



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

E.L.C. CASE NO. 178 OF 2014

THOMAS MUGO MBITI (Suing as personal representative of the
estate of **MBITI MUTHIGIRE (DECEASED)**).....**PLAINTIFF**

VERSUS

JANE WANGUI NGURU.....**DEFENDANT**

JUDGEMENT

A. INTRODUCTION

1. By a plaint dated 2nd March 2012 and amended on 20th May 2019 the Plaintiff sought the following reliefs against the Defendant:

- a. An eviction order against the Defendant, her family members, agents, servants, employees and or anybody claiming under her from land parcel No. Nthawa/Gitiburi/1765.
- b. Costs of the suit.
- c. Interest.
- d. Any other relief that this honourable court may deem fit to grant.

B. THE PLAINTIFF'S CASE

2. The Plaintiff pleaded that he was the administrator of the estate of Mbiti Muthigire (*the deceased*) who was the registered proprietor of *Title No. Nthawa/Gitiburi/1765 (the suit property)*. It was pleaded further that letters of administration for the estate of the deceased were initially issued to his brother David Mwaniki Mbiti in *Siakago Succession Case No. 1 of 1999* on 16th July 1999 and same confirmed on 3rd February 2000.

3. The Plaintiff also pleaded that the Defendant's application for revocation of grant was dismissed with costs and that her earlier suit for adverse possession of the suit property in *High Court Civil Case No. 45 of 2001 (the earlier suit)* was dismissed for want of prosecution. Consequently, the Plaintiff considered that the Plaintiff had no legitimate reason to continue in occupation of the suit property hence the suit.

C. THE DEFENDANT'S RESPONSE

4. The Defendant filed a statement of defence dated 16th April 2012 admitting the Plaintiff's description and the succession proceedings in which the grant was issued but contended that she was not informed of the proceedings despite being a creditor of the estate of the deceased.

5. The Defendant pleaded that she was lawfully in possession of the suit property since 1977 upon purchasing it from the deceased for valuable consideration. It was her case that the earlier suit for adverse possession was dismissed on a technicality hence it was never heard on merit.

6. In her further defence, the Defendant pleaded that the Plaintiff's suit was statute barred under the **Limitation of Actions Act (Cap. 22)** in that the grant sought to be enforced was over 12 years old whereas the alleged claim for trespass was filed more than 3 years after the grant to the estate of the deceased was made on 16th July 1999.

D. THE DEFENDANT'S COUNTERCLAIM

7. By her counterclaim, the Defendant reiterated that she had been in exclusive possession of the suit property since 1977 when she bought it from the deceased. Consequently, she sought the following reliefs against the Plaintiff:

- a. A declaration that the Defendant is entitled to be registered as proprietor of L.R. No. Nthawa/Gitiburi/1765 by way of adverse possession.
- b. In the alternative an order compelling the Plaintiff to transfer L.R. Nthawa/Gitiburi/1765 to the Defendant as a creditor to the estate of the late Mbiti Muthigire.
- c. Costs of the suit with interest.

E. REPLY TO DEFENCE & COUNTERCLAIM

8. By a "reply to counterclaim" dated 27th April 2012 the Plaintiff reiterated the contents of the plaint and denied that the Defendant had bought the suit property from the deceased in 1977 or at all. It was pleaded that the Defendant's counterclaim was bad in law and *res judicata* in view of previous proceedings between the parties.

9. The Defendant also filed a reply to the Plaintiff's defence to counterclaim in which she reiterated the contents of her defence and counterclaim. She denied that her counterclaim was *res judicata* and pleaded that her application for revocation of grant was dismissed because she was not an heir to the estate of the deceased but the court recognized that she was a creditor to the estate.

F. SUMMARY OF EVIDENCE AT THE TRIAL

a. The Plaintiff's evidence

10. The Plaintiff testified at the trial as the sole witness. He adopted the joint witness statement dated 2nd March 2012 as his evidence-in-chief and produced the documents listed in his list of documents dated 2nd March 2012 as Exhibits P1-P6. The gist of his case was that the suit property was part of the estate of the deceased and that the Defendant had no legitimate claim against it. He was of the view that the Defendant's counterclaim was *res judicata* because her application for revocation of grant was dismissed as well as the earlier suit for adverse possession. He, therefore, wanted his claim to be allowed as pleaded in the amended plaint.

b) The Defendant's evidence

11. The Defendant also testified as the sole witness at the trial. She adopted her witness statement as her evidence-in-chief. She also produced the documents in her list of documents dated 3rd May 2012 as exhibits D1-D10. The gist of her evidence was that she bought the suit property from the deceased in 1977 and took possession thereof in the same year. It was her case that she built a residential house thereon and developed the suit property and that she had enjoyed exclusive possession thereof since then.

G. DIRECTIONS ON SUBMISSIONS

12. Upon conclusion of the trial on 12th March 2020 the Plaintiff was granted 21 days to file and serve his written submissions whereas the Defendant was granted 21 days upon the lapse of the Plaintiff's period to file hers. However, the record shows that both the Plaintiff and the Defendant filed their respective submissions on 5th May 2020.

H. THE ISSUES FOR DETERMINATION

13. The court has noted that the parties did not file an agreed statement of issues for determination. Whereas the Plaintiff filed a list of 6 issues for determination, the Defendant did not file any statement of issues. In the premises the court shall frame the issues for determination as provided for in law. Under **Order 15 Rule 2** of the **Civil Procedure Rules**, the court may frame issues from any of the following:

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

14. The court has considered the pleadings, documents and evidence on record in this matter. The court is of the opinion that the following issues arise for determination in this suit:

- a. Whether the Plaintiff's suit is statute-barred under the *Limitation of Actions Act (Cap. 22)*.
- b. Whether the Plaintiff has proved his claim against the Defendant to the required standard.
- c. Whether the plaintiff is entitled to the reliefs sought in the amended plaint.

- d. Whether the Defendant's counterclaim is bad in law and res judicata.
- e. Whether the Defendant has proved her claim for adverse possession to the required standard.
- f. Whether the Defendant is entitled to the reliefs sought in the counterclaim.
- g. Who shall bear costs of the suit and counterclaim.

I. ANALYSIS AND DETERMINATIONS

a. Whether the Plaintiff's suit is statute barred

15. The court has considered the evidence, documents and submissions on record on this issue. There is no doubt that the Plaintiff sued as the personal representative of the deceased to recover the suit property from the Defendant. There is no doubt from the evidence on record that the Defendant took possession of the suit property in the late 1970s. The Defendant contended in her evidence that she took possession in December 1977 whereas the Plaintiff contended in cross-examination that she had been in possession since 1978. The difference between December 1977 and 1978 shall however, not make any material difference on the Plaintiff's claim for recovery of the suit.

16. Although the Defendant contended that the Plaintiff's suit was statute barred because the grant for the estate of the deceased was made in 1999 whereas the suit was filed more 12 years thereafter, the court is of the opinion that since the Plaintiff was merely the administrator of the estate of the deceased, the period of limitation would start running from the time the right of action accrued to the deceased and not the moment when letters of administration were obtained.

17. **Section 7** of the **Limitation of Actions Act (Cap. 22)** stipulates as follows:

“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. (emphasis added)

18. The court is therefore of the opinion that the applicable provision is **Section 7** and not **Section 4 (4)** of the **Act** which deals with enforcement of judgements or decrees. The material on record indicates that the deceased sold the suit property to the Defendant in 1977 or thereabouts. There are several documents and payment acknowledgments on record evidencing such an agreement. There is also evidence on record to demonstrate that the suit property is agricultural land for which the consent of the Land Control Board was never obtained. Consequently, the sale agreement became null, void and unenforceable by virtue of **Section 6** of the **Land Control Act (Cap. 302)** upon the lapse of 6 months from the date of the agreement.

19. Whether the period of 6 months is computed with reference to December 1977 or the end of 1978, that period must have lapsed latest by June 1979 with the consequence that the right of action of the deceased to recover the suit property arose in 1979. Even if the limitation period were to be computed with reference to the date of first registration in the land register, the relevant register indicates that the deceased was registered as proprietor of the suit property on 28th May 1984. The limitation period of 12 years would still have lapsed on or about 27th May 1996. So, whether the limitation period is computed with effect from 1979 or 1984 the Plaintiff's suit for recovery of the suit property is clearly statute-barred under the **Limitation of Actions Act (Cap. 22)**.

b. Whether the Plaintiff has proved his claim against the Defendant

20. There is no doubt from the material on record that the deceased was the registered proprietor of the suit property all material times. He would certainly have been entitled to sue for recovery thereof within the limitation period. His personal representative would equally have been entitled to sue for recovery thereof within the limitation period. However, in view of the court's holding that the claim is statute-barred, it would therefore follow that the Plaintiff has failed to prove his claim as required by law. Accordingly, the 2nd issue is answered in the negative.

c. Whether the Plaintiff is entitled to the reliefs sought in the amended plaint

21. The court has already found and held that the Plaintiff's suit is time barred under the **Limitation of Actions Act (Cap. 22)**. The court has also found that the Plaintiff has failed to prove his claim against the Defendant. It would, therefore, follow that the Plaintiff is not entitled to the reliefs sought in the amended plaint or any one of them.

d. Whether the Defendant's counterclaim is bad in law and res judicata

22. The court has considered the evidence, documents and submissions on record on this issue. The Plaintiff submitted that the counterclaim was bad in law and *res judicata* for two main reasons. First, that the Defendant had filed a previous suit being *Embu HCCC No. 45 of 2001 (the earlier suit)* seeking adverse possession which was dismissed for want of prosecution on 20th December 2004. Second, it was contended that the Defendant's application for revocation of grant in *Embu High Court Succession Cause No. 21 of 2005 (the succession cause)* was dismissed by the High Court.

23. It was submitted by the Plaintiff that the dismissal order made in the earlier suit was as good as a final judgement within the meaning of **Section 7** of the **Civil Procedure Act (Cap. 21)** hence the Defendant was not entitled to lodge a counterclaim in respect of the same cause of action. The Plaintiff relied on the case of *Njue Ngai V Ephantus Njiru Ngai & Another Nyeri Civil Appeal No. 29 of 2015 [2016] eKLR* in support of that submission.

24. The Defendant's response was that the earlier suit was dismissed on a technicality and in a preliminary manner hence there was no hearing on the merits of the case. It was submitted that the earlier suit was a non-starter on account of *locus standi* since the 3 Defendants who had been sued were not the legal representatives of the deceased.

25. According to **Black's Law Dictionary, 9th Edition**, *res judicata* is a Latin phrase meaning "a thing adjudicated". It defines the phrase at page 1425 as follows:

"1. An issue that has been definitively settled by judicial decision.

2. An affirmative defence barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been – but was not – raised in the first suit. The three essential elements are (1) an earlier decision on the issue, (2) a final judgement on the merits, and (3) the involvement of the same parties or parties in privity with the original parties ..."

26. The principle of *res judicata* is codified in **Section 7 of the Civil Procedure Act (Cap. 21)** 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."

27. The court has considered the material on record with regard to the earlier suit for adverse possession. Vide an originating summons dated 26th May 2001, the Defendant had sued three sons of the deceased namely, David Mwaniki Mbiti, Thomas Mugo Mbiti and Stephen Muchoki Mbiti seeking adverse possession of the suit property on the same grounds as those advanced in the counterclaim. By a ruling dated 16th September 2002 the High Court dismissed the Defendant's application for interim orders since it was not shown that the three sons had a grant to enable them defend the suit on behalf of the estate of the deceased. Consequently, the court found the application incompetent and dismissed it on that account.

28. The court is of the opinion that even though the Defendant intended to sue the legal representatives of the deceased in the earlier suit, she ended up suing the wrong persons who had no legal capacity at the time to defend the suit on behalf of the estate of the deceased. That is why the High Court held that the application for interim orders was incompetent. It would, therefore, follow that the originating summons was also incompetent for the same reason. Whatever rights or defences may have arisen from the dismissal order in the earlier suit could only be available to the Defendants in their personal capacities and not in a representative capacity as legal representatives of the estate of the deceased.

29. In the case of **Saleh Bin Kombo V Administrator General, Zanzibar [1957] E.A. 191** it was held that the plea of *res judicata* could not apply where the Administrator General was not litigating under the same title or capacity in both the previous suit and the suit under consideration. Windham, CJ held, *inter alia*, that:

"At first sight, then, the matter might appear to be *res judicata*. The defendant's contention must, however, fail on one point, namely that although in each of the two cases the Administrator General was a party, he was not in both cases "litigating under the same title" for the purpose of Section 6 of the Civil Procedure Decree, which deals with *res judicata* MULLA in his COMMENTARY ON THE INDIAN CIVIL PROCEDURE CODE, (9th Edn.) at p. 62 makes it clear, citing Indian decisions in support of his views, that the expression "the same title" means "the same capacity", that is to say the same representative capacity. The Administrator General having been a party in a different representative capacity in the two cases, the defence of *res judicata* must fail, notwithstanding that the matter is indeed *res judicata* in every other respect." (emphasis added)

30. The court, therefore, finds and holds that the requirements for *res judicata* have not been established against the Defendant on account of the verdict in the earlier suit. The claim in the earlier suit was directed at the Defendants in their personal capacities whereas in the instant suit the claim has been directed to the Plaintiff in his representative capacity as administrator of the estate of the deceased duly appointed under the **Law of Succession Act (Cap. 160)**.

31. The court has also considered the material and documents on record regarding the Defendant's application for revocation of grant in the succession cause. There is no doubt that the Defendant had filed an application for revocation of grant under the relevant provisions of the **Law of Succession Act (Cap. 160)**. Vide a ruling dated 3rd May 2007 the High Court dismissed the same on the ground that the Defendant had failed to prove that the grant was obtained fraudulently by the making of a false statement or concealment of some material facts as required by law. The court, however, found that although she was not a beneficiary of the estate of the deceased, she was purchaser of the suit property under an agreement which had become void for lack of consent of the Land Control Board. The court also found that the Defendant was a creditor of the estate whose remedy lay in claiming a refund of the purchase price from the administrator of the estate of the deceased.

32. The court is unable to appreciate how the dismissal of an application for revocation of a grant under the **Law of Succession Act (Cap. 160)** could preclude the Defendant from ventilating her claim for adverse possession on account of *res judicata*. The Defendant's claim for adverse possession was never adjudicated upon in the succession cause. The Defendant was simply seeking to enforce her perceived rights as a purchaser of the suit property but she did not succeed in her bid. In the premises, the court is not satisfied that the counterclaim on account of adverse possession is barred on account of the doctrine of *res judicata*.

e. Whether the Defendant has proved her claim for adverse possession

33. The court has considered the evidence and submissions on record on this issue. Whereas the Defendant submitted that she had satisfied all the elements of adverse possession, the Plaintiff submitted otherwise. The elements of adverse possession were restated in the following cases: **Wambugu Vs Njuguna [1983] KLR 172; Githu Vs Ndeete [1984] KLR 776; Kasuve Vs Mwaani Investments Ltd & 4 Others [2004] 1KLR 184 and Kimani Ruchine Vs Swift Rutherfords & Co Ltd [1980] KLR 10.**

34. The elements of adverse possession were summarized in the case of **Kasuve Vs Mwaani Investments Ltd** (*supra*) 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...”

35. The court has fully considered the material on record on the issue of adverse possession. There is ample evidence on record to demonstrate that the Defendant has been in exclusive possession of the suit property at least since December 1977 even though the Plaintiff contended that it was with effect from 1978. There is evidence to demonstrate that the Defendant has a semi-permanent house on the suit property and that she has developed the same. There was no suggestion by the Plaintiff that the Defendant’s exclusive possession had been interrupted at any given time. There was no evidence to show that the Plaintiff had occupied or developed any portion of the suit property either.

36. The mere fact that the Defendant’s initial entry into the suit property was with the consent of the deceased or on the basis of a sale agreement does not necessarily mean that the limitation period could not run. Time for purposes of limitation of actions may run once such permission is terminated or the sale agreement is repudiated, or becomes null and void by operation of law. See **Situma V Cherongo [2007] 2 KLR 85**. In the instant case, it is evident that the suit property was agricultural land which was subject to the provisions of the **Land Control Act (Cap. 302)**. There is evidence on record to demonstrate that the consent of the Land Control Board was not obtained by the concerned parties. Consequently, the sale agreement became null and void upon expiry of six months from the date it was made. As indicated before, such period of six months must have expired at the latest by June 1979.

37. The court is, however, aware that the deceased was registered as proprietor of the suit property on 28 May 1984. Accordingly, the computation of time for purposes of adverse possession should be undertaken with effect from the date of such registration. The minimum statutory period of 12 years must therefore have expired on or about 27th May 1996. The court is thus satisfied that the Defendant has demonstrated her claim for adverse possession of the suit property as required by law.

f. Whether the Defendant is entitled to the reliefs sought in the counterclaim

38. The court has found and held that the Defendant’s counterclaim is not bad in law or *res judicata*. The court has also found that the Defendant has demonstrated her claim for adverse possession as required by law. Accordingly, the court is of the opinion that the Defendant is entitled to the reliefs sought on the basis of adverse possession.

39. The court has noted, however, that the Defendant also included alternative prayer for an order compelling the Plaintiff to transfer the suit property to her as a creditor of the estate of the deceased. The court is of the opinion that the alternative prayer is bad in law and untenable for at least two reasons. First, any claims relating to the administration of the estate of the deceased fall within the jurisdiction of the Succession Court under the **Law of Succession Act (Cap. 160)**. Accordingly, this court has no jurisdiction to entertain such claim under **Article 162 (2) (b) of the Constitution of Kenya 2010 and Section 13 of the Environment and Land Act, 2011.**

40. The second reason is that the said claim was adjudicated upon in the succession case whereby the Defendant sought revocation of the grant. That application for revocation of grant was fully considered by the High Court and dismissed on merit. Although the High Court found that the Defendant was a purchaser it also found that the relevant sale agreement was null and void for want of consent of the Land Control Board. Accordingly, the Defendant was advised to seek a refund of the purchase price from the administrator as a creditor of the estate. In the premises, the same issue cannot be re-opened and re-litigated before this court.

g. Who shall bear costs of the suit and counterclaim

41. Although costs of an action or proceeding 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)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohammed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. There is no good reason why the successful party herein should not be awarded costs of the suit. Accordingly, the Defendant shall be awarded costs of the suit and the counterclaim.

J. SUMMARY OF COURT’S FINDINGS ON THE ISSUES

42. The court’s summary of findings on the issues for determination is as follows:

- a. The Plaintiff’s suit for recovery of the suit property is time-barred under **Section 7 of the Limitation of Actions Act (Cap. 22)**.
- b. The Plaintiff has failed to prove his case against the Defendant as required by law.
- c. The Plaintiff is not entitled to the reliefs sought in the amended plaint or any one of them.

- d. The Defendant's counter claim is not bad in law and res judicata.
- e. The Defendant has proved her claim for adverse possession as required by law.
- f. The Defendant is entitled to the reliefs sought with respect to adverse possession only but is not entitled to the alternative prayer for an order compelling the Plaintiff to transfer the suit property to her as a creditor of the estate of the deceased.
- g. The Defendant is entitled to the costs of the suit and counterclaim.

K. CONCLUSION AND DISPOSAL ORDER

43. The upshot of the foregoing is that the court finds that the Plaintiff has failed to prove his claim against the Defendant whereas the Defendant has proved her case for adverse possession against the Plaintiff. 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. A declaration be and is hereby made that the Defendant has become entitled to be registered as proprietor of Title No. Nthawa/Gitiburi/1765 on account of adverse possession.
- c. The Defendant's claim for an order compelling the Plaintiff to transfer the suit property to her as a creditor of the estate of the deceased is hereby declined.
- d. The Defendant is hereby awarded costs of the suit and counterclaim.

44. It is so adjudicated.

JUDGEMENT DATED and **SIGNED** in Chambers at **EMBU** this **4TH DAY** of **JUNE, 2020** and delivered in the presence of Mr. Kathungu for the Plaintiff and Mr. Kiama Kinyua for the Defendant via the zoom platform.

Y.M. ANGIMA

JUDGE

04.06.2020