after subdivision of parcel CENTRAL KITUTU/MWABUNDUSI/587. The portion he bought from the deceased is currently registered as parcel No. CENTRAL KITUTU/MWABUNDUSI/1258 which was transferred to the 1st Defendant on 24th January 2014. However, the photograph on the Transfer form is not that of Ondieki Matara as Ondieki Matara died in 2006. He also told the court that the number on the identity card of the purchaser and the vendor in the transfer form were identical which was strange. He testified that the true identification number of the deceased which is 4142373, is reflected on the application form for subdivision of parcel No. CENTRAL KITUTU/MWABUNDUSI/937. He testified that in the transfer form for land parcel No. CENTRAL KITUTU/MWABUNDUSI/2182 by the 1st Defendant to William Bitutu Kimori, the 1st Defendant has affixed the photograph of the deceased instead of that of the 1st Defendant. He told court that after the death of the deceased his stay on the suit land was threatened by the deceased's children who damaged his fence and destroyed his pit latrine.

DEFENDANT'S CASE

11. David Ogega Omonywa (DW1) testified that he sold his plot to the 2nd Defendant. He told court that the deceased was the registered owner of land parcel CENTRAL KITUTU/MWABUNDUSI/587. He testified that the deceased who was his father had two wives and before his death he divided his land into three portions. The first house got parcel No. CENTRAL KITUTU/MWABUNDUSI/1258, the second house got parcel No. 1259 while parcel No. 1260 was transferred to a purchaser. He testified that there was no succession done since the

deceased divided his land during his lifetime. He told court that the Plaintiff had not obtained letters of administration to bring a suit against the deceased's estate. He testified that the deceased gave him PARCEL CENTRAL KITUTU/MWABUNDUSI/1258 in 2002. From the mutation form, land parcel CENTRAL KITUTU/MWABUNDUSI/937 was subdivided in 2003 and registered on 9.6.2009 to create parcels CENTRAL KITUTU/MWABUNDUSI/1258, 1259 And 1260.

PLAINTIFF'S SUBMISSIONS

12. The Plaintiff submitted that the death certificate of the deceased shows that the deceased died on 19th January 2006. It is the Plaintiff's submission that after the death of the deceased no single step could be taken in respect of his estate without letters of administration. The Plaintiff referred to *section 45 of the Law of Succession Act* and cited the case of **Veronica Njoki Wakagoto (Deceased) [2013] eKLR** where the court held that the effect of section 45 is that property of a deceased person cannot be lawfully dealt with by anybody unless such a person is authorized to do so by the law and such authority emanates from a grant of representation. The 1st Defendant thus had no authority to sell or transfer the land to the 2nd Defendant. It was submitted that the 1st Defendant is liable to a penal process under section 103 of the Land Registration Act and section 45 of the Law of Succession Cap 16 Laws of Kenya. The Plaintiff urged court to consider the actions of the 1st defendant as illegal and fraudulent.

13. It was submitted that the sale agreement between the Plaintiff and the deceased was in writing and was in compliance with the requirements of section 38 of the Land Act No. 3 of 2012. The Plaintiff is thus a bona fide purchaser who paid consideration for the portion measuring 50 feet by 100 feet which was part of CENTRAL KITUTU/MWABUNDUSI/587. The sale agreement and the purchase receipts demonstrate that a transaction took place and the Plaintiff is thus entitled to the portion he bought from the deceased.

14. The Plaintiff submitted that the 3rd Defendant failed to file a defence and therefore the court should consider the averments of the Plaintiff against the 3rd Defendant as uncontroverted. The Plaintiff submitted that the court should enter judgment against the 3rd defendant.

DEFENDANT'S SUBMISSIONS

15. The Defendants filed their submissions on 10th March 2020. They contend that the Plaintiff did not have a grant of letters of administration at the time of commencing the proceedings and therefore the plaintiff lacked capacity to mount this suit.

16. With regard to the transaction between the deceased and the Plaintiff, the Defendants claim that the deceased only acknowledged the payment of Kshs 77,000/- from the Plaintiff and therefore submit that the Plaintiff failed to pay the balance of Kshs 13,000/-. They further contend that the deceased died before applying for Land Control Board consent and in the absence of the Land Control Board consent, the transaction became null and void. It was further submitted that the deceased died without signing the transfer documents as agreed in the sale agreement and it took 12 years before the Plaintiff made any step towards transferring the land to his name.

ISSUES FOR DETERMINATION

17. Having considered the pleadings, evidence and counsel's submissions, the following issues fall for determination

- i. Whether the Defendants have the locus standi to be sued.
- ii. Whether there was a valid sale agreement between the 1st Defendant's late father and the Plaintiff in respect of a portion of L.R No. CENTRAL KITUTU/MWABUNDUSI/ 587
- iii. Whether the 1st Defendant had the capacity to transfer the suit property to the 2nd Defendant.
- iv. Whether the Plaintiff is entitled to the reliefs sought

ANALYSIS AND DETERMINATION

18. The issue of locus standi has been raised by both the Plaintiff and the Defendant and it is therefore important to determine the same before delving into the other issues. The Court of Appeal in the case of **Alfred Njau & 5 others -vs- City Council of Nairobi [1983] eKLR** defined locus standi as follows:

"The term locus standi means a right to appear in Court and, conversely, as is stated in Jowitt's Dictionary of English Law, to say that a person has no locus standi means that he has no right to appear or be heard in such a proceeding."

19. In **Julian Adoyo Ongunga & another v Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi, Deceased) [2016] eKLR** the court held that;

"Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a court acting without jurisdiction since it all amounts to null and void proceedings. It is also worth-noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties."

20. To determine who may institute any cause of action vested in the deceased at the time of his death, one must turn to **section 82 (a) of the Law of Succession Act** which confers that power on personal representatives of the deceased. (See *Trouistik Union International & Another -vs- Jane Mbeyu & Another (2008) IKLR (G&F) 730*). **Section 82 (a) of the Law of Succession Act** provides as follows;

“82. Powers of personal representatives

Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

- (a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;
- (b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that—

- i. any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and
 - ii. no immovable property shall be sold before confirmation of the grant;
- (c) to assent, at any time after confirmation of the grant, to the vesting of a specific legacy in the legatee thereof;

21. It is not in dispute that Ondieki Matara-deceased was the registered proprietor of land parcel No. CENTRAL KITUTU/MWABUNDUSI/587 and he was issued with a certificate of title in respect of the property on 5th May 1977. The deceased proceeded to subdivide parcel CENTRAL KITUTU/MWABUNDUSI/587 and the title was closed on 21. 7. 1994 upon subdivision of the land into parcels No. CENTRAL KITUTU/MWABUNDUSI/937, 938, 939, 940 and 941.

22. On 5th March 2003 the deceased applied to have land parcel No. 937 subdivided into land parcel No. CENTRAL KITUTU/MWABUNDUSI/1258, 1259 and 1260 after obtaining a consent from the Land Control Board. According to the consent by the Land Control Board and the mutation form, the subdivisions were made in favour of the deceased and he was duly registered as the owner of the three parcels on 9.6.2009. Land parcel No. CENTRAL KITUTU/MWABUNDUSI/1258 was later registered in the name of the 1st Defendant on 26.6.2015 after which it was sub-divided into L.R No. CENTRAL KITUTU/MWABUNDUSI/2101 and 2102. Land parcel no. 2101 was in turn sub-divided into land parcel No 2181 and 2182. The portion that was purchased by the plaintiff is said to be registered in land parcel number No. CENTRAL KITUTU/MWABUNDUSI/2182.

23. The death certificate produced by the 1st Defendant, shows that his late father died on 19th January 2006. It is not contested that no grant of letters of administration has been obtained in regards to his estate. It is on this ground that Plaintiff challenges the 1st and 2nd Defendant’s ownership of the deceased’s property and claims that the defendants acquired the property through fraudulent and illegal dealings. **Section 45 of the Law of Succession Act** makes it unlawful to intermeddle with the property of a deceased person and the offence is punishable by a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or both. **Section 45 (1) of the Law of Succession Act** provides that:

“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”.

24. The dispute herein clearly revolves around the estate of Ondieki Matara- deceased. At the time of his death the suit property was still registered in his name. Both the Plaintiff and the Defendant claim that the deceased was in the process of transferring a portion of his land to them before he died. Apart from challenging the validity of the land sale agreement between the Plaintiff and the deceased, the 1st and 2nd Defendant submitted that the Plaintiff lacks the locus standi to institute this suit as he did not obtain an ad litem grant. However, there is no legal requirement for a purchaser who is claiming a portion of the property belonging to a deceased person to take out letters of administration. The more fundamental issue is for anyone who is suing or being sued in respect of the estate of a deceased person to have grant of letters of administration as this is what gives him the legal capacity to implement any orders made either in his favour or against him.

25. The Plaintiff alleged that the transfer of the suit property from Ondieki Matara- deceased to the 1st Defendant’s name was unlawful, since it was done after the demise of the deceased without obtaining a grant in respect of the deceased’s estate. This was denied by the 1st defendant as he claims that the deceased had already signed the transfer forms. Even though the purported transfer of parcel No. Central KITUTU/MWABUNDUSI/1258 from the deceased to the 1st Defendant is questionable, the Plaintiff who was aware that the 1st defendant had not obtained a grant in respect of late father’s estate ought to have filed citation proceedings against the 1st Defendant or any of the deceased’s beneficiaries in order for them to take out grant of letters of administration before he could institute a suit against them. 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 estate of the registered owner of the suit property lacked the locus standi to be sued.

26. Similarly, in the instant case, the Plaintiff’s suit was instituted against the 1st Defendant who had no locus standi to be sued and it is therefore incompetent. On this ground alone, the Plaintiff’s suit cannot succeed. It is instructive to note that the case against the 2nd and 3rd Defendants would not succeed in the absence of the 1st Defendant.

27. The upshot is that the Plaintiff's suit cannot be sustained and it is hereby dismissed.

28. Considering the circumstances of this case, each party shall bear their own costs

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

J.M. ONYANGO

JUDGE