



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

ELC. NO. 23 OF 2014 (FORMERLY H C.C. 79 OF 2011)

ANNE OLAWO KIMARU:::::::::::::::::::::::::::::::::PLAINTIFF

VERSUS

NICHOLAS MAYERI OKOMBO

JOHN P. OTHIENO:::::::::::::::::::::::::::::::::DEFENDANTS.

J U D G M E N T.

ANNE OLAWO KIMARU, hereinafter referred to as the Plaintiff, commenced this suit against Nicholas Mayeri Okombo and John P. Othieno, hereinafter referred to as 1st and 2nd Defendant respectively through the originating summons dated 29.10.2011, filed through M/S. Balongo & co. Advocates. Through the directions issued on 10.7.2012, the originating summons and supporting affidavit were taken as the plaint and the replying affidavit filed by Defendants was taken as the defence.

PLAINTIFF'S AVERMENTS.

1. That her late husband purchased land parcel Bukhayo/Mundika/1852 in 1977 and that they took possession immediately thereafter.
2. That her husband James Kimaru Kiptembur died in 1993 and she has been appointed the administrator of his estate.
3. That in 2008 the Defendant forcefully entered into the land and cut down the trees alleging he was the registered owner of the land.
4. That she later established that the land had been subdivided into parcels Bukhayo/Mundika/6797 and 6798 but the subdivision had not been captured in the survey map that she subsequently obtained from Kakamega survey office.
5. That the Defendants title to the land should be extinguished and she be registered as proprietor as she has occupied the land for over 30 years.
6. That the subdivision done on the parcel should be revoked and Defendant made to pay costs of this suit.

The Defendants filed their replying affidavit sworn on 9.01.2012 that is now taken to be their defence, through M/S. Fwaya Advocates.

DEFENDANTS' AVERMENTS:

1. That they jointly bought one acre of land from Bukhayo/Mundika/1564 in 1974 and after

- subdivision, the one acre become parcel Bukhayo/Mundika/1852 and was registered with 1st Defendant.
2. That subsequently the 1st Defendant subdivided the parcel into two portions and transferred one to the 2nd Defendant .
 3. That none of the Defendants has ever sold land to the Plaintiff.
 4. That the Plaintiff has never resided or been in occupation of the suit land.
 5. That the Defendant's mother never sold any land to Plaintiff.
 6. That the Defendants mother was not known as Nakhayo Omilo or Getrude.
 7. That Defendant are not the administrators of their late mothers estates.

SUMMARY OF PLAINTIFF'S EVIDENCE

1. That she married James Kimaru in 1979 and stayed in a rented house though her late husband had bought land before he died in 1988.
2. That in 2008, she filed Busia Succession Cause No. 215 of 2008 and was appointed administrator of her late husband's estate.
3. That her late husband had bought Bukhayo/Mundika/1852 from a neighbor called Wanjala in 1977, and her late husband's brothers and herself witnessed the transaction and the land was subsequently registered in her husband's names.
4. That her late husband dug the pit for a latrine and had building materials delivered to the land before he died.
5. That Plaintiff has been cultivating on the land growing food crops and trees.
6. That 1st Defendant whose, wife was teaching in the same school with the Plaintiff, interfered with the land after he came from Uganda.
7. That Defendants do not use the suit land.
8. That she does not know parcels Bukhayo/Mundika/8914 and 8915 which Defendants are claiming.
9. That Plaintiff has never seen the sale agreement under which her late husband bought the suit land from Michael Wanjala in 1977 and does not also know the purchase price.
10. That Plaintiff has had several cases relating to the suit land since 2007.

SUMMARY OF DEFENDANTS EVIDENCE.

1. That both Defendants wanted to own plots near the town and in 1974 they bought one acre out of Bukhayo/Mundika/165 from Michael Wanjala, Alex Barasa and Charles Maende.
2. That after completing paying the purchase price, the land was subdivided creating parcel 1564 among others. That Parcel 1564 was subsequently subdivided into parcel 1851 to 1854 and parcel 1852 transferred to 1st Defendant on 28.2.1977.
3. That the Defendants later subdivided parcel 1852 into parcels numbers 6797 and 6798 which parcels were subsequently renumbered 8914 and 8915 respectively.
4. That parcel 8914 was registered in the names of the 1st Defendant and parcel 8915 in the names of 2nd Defendant.
5. That the land was virgin when the Defendants bought it in 1974 and after clearing it they started cultivating on it.
6. That in 2008, the Plaintiff had claimed ownership of the land before the Chief who gave her two weeks to avail supporting documents but did not do so.
7. That the matter was subsequently taken to the Land Control Board and the Plaintiff's claim was dismissed.
8. That Plaintiff had cut some euphorbia trees on the land in 2008 and had some holes dug on the land but has never resided on it.
9. That Plaintiff had deposited some building stones and sand and dug foundation in 2010 when this case was pending in court in 2010.
10. That Plaintiff has not planted any trees on the land and that she had fenced it

after the court visit in relation on H.C.C.C. No. 9 of 2011.

CONCLUSIONS.

1. That according to the copy of the register for parcel Bukhayo/Mundika/1852 produced by the Defendants, that parcel was created from the subdivision of Bukhayo/Mundika/1564.
2. That parcel Bukhayo/Mundika/1852 was initially registered in the names of Michael Wanjala , Alex Barasa and Charles Maende on 23.12.1977 and subsequently transferred to the names of Nicholas Kombo (1st Defendant) on 28.12.1977.
3. That parcels Bukhayo/Mundika/1852 was subdivided and register closed on 15.2.2000 to create parcels Bukhayo/Mundika/6797 and 6798 which were later renumbered 8914 and 8915 respectively for reasons that those numbers had already been given to other parcels as explained by DW 1.
4. That Alex Barasa testified as DW 3 and confirmed that his two brothers and himself had transferred land parcel Bukhayo/Mundika/1852 to 1st Defendant and they had had not sold any land to the Plaintiff.
5. That from the evidence availed, the Plaintiff has never resided on the suit land but has been using portions of it from either, 2008 or 2010. This clearly shows she has not been in exclusive use of the suit land for a period exceeding twelve (12) years as claimed and the remedy of prescription is not available to her.
6. That land parcel Bukhayo/Mundika/1852 ceased to exist on 15.2.2000 when its register was closed upon subdivision to create parcel 6797 and 6798 which were later renumbered 8914 and 8915. That when the Plaintiff filed her originating summons dated 29.10.2011, the suit land described in the pleadings did not exist. Also parcels 6797 and 6798 did not exist as they had been renumbered as parcel 8914 and 8915 respectively. That the Plaintiff did not move the court to amend the description of the parcels of land she was claiming to reflect the current parcel references.
7. That even though Plaintiff claimed that her late husband had bought the land described as Bukhayo/Mundika/1852 and that her late husband had been registered as proprietor of that land , she did not avail the land sale agreement or any document to confirm her claim. As the Defendants have availed documentary evidence that they were the owners of Bukhayo/Mundika/1852 and the two parcels subsequently subdivided from that parcel, the court therefore finds that the Plaintiff has failed to prove that the suit land belonged to her late husband or herself.
8. That the Plaintiff has also not availed a copy of the grant to support her claim that she is the administratrix of her late husband's estate. Even if she had provided such a grant, she has also failed to show that the land parcel Bukhayo/Mundika/1852 or any of the portions created from it after subdivision were parts of the estate of her late husband in view of the evidence adduced by DW 1, DW 2 and DW 3.
9. That the Plaintiff in her evidence as PW 1 and during cross examination disowned parts of the contents of her supporting affidavit sworn on 29.11.2011 in support of the originating summons. She also denied signing the said affidavit which would mean the originating summons filed herein is without a supporting affidavit. Order 37 Rule 7(2) of Civil Procedure Rules states:

“ 7 (2) The summons shall be supported by an affidavit in which a certified extract of the title to the land in question has been annexed”.

The effect of the Plaintiff disowning the supporting affidavit leaves the originating summons without the basis on which it is supposed to be based. The originating summons is therefore not properly before the court and is struck out.

That for reasons set out above, the Plaintiff has failed to establish her claim against Defendants on a balance of probabilities and the suit is dismissed with costs.

It is so ordered.

S. M. KIBUNJA,

JUDGE.

DATED AND DELIVERED ON 9TH DAY OF JULY, 2014.

IN THE PRESENCE OF;

JUDGE.