



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

LAND AND ENVIRONMENT CASE NO. 319 OF 2013

JULIUS W. NAMIANYE.....1ST PLAINTIFF

ABEL WALEKHWI NAMIANYE2ND PLAINTIFF

VERSUS

GABRIEL W. WEKESA.....1ST DEFENDANT

AGNES NELIMA WAFULA.....2ND DEFENDANT

EMMANUEL MARAUNI WAMUKONYE.....3RD DEFENDANT

JUDGEMENT

[1]The plaintiffs claim against 1st, 2nd and 3rd defendants is for a permanent injunction restraining them by themselves their agents workers and servants or anybody, claiming through them from working on, ploughing, planting crops or in any other manner whatsoever from dealing with land parcel Bokoli/Chwele/982 his reasons for doing so are set out in their plaint filed in court on 26/11/2013.

[2] The defendant filed their joint defence to the plaintiffs claim. They denied the plaintiffs claim. They stated that the parties herein are beneficiaries of all of the suit land from one John Namianye Munialo their common grandfather and father to the third defendant. They stated that the land has been demarcated and boundaries are planted and each of the defendants occupy and have developed their portions without interruption since 1964 to date. They state that the plaintiffs filed a succession cause in the Bungoma High Court without informing the defendants. They prayed for the suit to be dismissed with costs.

[3]There are a number of issues that arise out of this suit. The defendants are alleged to have trespassed into the suit land in 1994. At this time the plaintiffs' father was alive. He is said to have died in the year 2008. This was 14 years after the cause of action had arisen. The question that arises is why did he not take action for 14 years? By the time he died, was the claim against the respondents not time barred? Under the law no action in land can be brought in an action that arose after a period of 12 years has lapsed. The plaintiffs filed this suit for eviction on 4th December 2013. This was 19 years after the cause of action arose. The suit was hopelessly time barred. Time having elapsed seven (7) years earlier.

[4]Previously the plaintiffs had filed Bungoma High Court Succession Cause No. 350 of 2010 for the letters of administration of the estate of John Mamianya Munialo alias Namianya Munialo. They were appointed the administrators of the deceased's estate. A certificate of confirmation of Grant was issued and a grant of representation was issued to the plaintiffs and land parcel Bokoli/Chwele/895 was distributed to the plaintiffs in the following shares:

Abel Walekwa Namianye 1.65 Ha

Henry Wamalwa Namianye 2 Ha

[5] When this succession cause was filed the respondents had been on the land for 16 years. No action to remove them could be sustained due to the Limitation of Actions earlier stated. I am not aware, that the occupation of the respondents on the suit land was brought to the attention of the Succession court at all. The judge was not aware of such occupation.

In any case, the defendant gave evidence in court and stated that they were not notified of the Succession Cause and were unaware of it. They ought to have known of its existence as the Succession Cause was advertised in the Kenya Gazette of 1st April 2011 Gazette Notice No. 3397. It is up to them to follow their rights in that Succession cause by probably filing an annulment of grant under Section 76 of Cap 160 in the High Court to have their claim and/or right to ownership established by the Succession Court. A determination has been made that the land should be shared by the plaintiffs in this case. I have no jurisdiction to interfere or change that finding of the High Court.

[6] The dichotomy here is that you have plaintiff who have succeeded the land through a Succession Cause and defendants who cannot be told to move out due to Limitation of Actions Act. And those defendants claim ownership not as adverse possessors, but as heirs of the suit land together with the plaintiffs. Any order that can be made in favour of the defendants would make the subject matter of the suit have two parallel decisions from two separate courts of equal jurisdiction. That would not be helpful or desirable. The ball is now squarely on the respondents door step to rectify that situation. They have the benefit of having the advice of counsel who will no doubt advice them appropriately.

[7] In the final analysis, I am unable to grant the orders sought by the plaintiff since this suit is time barred. The parties herein are relatives. I strike the suit out with no order as to costs.

Dated at Bungoma this 11th day of May 2016

S. MUKUNYA - JUDGE

Judgement read in open court in presence of

C.A Nyongesa

Mr. Anwar for Mr. Ateya for the defendants

Plaintiff in person

S.MUKUNYA - JUDGE

11/5/2016