



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL CASE NO. 32 OF 2011

SABINA NAFULA NYONGESA..... PLAINTIFF

VERSUS

BELIDA SHIBUTSE WANYAMA DEFENDANT

JUDGMENT

1. The Plaintiff filed her suit by a plaint dated 21.4.2011 seeking for eviction orders to issue against the defendant, her agents, servants, heirs, children and anybody claiming through her and costs of the suit. The basis of her claim is that she is the registered owner of land parcel no. Ndivisi/Khalumuli/3209 hereinafter referred to as the “*suitland*.”
2. The Defendant has denied the Plaintiff's claim and filed a defence and counter-claim. It is the Defendants case that the plaintiff acquired registration of the suit property by means of fraud and pleaded the particulars of fraud at paragraph 4 of her defence. The defendant has also pleaded in paragraph 10, 13 and 16 of the counter-claim a claim for beneficial interest in the land. She asked the court to dismiss the Plaintiffs claim and enter judgment in her favour as contained in the counter-claim.
3. The Plaintiff testified before this court on 11th June 2013. She stated that she succeeded her husband Eliud Nyongesa – deceased as the administratrix and produced a copy of the Certificate of Confirmation of Grant as Pex. 1. Eliud Nyongesa was the registered proprietor of the Land title no Ndivisi/Khalumuli/939 from which the suit property was curved from.
4. Further evidence of the Plaintiff is that she had sued the Defendant in Webuye SRMCC No. 18 of 2010 and produced the judgment from that case as Pex. 3. The defendant appealed against that judgment vide Bungoma HCCA No. 20 of 2011 which appeal was dismissed as per the High Court judgment produced as pex. 4. The summary of this case was an order stopping the burial of the defendant’s husband on the suitland. Both courts ruled in favour of the plaintiff and issued permanent order of injunction stopping burial. According to the Plaintiff, the Defendant's husband Jestimore Wanyama – deceased had requested his bother Eliud Nyongesa – deceased to live on the suit property for a determined period. She did not indicate however the period this was but her case is, the Defendant has no rights over this land.
5. On cross-examination, she admitted her husband and the Defendant's husband were biological brothers. That their matrimonial home is in Kimilili. The suit property (originally L.R. Ndivisi/Khalumuli/939) was purchased from one Josam Sande in 1970. She has admitted the Defendant's husband built a house on this land and has lived on it with his family.
6. The Plaintiff denied the cows used to pay her dowry were given to her late husband by the Defendant’s husband on account of 1 ½ acres of the suitland. She did not include the Defendant in the list of beneficiaries when she filed the succession cause of her late husband's estate. She closed her case at this point.
7. The Defendant also testified on the same date and called two witnesses. She produced as Dex. 1 limited grant giving her authority to claim on behalf of her late husband. She produced the

- proceedings undertaken at Kakamega Land Disputes Tribunal as Dex. 3. Her evidence is that her husband died on 3rd February 2010 and has not been buried to date.
8. The Defendant avers they settled on the suitland in 1976 when they returned from Nakuru where her husband was working. She knew the suitland belonged to her mother-in-law who according to her bought it for the benefit of her three sons – her husband included. She placed a caution when the Plaintiff's husband wanted to sell the land fraudulently but does not know when and how this caution was removed
 9. According to the Defendant, there existed a boundary which divided her share of 1.5 acres of the suitland with that of the Plaintiff's 2.0 acres. She urged the court to order the suit property L.R. Ndivisi/Khalumuli/3209 to be registered into her name and also permission to bury her deceased husband on this parcel of land. She asked the court to dismiss the Plaintiff's suit with costs.
 10. During cross-examination by Mr. Omukunda for the plaintiff, she said her mother-in-law was never registered as owner of this land. She came to this land after her mother-in-law had passed on. The Defendant denied being sued by Eliud in CMCC No. 287 of 1993. She could not remember when Eliud removed the boundary.
 11. DW2 Kassim Wekesa Musebe is brother-in-law to both the Plaintiff and the Defendant. He confirmed his brother (Jestimore Wanyama) who died in February 2010 (Defendant's husband) has not been buried to date. His evidence is the land was bought by their mother who intended to share it between his three sons. Eliud was given 2 ½ acres while Jestimore got 1 acre. The land was registered in Eliud's name in trust for them as they were working away from home.
 12. DW2 also said Jestimore (Defendant's husband) paid dowry for the plaintiff in 1980 in exchange for ½ acre of the suitland. In cross examination, he stated his first house was built in Kimilili in his father's land. He was not present when his mother paid for the suit property. He did not get a share from the suit property as he had bought his own land.
 13. DW3 Walter Wasike Kijana testified that he was a nephew to the original owner Josam Sande who sold the land. According to him, the mother-in-law of the plaintiff and the Defendant called Agnes was the buyer. At the time Agnes was buying the land, she was accompanied by her 3 sons (Eliud, Jestimore and Kassim). That Agnes did not live on this land. He confirmed the Defendant came into the land in 1976.
 14. In cross examination, he said he was present when the land was sold but could not remember the purchase price. In his testimony, he states that DW2 was also present when the 1st payment was made. The defence case was closed at this stage.
 15. The court will determine whether or not the Plaintiff has proved her case within the required standards and also whether or not the Defendant has proved her counter-claim within the standards provided in law. I have considered the submissions filed and case law cited by both parties and will apply them in the body of the judgment.
 16. It is not in dispute that the Plaintiff got registered as owner of the suit property by way of transmission. Although the Defendant alleged fraud in her statement of defence filed, she did not endeavor to prove all the particulars pleaded except the one that she had acquired prescriptive rights over the land. It is also not in dispute that the defendant has been in physical occupation of the suit property over a long period of time. She justifies her occupation by virtue of a claim for beneficial interest.
 17. In his submission, Counsel for the Defendant rely on the provisions of sec. 28 of the Land Registration Act 2012 in laying claim to the beneficial interest by virtue of her marriage (spousal right) and customary trust. He cited case law of **Mukangu vs. Mbui [2004] KLR 633** which touched on the subject of customary trusts and **Arumba vs Mbega & Another (1988) KLR 121** which discussed the creation of constructive/resulting trusts.
 18. In Plaintiff ex. 3 and ex. 4, the lower and high court found for the Plaintiff and granted a permanent order of injunction restraining the Defendant from burying the remains of her late husband on this land. The Defendant did not file further appeal to challenge that judgment. It is unfortunate that up to the time she was testifying, the body had not been buried. However this matter is *res judicata* as it was already heard and determined by a court of competent jurisdiction. The Defendant cannot purport to ask this court to grant her permission to lay the remains of her late husband Jestimore Wanyama-deceased on the suitland. I will therefore not

- make any order touching on burial rights or otherwise.
19. At page 2 of pex.3 the trial court asked whether the Defendant had registrable rights in the suit property. The subordinate court found at page 4 (pex. 3) the Defendant was trying to lay claim on adverse possession. The court found such claim ought to have been filed in the High Court by way of originating summons. The High Court upheld this position at page 4 of Pex. 4 when the judge said **“on evaluation of the evidence of both parties, I find that the Respondent proved ownership of the land while the Appellant failed to prove any legal interest in the land.”**
 20. The Defendant in her evidence states that she ought to have been included in the list of beneficiaries of the estate of Eliud Nyongesa – deceased. During her testimony, she did not show any documentary evidence that she had commenced objections proceedings in the succession cause to establish her claim. To that extent, I will not determine whether she was a beneficiary of the estate of Eliud Nyongesa-deceased as provided under the Succession Act as this court lacks jurisdiction to do so.
 21. The Defendant at paragraph 6 of the defence pleads that *“... Having been in occupation of the land since 1976, the prayer for eviction is unavailable to the plaintiff”* and at par 16 in the counter-claim says *“It is the Defendant's case that she is entitled to L.R. No. Ndivisi/Khalumuli/3209 being the person in actual occupation and being the bonafide widow of the said Jestimore Wanyama – deceased who had a beneficial interest in the said land.”*
 22. The evidence clearly shows this was not ancestral land as it was purchased. The dispute is whether it was bought by Agnes (mother in-law) or the Plaintiff's husband. At one point the Defendant's evidence is that her late husband bought a piece of the suitland from Eliud by paying dowry (4 cows and 2000/=). DW2 testified the land was bought by their mother Agnes so the Defendant is entitled to a share. He was not present when his mother paid for the purchase price. DW3 on his part claim all the three sons of Agnes (mother) accompanied her when she went to make payments. This creates conflict as DW2 is categorical that he was absent. But this does not change the fact the late Eliud got himself registered as owner and somehow allowed his brother Jestimore to settle with him on the same parcel of land.
 23. The Defendant's evidence is being on the land since 1976. While the plaintiff in cross examination states the defendant came on the land in 1985. The Plaintiff states further the defendant's family built on the land with the consent of her husband. She does not disclose how long the defendant was to stay on the land. In 1993, the Plaintiff's husband Eliud Nyongesa-deceased is said to have taken the defendant to court seeking eviction. Nothing was told to this court of the status of that case but it must have abated by now, its plaintiff having passed on over a year ago.
 24. The defendant also sued the Plaintiff before Tribunal sitting at Webuye but it seems that the Defendant did not have the decision of the Tribunal (Dex.3) adopted as an order of court. Therefore producing the proceedings does not add any value to her case.
 25. Submission put by the defence that the defendant acquired interest in the suitland by virtue of being a widow of Jestimore who was not the registered owner of the suit proper is a proposition unknown in law. In my view, the fact that the defendant has been living on this land by itself gives her right to claim for prescriptive rights. In **Mukangu vs. Mbui supra page 623** although in **holding No. 3**, the Court of Appeal stated that customary rights are subject to rights under written law and are excluded under the clear provisions of sections 27 & 28 of the Registered Land Act. In the same vein at **holding no 4**, the same court said that the same registration recognized trusts in general terms without excluding trusts under customary law. **In no 5**, the Court of Appeal stated that **“a trust arose from possession and occupation of the land by Gerald.”**
 26. In **Arumba vs Mbega & Ano supra**, the Court of Appeal stated that *“in circumstances of the delay of the Respondents in bringing their claim to the land against the Appellant, and in a further seven years in counter-claiming for his eviction after he case was filed it would be unconscionable to throw the appellant off the land, considering that the appellant's father did nothing on the land itself.”* The Court proceeded to find that the heirs of the deceased vendor held the land on a resulting trust for the appellant and themselves in common.
 27. I find the circumstances in both Mukangu and Arumba cases applicable in the present case. The Plaintiff admitted the defendant settled on the land in 1985 although defence evidence indicated

1976. Eliud's rights and subsequently the Plaintiffs rights over the suitland were obviously extinguished on the lapse of 12 years and the defendant acquired prescriptive rights over the same land. Further, the length of occupation of the land by the defendant and the relationship existing between the parties herein created customary trust which this court cannot ignore.
28. Although the Plaintiff holds title to the suit property, I find that she is holding the title in trust for the benefit of the Defendant who has lived on this land since 1976. It would be unconscionable to grant an eviction order against the defendant. I therefore dismiss the Plaintiff's suit. I have searched for prayers in the counter-claim but find none I can grant. I will therefore end at making the findings in par 27 above.
29. I am alive to the decision given by court in Pex4 but I point out that court shares concurrent jurisdiction with this one. I am therefore not bound by its finding in confirming the plaintiffs as owners of the suit land.
30. Given the relationship between the Defendant and the Plaintiff, each party will bear their cost of the suit.

DATED, SIGNED and DELIVERED in open court this 3rd day of March 2014

A. OMOLLO

JUDGE.