



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 152 OF 2013

ALIMA ABDI MUTAI.....PLAINTIFF

VERSUS

GEOFFREY MUTAI.....DEFENDANT

JUDGMENT

1. The plaint in this suit was filed on **7/11/2013**. It states that the plaintiff is a beneficiary of **10.5 acres** out of **LR. No. 5766** known as **Tulwet Farm** by virtue of her being the beneficiary of the Estate of the late **Joseph Malakwen Maina** (deceased).

2. The plaintiff states that on or about **26/7/2001** the plaintiff was confirmed as the beneficiary of **10.5 acres** out for **LR. No. 5706 in Kitale High Court Succession Case No. 149 of 1999** - In the matter of the Estate of the late **Joseph Malakwen Maina**. Mr Malakwen is her late father. She was again confirmed as such in the Amended Certificate of Confirmation of Grant in respect of the same Estate in the same Succession Cause on **26/3/2012**.

3. The plaintiff avers that the defendant has taken possession of the **10.5 acres** and is leasing it out. Her prayer is that the defendant be evicted from **10.5 acres** out of **LR. No.5766**, and that a permanent injunction do issue to restrain the defendant or his agents from the piece of land.

4. The defendant in his defence avers that he never purchased the **10.5 acres** from **Joseph Malakwen Maina**, under whose estate the plaintiff claims as a beneficiary, but from one **Loboywa Arap Too** who was a shareholder of **Tulwet Farm LR. No. 5766**. As such, states the defendant, there is no privity whatsoever between the plaintiff as a beneficiary of that estate and the defendant. Further, the defendant claims that for the last **39 years** (up to **2013**) he has been in exclusive possession/occupation of the said land. He states in the alternative that from the **26/7/2001** when the plaintiff was named a beneficiary she had **12 years** to claim her perceived interest from the applicant and the **12 years** statutory period provided or under **Section 7 of the Limitation of Action Act Cap 22 of the Laws of Kenya** expired on **25/7/2013** yet this suit was filed on **7/11/2013**. He adds that the plaintiff filed a dispute before the local land disputes tribunal and was awarded the land which award was subsequently quashed by the **High Court in Eldoret HC Misc. 205 of 1995** and this suit is therefore *res judicata*. For those reasons the defendant urged this court to strike out this suit. It is also stated in the defence that in the succession cause regarding Mr Malakwen's estate, the defendant's listing as a beneficiary had been expunged at the instance of the plaintiff.

5. **PW1**, the plaintiff testified on the **10th March 2020**. The gist of her evidence is that her father (Mr Malakwen) had sold one **Liboiywo** 5 acres out of his land in the farm and later **Liboiywo** sold them to the defendant. Subsequently, the defendant took over the remaining portion of her father's land and occupied it though the same had not been sold to him by her parents; the defendant was included in the succession proceedings to her father's estate but he rejected that inclusion and therefore another grant omitting his name was secured; upon cross examination she stated that the land is within **LR NO 5766** and that that main parcel has not yet been subdivided. The plaintiff produced only one document, that is, the copy of certificate of confirmation of grant dated **26/7/2001** as **PExh 1**. The plaintiff then closed her case.

6. **DW1**, the defendant testified on the same date as the plaintiff. His evidence is that his land now has a title deed and it is referred to as **Witaluk Mabonde Bk 14/Tulwet/348**; that the same was sold to him by **Liboiywo** who pointed out its extent to him; that **Liboiywo** had **27 acres** and he left as soon as he sold the land to the defendant; that the transfer was endorsed by the farm committee; that he has remained in possession of the land since the date of purchase; that he has come to know the plaintiff only recently and that he has never obtained any land from Malakwen's estate.

8. The defendant produced a certified copy of the receipt dated **14/7/1971** and a certified copy of a title deed issued on **12/11/2014**.

9. The defendant filed submissions on **11/6/2020**. This court has considered the pleadings, evidence and the filed submissions in this case. The issues that present themselves for determination are as follows:

a. Whether the instant suit is time barred.

b. Whether the instant suit is *res judicata*.

c. Whether the defendant is in illegal occupation of the plaintiff's land and if so whether he should be evicted therefrom.

d. Who should pay the costs of the suit?

The issues are discussed as hereunder.

a. Whether this suit is time barred.

9. None of the parties addressed the first issue in their evidence and this court has to rely on the documents and pleadings on the record. The defendant's assertion is that the claim ought to have been filed within **12** years of **1974**, or in any event within **12** years from the date of confirmation of the grant in respect of Malakwen's estate which was not done in either case.

10. In this case the Tulwet Farm land was not subdivided or registered in the names of the individual farm members and the defendant obtained title on **12/11/2014**. The period of limitation of time may not be considered to have commenced unless the proprietor of land has been registered as the owner of the land and for this reason, computation of time must commence on **12/11/2014**. **12** years had clearly not lapsed from that date till the date of filing this suit. The claim that the suit was time barred therefore has no merit.

b. Whether the suit is *res judicata*.

11. Both parties never led any evidence on this matter. No documents were produced showing existence of any previous litigation and this court has no basis on which to declare this suit *res judicata*.

c. Whether the defendant is in illegal occupation of the plaintiff's land and if so whether he should be evicted therefrom.

12. The plaintiff produced a certified copy of the title to the suit land. The defendant produced no documents showing the history of the subdivision of **LR 5766** to show that her father was entitled to any land in Tulwet Farm or that he had sold any land to *Liboiywo*. She also failed to secure evidence of the farm officials who would have shed light on the origin of the defendant's parcel of land. Evidence of the alleged contractual relationship between her father and *Liboiywo* over **5** acres is conspicuously missing. Save the plaintiff's uncorroborated evidence, there is nothing else in this case to even suggest, however remotely, that the defendant encroached on the allegedly **5** acres said not to have been sold to *Liboiywo* by her father. On the other hand the defendant produced a certified copy of a receipt showing that *Liboiywo* had paid **Ksh 4000/=** to the Farm and had a share in the land. Mr Malakwen's name does not feature in that receipt.

13. There being no proved link between the suit land the defendant occupies and the land said to have been owned by the plaintiff's father, this court finds that the plaintiff has not established her allegation that the defendant is in occupation of land that belongs to her late father's estate.

CONCLUSION:

14. The plaintiff has failed to establish her claim on the requisite balance of probabilities required in civil cases. It is upon the plaintiff now to follow up with the farm officials to establish what exactly happened in regard to her late father's share of land in the farm, if he had any.

d. Who should pay the costs of the suit?

15. The plaintiff having failed to establish her claim must meet the costs of this suit.

16. Consequently, I hereby issue the following final orders:-

a. The plaintiff's suit is hereby dismissed.

b. The plaintiff shall pay to the defendant the costs of this suit.

It is so ordered.

Dated, signed and delivered at Kitale by electronic mail on this 30th day of June, 2020.

MWANGI NJORGE

JUDGE, ELC, KITALE.