



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND COURT

ELC NO 85 OF 2013

TRUSILLAH ONGERI.....PLAINTIFF

VERSUS

ANDRIANO MAKORI SIANGU..... DEFENDANT

JUDGMENT

The plaintiff brought this suit to enforce a contract for sale of land that was entered into between her deceased husband, Ongerinyairo (hereinafter referred to as “the deceased”) and one, MogereAyora, also deceased (hereinafter referred to only as “Ayora”). In her plaint dated 25/2/2013, the plaintiff averred that in the year 1975, the deceased entered into an agreement for sale with Ayora in respect of a portion measuring 2 acres of all that parcel of land known as LR.No. Wanjare/Bogitaa/41. The plaintiff averred that following this agreement, Ayora applied to the Land Control Board for consent to sub-divide L.R.No. Wanjare/Bogitaa/41 (hereinafter referred to as “Plot No. 41”) and transfer the said portion thereof measuring 2 acres (hereinafter referred to as “the suit property”) to the deceased, which consent was duly given in the year 1980. The plaintiff averred that the deceased died before the suit property could be transferred to him by Ayora. The plaintiff averred further that in the year 2007, she carried out a search on the register of Plot No. 41 and discovered that the same was registered in the name of the defendant which registration took place in the year 1995. Following this discovery, she lodged a claim at the Land Disputes Tribunal (hereinafter referred to as “the tribunal”) in respect of the suit property which tribunal made an award in her favour. The said award was filed at the Chief Magistrate’s Court and adopted as a judgment of the court. The plaintiff has sought an order compelling the defendant to transfer the suit property to her failure to which the Deputy Registrar of the court be authorized to execute all documents necessary to effect the transfer of the said property to her name.

The defendant entered appearance and filed a statement of defence and counter-claim against the plaintiff on 23/4/2015. In his defence, the defendant averred that the plaintiff is not the administrator of the estate of her deceased husband and as such has no *locus standi* to maintain this suit in which she has purported to enforce an agreement for sale which her husband entered into with Ayora. The defendant averred further that the plaintiff’s suit is time barred and as such unmaintainable. The defendant averred that he was not privy to the agreement for sale that the deceased entered into with Ayora in respect of the suit property. The defendant admitted that he was aware of the claim that the plaintiff had lodged at the tribunal in respect of the suit property and the award that was made in her favour. The defendant contended however that he was not a party to the said claim which was against one, Adriano Makori Ongiti and Mathew Ongiti. In his counter-claim, the defendant averred that the plaintiff and members of her family have from time to time entered the suit property and prevented him from peaceful occupation and use thereof.

The defendant sought an order for the eviction of the plaintiff from the suit property and a permanent injunction to restrain the plaintiff from entering onto, cultivating, tilling and/or in any other manner interfering with Plot No. 41 or any part hereof. In her defence to the counter-claim, the plaintiff averred that she is in occupation of the suit property as of right having taken possession of the same in the year 1975.

At the trial, the plaintiff and the defendant gave evidence but none of them called a witness. In her evidence, the plaintiff testified that her deceased husband purchased the suit property from the defendant but died before the defendant could transfer to him the suit property. She stated that following that transaction, the deceased and she took possession of the suit property and she has remained in occupation thereof since then. The plaintiff stated that with a view to obtain title to the suit property, she brought a claim against the defendant at the tribunal. The tribunal made an award in her favour which award was lodged at the Magistrate's court and made a judgment of the court. She produced as exhibits; copies of the tribunal's award and the decree of the Chief Magistrate's court that was issued after the adoption of the said award as a judgment of the court. The plaintiff stated that even after the defendant was ordered by the court to transfer the suit property to her, he has declined to do so and it is for this reason that she was constrained to file this suit for the defendant to be compelled to transfer the property to her.

In cross-examination, the plaintiff stated that her husband (“**deceased**”) died in the year 1994 and that he had purchased the suit property from the defendant. She stated further that her claim at the tribunal was against Adriano Makori Ongiti and Mathew Ongiti. She admitted that she had not done succession in respect of the estate of her deceased husband. She stated that Adriano Makori Ongiti was deceased while Mathew Ongiti was alive. She stated further that Adriano Makori Ongiti against whom she had lodged a claim at the tribunal is different from Adriano Makori Siangu, the plaintiff herein. In further cross-examination, the plaintiff changed her earlier evidence. She stated that her deceased husband (“the deceased”) had purchased the suit property from Ayora and not from the defendant as she had claimed earlier. She reiterated that she is the one in occupation of suit property and that the defendant has never occupied the same.

On his part, the defendant testified that he is not Adriano Makori Ongiti. He stated that he is the registered proprietor of Plot No. 41 which measures 1.5 ha. He told the court that he purchased the said parcel of land from one, Francis Ndege Ongiti. He produced as exhibit, a copy of the title deed that was issued to him in respect of plot No. 41. He stated that Plot No. 41 belonged to the father of Francis Ndege Ongiti who is deceased and that Francis Ndege Ongiti did succession before the said property was sold and transferred to him. He produced as exhibit, a copy of the Gazette Notice in which the application by Francis Ndege Ongiti for Grant of letters of Administration in respect of the estate of Ayora was published. He stated that he was not a party to the claim that the plaintiff had lodged at the tribunal. He stated that the plaintiff has her own parcel of land but has encroached on Plot No. 41 to the extent of 2 acres. He denied that he has trespassed on the plaintiff's parcel of land and urged the court to evict the plaintiff from the portion of plot No. 41 under her occupation.

After the close of the defendant's case, the parties informed the court that they did not wish to make closing submissions. They chose to rely on the evidence on record. I have considered the pleadings on record and the evidence that was tendered by the parties in proof of their respective cases. The parties did not agree on the issues for determination by the court. From the pleadings and the evidence that was adduced by the parties aforesaid, the following in my view are the issues that present themselves for determination in this case, namely;

- (i) Whether the plaintiff has *locus standi* to institute this suit?
- (ii) Whether the suit is time barred?
- (iii) Whether the plaintiff has proved her claim against the defendant?
- (iv) Whether the defendant has proved his counter-claim against the plaintiff?

(v) Who is liable to pay the cost of the suit?

The first issue:

It is not in dispute that the plaintiff brought this suit to enforce an agreement for sale that her deceased husband, Onger Nyairo (“**deceased**”) had entered into with Mogere Ayora (“**Ayora**”). The plaintiff had attached to her list of documents dated 25/2/2013 which was filed in court together with the plaint, among others, a copy of the agreement for sale of land dated 8/12/1975 between Ayora and the deceased in respect of a portion of Plot No. 41 measuring 2 acres. The purchase price according to that agreement was Kshs.1700/- and possession was to be given to the deceased immediately upon the execution of the said agreement. The plaintiff also annexed to that list of documents, a copy of the application for consent of the Land Control Board that was made by Ayora and the deceased to sub-divide Plot No. 41 into two (2) portions measuring 0.6 ha. and 0.9ha and to transfer one of the said portions to the deceased. In the said application for consent, the deceased was indicated as the proposed purchaser. The consideration was also given as Kshs.1700/- which is consistent with the terms of the agreement for sale that I have mentioned above. The other attachment to that list of documents was a copy of the Consent of the Land Control Board dated 14/2/1980 that was issued to Ayora authorizing him to sub-divide Plot No. 41 and transfer a portion thereof to the deceased. The plaintiff filed this case in person but was later on represented by an advocate. It is not clear to me why the plaintiff never produced any of these documents in evidence in proof of her case. I have referred to these documents to show that there was indeed an agreement for sale of the suit property between the deceased and Ayora. As I have stated above, the plaintiff brought this suit to enforce the said agreement. I am in agreement with the defendant that the plaintiff has no *locus standi* to enforce an agreement for sale that was entered into between the deceased and Ayora. In cross-examination, the plaintiff admitted that she has not done succession in respect of the estate of the deceased. In the circumstances, the plaintiff is not the legal representative of the estate of the deceased and as such has no *locus standi* to enforce the agreement for sale aforesaid. If any authority is required for this well settled legal position, I would cite the cases of **Virginia Edith Wamboi Otieno vs. Joash Ochieng Ougo & another (1982-88) 1 KAR 1049** and **Troustik Union International & another vs. Jane Mbeyu & another [1993] eKLR**. Connected to this point is the issue as to whether the said agreement for sale can be enforced against the defendant. Again, there is no evidence that the defendant is the legal representative of the estate of Ayora. From the material on record, the person who applied for a Grant of Letters of Administration in respect of the estate of Ayora was one, Ndege Ongiti from whom the defendant has claimed to have purchased Plot No. 41. There is no basis therefore upon which a suit can be maintained by the plaintiff against the defendant in respect of the said agreement for sale that was made between the deceased and Ayora. For the foregoing reasons, it is my finding that the plaintiff has no *locus standi* to maintain this suit against the defendant.

The second issue:

The defendant had contended in his statement of defence that the plaintiff’s suit is time barred. The defendant did not however give any evidence in support of this contention. In the circumstances, there is no basis upon which I can make a finding that the suit herein is time barred.

The third issue:

As I have stated earlier in this judgment, this suit was brought principally to enforce the agreement for sale that the deceased had entered into with Ayora. I have already made a finding that the plaintiff has no *locus standi* to enforce the said agreement because she is not the legal representative of the estate of the deceased. In her testimony, the plaintiff had stated that she had lodged a claim in respect of the suit property at the tribunal and that the tribunal had made an award in her favour. Assuming that the plaintiff came to this court to enforce the said award of the tribunal, can such claim be sustained as against the defendant? I have looked at the tribunal’s award that was produced by the plaintiff as exhibit. I have also looked at the decree that was issued by the Chief Magistrate’s court upon the adoption of the said award as judgment of the court. To start with, the defendant was not a party to the plaintiff’s claim at the tribunal and as such could not be bound by the award that was issued by the said tribunal. The plaintiff admitted this fact in her cross-examination. Secondly, the tribunal did not make an order that a portion of

Plot No. 41 measuring 2 acres be transferred to the plaintiff. Due to the foregoing, the said tribunal's award cannot be enforced against the defendant in the manner sought by the plaintiff herein or at all. It is clear from the foregoing that the plaintiff has failed to prove her claim against the defendant. The plaintiff has failed to prove that the defendant is bound by the agreement for sale that the deceased made with Ayora and that she has the *locus standi* to enforce the said agreement. The plaintiff has also failed to prove that the defendant is bound by the award that was made in her favour by the tribunal and that tribunal had directed that a portion of Plot No. 41 measuring 2 acres be transferred to her.

The fourth Issue:

The defendant's counter-claim against the plaintiff is based on trespass. Trespass is any unjustifiable intrusion by one person on the land in the possession of another. On the material before me, there is no dispute that the defendant is the registered owner of Plot No. 41 a portion of which is being claimed by the plaintiff. As stated hereinabove, the portion of Plot No. 41 being claimed by the plaintiff (the suit property) measures 2 acres. In his counter-claim the defendant has sought the eviction of the plaintiff from this portion of Plot No. 41 (the suit property). In her plaint, the plaintiff averred that the deceased purchased the suit property from Ayora in the year 1975. In her evidence, she stated that they took possession of the suit property soon after purchase and that she has remained in possession thereof to date. The plaintiff testified that the defendant has never occupied the suit property neither has he made a demand that she vacates the same. I have noted from a copy of the title deed that was produced in evidence by the defendant that he acquired Plot No. 41 on 27/11/1995. This was several years after the deceased had purchased and occupied a portion thereof measuring 2 acres (the suit property). In the counter-claim, the defendant claimed that the plaintiff's entry on the suit property has been intermittent or seasonal. The defendant did not however tell the court when the plaintiff first entered the suit property more particularly whether it was after he had purchased the same or before. The defendant did not also dispute the plaintiff's evidence that he has never occupied the suit property. From the totality of the evidence before me, it appears that the defendant acquired Plot No. 41 while the plaintiff was in possession of a portion thereof which is comprised in the suit property. From the evidence on record, I am of the view that the plaintiff took possession of the suit property lawfully following a valid agreement for sale that the deceased had entered into with Ayora who was the previous owner of Plot No. 41. As I mentioned earlier, the said agreement for sale was approved by the Land Control Board. The deceased and the plaintiff occupied the suit property awaiting the transfer thereof to the deceased which was to be a mere formality. I am not persuaded therefore that the plaintiff is a trespasser on the suit property.

The upshot of the foregoing is that the plaintiff's suit and the defendant's counter-claim are both dismissed. Each party shall bear its own costs of the suit and the counter-claim.

Signed at Nairobi this.....day of November, 2015.

S.OKONGO

JUDGE

Delivered and Dated at Kisii this 4th day of December 2015.

J.M. MUTUNGI

JUDGE

In presence of

.....for the Plaintiff

.....for the Defendant