



REPUBLIC OF KENYA

High Court of Kisii

Civil Case 116 of 2010

PACIFICA MORAA ONKUNDI PLAINTIFF

VERSUS

JOSEPH NYABASA ONDARA 1ST DEFENDANT

ANNA BOSIBORI NYABASA 2ND DEFENDANT

JUDGMENT

The pleadings

1. By a plaint dated 26th April 2010 the plaintiff seeks the following relief against the defendants jointly and severally:-

- a) *An order of eviction evicting the defendants from parcel of land Kineni Scheme/Block 1/61.*
- b) *Costs of the suit.*
- c) *Any other relief this Honourable court may deem fit and just to grant.*

2. The plaintiff's case as stated in the plaint is that she is the registered owner of a parcel of land known as Kineni Settlement scheme/Block 1/61 (hereinafter referred to as the suit land). That the 1st and 2nd defendants who are husband and wife are the plaintiff's son-in-law and daughter in-law respectively.

3. She further stated that in the year 2002 she permitted the 2nd defendant to use a portion of the suit land temporarily as she recovered from illness but contrary to the said permission, the defendants built a homestead in the year 2008 and settled in the suit land, hence these proceedings.

4. The defendants on their part filed their written statement of defence on 19th May 2010 stating that they occupied the suit land in the year 1982 and not the year 2002 or 2005; they further stated that they bought a portion measuring 4 acres out of the suit land from the plaintiff's husband (one Onkundi Ogeto now deceased) and counterclaimed 5 cares from the suit land against the plaintiff.

5. In a reply to the above defence and counterclaim dated 26th May 2010, the plaintiff denied that there was such sale agreement between the plaintiff's deceased husband and the defendants as alleged or at all.

6. When the parties came to court for hearing, the plaintiff donated a Power of Attorney to her agent

(her son one Charles Ogeto Onkundi).

the plaintiff's case

7. The said Charles Ogeto Onkundi who testified as PW1 testified to the following facts:-

- *That the plaintiff was his mother. She had 4 sons and 8 daughters. The 2nd defendant was her real sister while the 1st defendant was his brother in-law.*
- *The suit land is in the name of the plaintiff. He produced the title of the suit land which was marked as **P. Exhibit 2**.*
- *In the year 2002, the 2nd defendant fell ill, the plaintiff took her to hospital and after she was discharged the plaintiff took the 2nd defendant to the suit land and gave her 1 acre of the suit land to cultivate while she recovered from illness.*
- *After 3 years, the 2nd defendant brought the 1st defendant to the suit land and she then (2nd defendant) took possession of some other 8 acres which form part of the suit land and built her home there without the plaintiff's permission.*
- *Attempts to resolve the land dispute at home proved futile thus the plaintiff filed this case.*
- *The 2nd defendant has her own home at Bosamaro.*
- *The 2nd defendant's averment that she bought the suit land from his deceased father is not true as the suit land was only transferred to the plaintiff after succession.*
- *That during succession cause the defendants never raised any objection and have never pursued the title deed of the alleged 4 acres.*

He concluded his evidence by producing a certificate of confirmation of grant in the name of the plaintiff.

8. On cross examination, PW1 testified that the plaintiff was the deceased's 1st wife and has 12 children, the 2nd house had 5 children while the 3rd house had 12 children. The plaintiff's house was given 20 acres, the 2nd house was also given 20 acres while the 3rd house was given 34 acres. That all have a share to the land but none has a title.

9. On re-examination, PW1 stated that the plaintiff wants to issue the title after the two defendants have vacated, the beacons set by his deceased father are clear on the ground and that the plaintiff will issue title according to his deceased father's wishes.

The Defendants' case

10. The 2nd defendant was the sole witness for the defence. She testified to the following facts:-

§ *She confirmed the plaintiff was her mother, the 1st defendant was her husband, she was married to the 1st defendant in 1960 and her deceased father bought the suit land and upon his demise the plot was registered in plaintiff's name.*

§ *That her brothers, one of her sisters and herself live on the suit land, and only came to stay in the suit land after her deceased father called her and asked her for survey fees to enable him subdivide her land. She gave him the money after which he gave her a portion of the suit land in the year 1978 after which she took possession put up a home and planted trees.*

11. On cross examination DW1 stated that she gave her deceased father Kshs.30,000/= for the land, she came to find out that the plaintiff had taken succession cause later on and she did not file any objection. That she was claiming the suit portion of land as a buyer having paid Kshs.40,000/= though the purchase price was Kshs.15,000/= for 5¹/₂ acres (Five and a half acres). There were no witnesses to the agreement allegedly entered into between herself and her father and she was not taken to the Land Board for consent.

Issues of determination

§ *Was there a valid sale agreement between the plaintiff's deceased husband and the 2nd defendant over a portion of the suit land?*

§ *Can the defendants be evicted from the suit land?*

§ *Can this case be decided on the doctrine of adverse possession?*

12. With regard to the first issue, the 2nd defendant did not adduce any evidence to support her claim that she had bought land from the plaintiff's deceased husband. This was evident during cross-examination as she did not know how much she paid for the portion of the suit land she occupied nor was she sure of the actual acreage of the land she bought from her father. In the circumstances, I have reached the conclusion that there was no sale agreement between the plaintiff's deceased husband and the 2nd defendant.

13. With regard to the issue as to whether the defendants can be evicted from the suit property, it is an undisputed fact that the plaintiff's deceased husband was the father of the 2nd defendant and the plaintiff is the mother to the 2nd defendant. The plaintiff obtained confirmation of grant to the estate of her deceased husband (which is in this case is the suit land). This therefore means that the plaintiff holds the title to the suit land in trust for the benefit of the deceased's dependants/beneficiaries.

14. **Section 29 (a)** of the **Law of Succession Act** defines a dependant as:

a) The wife or wives or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death."

15. The 2nd defendant as a daughter to the plaintiff's deceased husband therefore qualifies as a dependant of the deceased.

16. Section 40 of the Law of Succession Act stipulates that:-

"Where an intestate has married more than once under any system of

law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses, according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children."

17. The Constitution of Kenya 2010 addresses the issue of land in Chapter Five Article 60 (1) to the effect that:-

"Land in Kenya shall be held, used and managed in a manner that is

equitable, efficient, productive and sustainable and in accordance with the following principles –

(f) Elimination of gender discrimination in law, customs

and practices related to land and property in land.”

18. On evaluation of all the above evidence and the law applicable, the plaintiff’s prayer for eviction of the defendants cannot be granted as the 2nd defendant is a daughter of the plaintiff’s deceased husband even though married. The law allows her to get a share of her father’s estate.

19. Finally, there is the question of adverse possession which was raised by the defendants during submissions. Counsel for the defendants submitted that the claim for adverse possession can be inferred from a reaching of the entire defence and counterclaim and in particular paragraph 4 of the Statement of Defence for both Defendants which reads:-

“4. The defendants deny that it is in the year 2002 that the plaintiff

allowed the 2nd defendant to cultivate a portion of suit land and that it is in the year 2005 that she invited the 1st defendant to join her and/or constructed a homestead; but shall aver that they have been in occupation of the suit land since 1982 or thereabouts having bought the same from the husband of the plaintiff one ONKUNDI OGETO now deceased long before the deceased and other shareholders of KINENI FARMERS’ CO-OPERATIVE SOCIETY LTD had their respective titles transferred to them although they had been allotted their respective portions and unfortunately the said deceased died before transferring the said portions to the defendants.”

20. The submission by counsel for the defendants on this issue of adverse possession was vehemently opposed by the plaintiff’s counsel in grounds:- **(a)** that the claim for adverse possession was neither pleaded nor prayed for in the counter claim; **(b)** that the defendants did not comply with the provisions of **Order 37 rule 7** of the **Civil Procedure Rules 2010**, which require a claim for adverse possession to be commenced by way of Originating Summons and **(c)** that even if the defendants had pleaded and prayed for adverse possession and also introduced their claim by way of Originating Summons, they have not proved/demonstrated that they have been in continuous and exclusive possession of the suit land for over 12 years.

21. After carefully considering the law and the facts that have been placed before me, I am not persuaded that the defendants were serious when they brought up this claim during submissions. The law does not permit such a course of action. I agree with counsel for the plaintiff that this claim is misplaced and has no legs to stand on. The defence argument is accordingly rejected.

22. In the final analysis, I hereby dismiss the plaintiff’s claim for eviction. I also dismiss the defendants’ counter claim based on a purported purchase by the 2nd defendant of 4 acres out of the suit land as there was no evidence to that effect. I however find that as a child of the deceased ONKUNDI OGETO, the 2nd defendant is entitled to a share of her father’s estate. The plaintiff is directed to give a share of the suit land to the 2nd defendant as she distributes the share of the suit land for her house among her children.

23. I make no order as to costs of this suit.

24. It is so ordered.

Dated and delivered at Kisii this 09th day of May, 2013

RUTH NEKOYE SITATI
JUDGE.

In the presence of:

Mrs. Sagwa h/b for Mrs. Asati (present) for Plaintiff

Mr. Soire (present) for 1st and 2nd defendants

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI
JUDGE.