



No. 183

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CASE NO.436 OF 1992

JAMES NYAKUNDI NYATUKA PLAINTIFF

VERSUS

JOHN ONSOTI MARUBI DEFENDANT

JUDGMENT

1. This suit was filed against the defendant on 3rd November, 1992 by one, Nyamonoru Kerubo Nyatuka (hereinafter referred to as “**Kerubo**”). In the Plaintiff of the same date, Kerubo claimed that her deceased husband, one, Nyatuka Mongare (hereinafter referred to as “**Mongare**”) was until the date of his death the registered proprietor of all that parcel of land known as **LR. No. West Mugirango/Nyamaiya/624** (hereinafter referred to as “**the suit property**”). Kerubo claimed that sometimes in April, 1980, the defendant fraudulently represented himself to Manga District Court as the sole heir of Mongare and in the process caused himself to be registered as the sole proprietor of the suit property thereby disinheriting Kerubo and his two sons of the said property. Kerubo sought a declaration that the defendant holds the suit property in trust for her, an order that the defendant do transfer the suit property to her name, general damages and costs. Through his defence and counter-claim dated 11th July, 1994 that was filed in court on the same date, the defendant denied Kerubo’s claim in its entirety. The defendant contended that he purchased the suit property from Kerubo on a willing buyer willing seller basis and had the property transferred and registered in his name on 8th April, 1980 and that he had enjoyed quiet possession of the suit property since 1977 when he purchased the same. The defendant also challenged Kerubo’s locus standi to maintain these proceedings. In his counter-claim, the defendant averred that he had enjoyed quiet possession of the suit property since 1977 and as such had acquired title to the same through adverse possession. He sought a declaration that he had acquired title to the suit property through adverse possession together with costs of the suit. Kerubo died on 20th December, 2002 and the Plaintiff herein, **James Nyakundi Nyatuka** (hereinafter referred to as “**the Plaintiff**”) who was her eldest son was substituted on 20th March, 2003 as the Plaintiff in her place.
2. Sometimes on 22nd March, 2013, the defendant’s advocates on record, S. M. Sagwe & Co. Advocates filed in court what was referred to as “Notice of withdrawal from acting” in which he purported to notify the court and the advocates for the Plaintiff that he had ceased acting for the defendant on the grounds that the defendant could not be traced and that he had taken his file from their offices. The purported notice of withdrawal by the firm of S. M. Sagwe & Co. Advocates was un-procedural and lacked the force of law as no leave was sought from the court for the firm to cease acting. The Plaintiff’s advocates as expected ignored the same and listed this suit for hearing on 7th May, 2013. The defendant’s said advocates on record were duly served with a hearing notice and when the matter was called out, Mr. Ondari advocate appeared for the Plaintiff

while Mr. Sagwe, advocate appeared for the defendant. Mr. Sagwe however left the court room thereafter before the hearing of the matter commenced. After satisfying myself that the defendant's advocates aforesaid were duly served with a hearing notice, I allowed the hearing of the case to proceed in the absence of the defendant and his advocates. Before the hearing commenced, the Plaintiff's advocate applied for the Plaintiff to be amended so that the name of the original deceased Plaintiff, Nyamunoru Kerubo Nyatuka is substituted with that of, James Nyakundi Nyatuka, the present Plaintiff in accordance with the order of substitution that was made on 20th March, 2003 that I had referred to herein earlier. The Plaintiff's application was allowed by the court after which the hearing commenced. The Plaintiff gave evidence and called one witness. The Plaintiff's evidence was taken on 7th May, 2013 while the Plaintiff's witness's evidence was taken on 8th July, 2013 on which day the defendant and his advocates once again failed to attend court even after being notified of the hearing date.

3. In his testimony, the Plaintiff stated as follows. He stated that the suit property was registered in the name of his father and after the death of his father the same was registered in the name of his mother who is also deceased. He stated that in 1980, the defendant caused his now deceased mother (Kerubo) to be arrested and arraigned before Manga District Court. She was arrested on the allegation that the suit property does not belong to her. At that time, the Plaintiff and his said mother were residing on the suit property and the Plaintiff is residing thereon to date. He stated that the defendant has never occupied the suit property and that the defendant has no relationship with his father Nyatuka Mongare (Mongare). He stated that the defendant was not one of the sons of Mongare who had only three sons namely, MOSES NYATUKA, MJUMBE NYATUKA and the Plaintiff, JAMES NYATUKA. The Plaintiff stated that the defendant got registered as the proprietor of the suit property after the death of Mongare on the allegation that he was the only son of Mongare a fact which was not true because the Plaintiff and the defendant have no relationship. The Plaintiff stated that the suit property was initially registered in the name of Mongare before the defendant fraudulently caused himself to be registered as the proprietor thereof. The Plaintiff contended that the defendant had no right to be registered as proprietor of the suit property. The Plaintiff produced a copy of the extract of the register of the suit property in evidence as P. exhibit No. 1. The Plaintiff urged the court to order the suit property to be transferred back to the name of Mongare so that the heirs of Mongare can do succession and have the suit property transferred to their names. The Plaintiff stated that he was not aware of any succession that had been done regarding Mongare's estate. He contended that if the defendant did any succession in respect to the said estate the process was fraudulent since the Plaintiff and other heirs of Mongare were not involved. The Plaintiff stated that he was born in 1962 and Mongare died in 1970's. He denied that his mother sold the suit property to the defendant. He urged the court to grant the reliefs sought in the plaint.
4. The Plaintiff's witness was one, JEREMIAH MATOKE NYARANGI (hereinafter referred to only as "PW2"). He testified that he is a retired chief of West Mugirango location. He was employed as a chief on 1st December, 1984 and retired on 31st January, 1984. He testified that the parties to this suit are known to him. He stated that the Plaintiff is the son of Mongare and that Mongare had 3 sons, namely, MOSES NYATWANG'A NYATUKA deceased, JAMES NYAKUNDI NYATUKA, the plaintiff and MJUMBE NYARIBO NYATUKA. He stated that he is conversant with the suit property and that the same is occupied by the Plaintiff and MJUMBE NYARIBO. He testified that the defendant has never occupied the suit property. He testified that the original plaintiff, Kerubo who was the widow of Mongare had complained to him about the defendant who was disturbing her over the suit property. He stated that the Plaintiff herein was in fact arrested and imprisoned for 6 months for trespass. He testified that the defendant comes from his sub-location and that the defendant has no relationship of any nature with Mongare with whom they did not even share a clan. He stated that the defendant could not inherit the suit property that belonged to Mongare because they had no relationship of any nature. He reiterated that the defendant has never occupied the suit property and that he must have obtained title to the suit property fraudulently. In his view, the defendant must have used his power as a police boss to acquire the suit property forcefully. He stated that the suit property belongs to the Plaintiff and MJUMBE NYARIBO NYATUKA who are the surviving children of Mongare. He stated that the defendant has his own parcel of land in the neighborhood which he is occupying. The Plaintiff closed his case with the evidence of PW2. The Plaintiff's advocate informed the court that he

- wished to rely on the evidence on record and urged the court to enter judgment for the plaintiff as prayed in the plaint.
5. I have considered the Plaintiff's case as pleaded and the evidence on record. The Plaintiff's contention is that the suit property was at all material times registered in the name of the Plaintiff's father, Mongare and that after the death of Mongare, the defendant fraudulently presented himself as the sole heir of Mongare and had the suit property transferred to his name some times in the year 1980. A copy of the register for the suit property that was produced by the Plaintiff in evidence shows that the suit property was registered in the name of Mongare on 20th July, 1976 and that the same was transferred to the defendant on 8th April, 1980 through succession. The Plaintiff and PW2 testified that the defendant is not related to Mongare in any way and as such could not have been entitled to inherit the property of Mongare. The Plaintiff testified that he was not aware of the said succession proceedings in which the defendant acquired the suit property as none of the heirs of Mongare were involved. Both the Plaintiff and PW2 testified that the suit property is occupied by the Plaintiff and one of his brothers and that the defendant has never occupied the suit property. The Plaintiff and PW2 maintained that in the circumstances of this case the defendant could only have acquired title to the suit property fraudulently. The defendant did not adduce any evidence to controvert the evidence tendered by the Plaintiff and his witness. The defendant had contended in his defence and counter-claim that he had had acquired the suit property lawfully through purchase from the Plaintiff's mother, Kerubo on a willing seller willing buyer basis. The defendant did not however tender any evidence in proof the alleged agreement for sale between the defendant and the Plaintiff's mother. The defendant did not also adduce any evidence in proof of his alleged quiet occupation of the suit property from 1977 to date. I am satisfied from the evidence adduced by the Plaintiff that the defendant acquired the suit property fraudulently. There is no way through which the defendant who had no relationship of any nature with the Plaintiff's father Mongare could have acquired the suit property that was owned by Mongare as at the date of his death through succession save through fraud. Having reached a finding that the defendant had acquired the suit property that was registered in the name of Mongare, deceased fraudulently, the next issue to determine is whether the Plaintiff is entitled to the reliefs sought. As I have mentioned earlier, the Plaintiff is seeking a declaration that the defendant holds, the suit property in trust for the Plaintiff and an order directing the defendant to transfer the suit property to the Plaintiff. Since the suit property was owned by a deceased prior to its fraudulent acquisition by the defendant, I am unable to make a declaration that the defendant is holding the suit property in trust for the Plaintiff. The suit property is being held by the defendant in trust for the estate of Mongare and not the Plaintiff. For the same reason, I am unable to order the transfer of the suit property to the Plaintiff as the Plaintiff is not the administrator of the estate of Mongare.
 6. In conclusion, I would enter judgment for the Plaintiff against the defendant by declaring that the defendant holds the suit property in trust for the estate of NYATUKA MONGARE. I would order further that the defendant shall transfer the suit property namely LR. No. West Mugirango/Nyamaiya/624 to the administrator of the estate of the said NyatukaMongare once appointed by the court through succession proceedings. The defendant's counter-claim is dismissed. The Plaintiff shall have the costs of the suit and the counter-claim.

Delivered, dated and signed at KISII this 7th day of February, 2014.

S. OKONG'O

JUDGE

In the presence of:

Mr. Kaburi h/b Ondari for the Plaintiff

Mr. Sagwe for the Defendant

Mobisa Court clerk

S. OKONG'O

JUDGE