



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**ELC CASE NO. 397 OF 2012**

**(FORMERLY HCC 185 OF 2007)**

**HOSEA K. KOSGEL.....PLAINTIFF**

**VERSUS**

**PETER KIPROP ARAP MASE.....1<sup>ST</sup> DEFENDANT**

**JOHN KIPKOECH TEGA.....2<sup>ND</sup> DEFENDANT**

**STEPHEN KIPKURUI NGETICH.....3<sup>RD</sup> DEFENDANT**

**JUDGEMENT**

1. By a plaint dated 12<sup>th</sup> November 2007 and filed on 15<sup>th</sup> November 2007, the Plaintiff sought the following reliefs against the Defendants;
  - a. *A permanent injunction do issue against the Defendants jointly and severally restraining them from disposing an interest in Nandi/Kombe/871 - 875 either by way of sale, transfer and or sub-division pending the hearing and final disposal of this suit.*
  - b. *The restriction placed by the Land Registrar on the instructions of the District Officer Kapsabet Division on 22<sup>nd</sup> December 2006 be removed and the register rectified by removing the names of the 3<sup>rd</sup> Defendant and the minor and registering thereon the Plaintiff.*
  - c. *The sub-division of title No. Nandi/Kombe/830 and the issuance of new titles as Nandi/Kombe/871 - 875 be declared a nullity and recalled by court to be cancelled.*
  - d. *In the alternative, the Plaintiff be declared proprietor by adverse possession.*
  - e. *Costs of the suit.*
2. It was pleaded that the Plaintiff was the son of the 1<sup>st</sup> Defendant who was at some point the registered owner of *Title No. Nandi/Kombe/830* (hereinafter *parcel 830*) which was previously part of *Title No. Nandi/Kombe/510* (hereinafter *parcel 510*).
3. The Plaintiff further pleaded that the 1<sup>st</sup> Defendant had initially sub-divided parcel No. 510 and sold it to various persons named in paragraph 5 of the plaint and utilized the proceeds of sale to purchase another parcel of land in Trans-Nzoia County where he allegedly settled with his 2<sup>nd</sup> wife.
4. The Plaintiff further pleaded that the remainder of the 1<sup>st</sup> Defendant's land, that is, parcel No 830 therefore rightfully belonged to the 1<sup>st</sup> wife who was the Plaintiff's mother. The Plaintiff further contended that he was entitled to inherit parcel No. 830 as a son of the 1<sup>st</sup> wife.
5. The Plaintiff's main grievance was that the 1<sup>st</sup> Defendant had sub-divided the said parcel No. 830 into 5 parcels and sold off some of the resultant parcels to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and that some elders had resolved that the Plaintiff was entitled to one of the parcels namely *Title No. Nandi/Kombe/875* (hereinafter *parcel No. 875*) as his inheritance.
6. The Plaintiff finally pleaded that the 1<sup>st</sup> Defendant's registration as proprietor of parcel No. 830 was in trust for the entire family and future generations and that he was entitled to an inheritance under Nandi customary law.

7. The 1<sup>st</sup> Defendant filed a statement of defence dated 18<sup>th</sup> September 2008 in which he denied the Plaintiff's claim in its entirety. He pleaded that he was the absolute registered owner of parcel No. 830. It was his defence that the issue of inheritance under Nandi customary law could not arise since he was still alive and that any claims under customary law were not overriding interests under the **Registered Land Act** (now repealed) which was then in force. He pleaded that the plaintiff did not disclose a cause of action against him.

8. The 2<sup>nd</sup> Defendant filed a statement of defence dated 17<sup>th</sup> September 2008 in which he denied the Plaintiff's claim. He pleaded that he was aware that at all material times the 1<sup>st</sup> Defendant was the registered owner of parcel No. 830 and that upon sub-division he lawfully acquired the resultant parcel Nos. 872 and 873 as absolute owner under the **Registered Land Act** (now repealed).

9. The 3<sup>rd</sup> Defendant filed a statement of defence on 18<sup>th</sup> September 2008 in which he denied the Plaintiff's claim in its entirety. He pleaded that he was jointly registered as proprietor of parcel No 871 together with one Kipkoech Kosgei who was no longer a minor. He pleaded that the suit did not disclose any reasonable cause of action against him and threatened to raise a preliminary objection to the suit.

10. When this suit was set down for hearing on 27<sup>th</sup> November 2018, neither the Defendants nor their Advocates attended court. The court, therefore, proceeded to hear the Plaintiff's case in the absence of the Defendants.

11. At the trial hereof, the Plaintiff testified on his own behalf and called one more witness. The Plaintiff simply adopted his witness statement dated 16<sup>th</sup> March 2017 as his sworn testimony after which he produced the documents listed in his list of documents dated 1<sup>st</sup> November 2018 as exhibits. The Plaintiff's witness, Henry Kirwa, similarly adopted his witness statement dated 16<sup>th</sup> March 2017 as his sworn testimony.

12. The court has considered the pleadings, the documents, the evidence and submissions on record in this matter. The court is of the view that the following issues arise for determination in this suit;

- a. Whether the Plaintiff has a reasonable cause of action against the 1<sup>st</sup> Defendant.
- b. Whether the Plaintiff has demonstrated a basis for cancellation of the sub-division of parcel No. 830 and the issuance of new titles for parcel Nos. 871 – 875.
- c. Whether the Plaintiff has demonstrated his claim for adverse possession.
- d. Whether the Plaintiff is entitled to the reliefs sought in the plaint or any one of them.
- e. Who shall bear the costs of the suit.

13. The court has considered the entire evidence on record on the 1<sup>st</sup> issue. The Plaintiff's claim is based on the fact that as an adopted son of the 1<sup>st</sup> Defendant he is entitled to inherit a share of the land due to the 1<sup>st</sup> wife of the 1<sup>st</sup> Defendant under Nandi customary law. The court is not satisfied that the Plaintiff has a reasonable cause of action against the 1<sup>st</sup> Defendant in his claim for the following reasons. First, the court was informed that the 1<sup>st</sup> Defendant is long deceased. Although the Plaintiff had reportedly taken out letters of administration for his estate, no application for substitution was undertaken within one year of his death or at all. The consequence of this is that the suit against the 1<sup>st</sup> Defendant abated automatically by operation of law under **Order 24 Rule 4 of the Civil Procedure Rules**.

14. The second reason why the claim against the 1<sup>st</sup> Defendant is not tenable in respect of the parcels which were registered in his name is that upon his death, the administration of his estate fell within the regime of the **Law of Succession Act (Cap 160)**. The administration and distribution of the deceased's estate would, therefore, be within the sole jurisdiction of the succession court. At the trial hereof, the Plaintiff's counsel informed the court from the bar that upon taking out letters of administration the Plaintiff had obtained registration of some of the parcels in dispute.

15. The third reason why the Plaintiff's claim is not tenable is that whereas he is claiming the entire land which was comprised in parcel No. 830 measuring about 20 acres, by his own pleading and admission in paragraph 9 of the plaint, he stated that his inheritance was parcel No. 875 measuring about 1.2 ha. He pleaded in paragraph 9 of the plaint thus;

*“9. The elders ruled that L.R. No Nandi/Kombe/875 registered in the names of the 1<sup>st</sup> Defendant be transferred to the Plaintiff as his lawful entitlement under Nandi customary law of land inheritance.”*

16. In view of such a state of pleading, it was not explained or demonstrated why the Plaintiff would be entitled to 20 acres as opposed to the 1.2 ha which the elders had resolved to be due to him under Nandi customary law.

17. The 2<sup>nd</sup> issue is whether the Plaintiff has made out a case for cancellation of the sub-division of parcel No. 830 and cancellation of the titles issued to the new titles for parcel Nos. 871 – 875. The court has considered the pleadings, evidence and the submissions on record on this issue.

18. The cancellation of titles is governed by the provisions of **section 26 of the Land Registration Act, 2012** which states as follows;

**“26 (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the**

land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except –

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the seal of the Registrar, shall be received in evidence in the same manner as the original.

19. The court has noted that the Plaintiff did not plead and provide any particulars of fraud or misrepresentation against the Defendants in the plaint. It was also not pleaded that the certificates of title issued to the Defendants were procured through a corrupt scheme and no particulars of such corruption were given. The allegation of corruption contained in the witness statement of Henry Kirwa Sugut is, therefore, not admissible. The court consequently finds no basis for cancellation of title has been demonstrated within the meaning of **section 26 (1) of the Land Registration Act 2012**.

20. The Plaintiff also sought an order for rectification of the land register to have the name of the 3<sup>rd</sup> Defendant removed and to have it substituted with his own name. The relevant provision of the law dealing with rectification of the register is **section 80 of the Land Registration Act, 2012**. It states as follows;

**“80 (1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.**

**(2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake in consequence of which rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.**

21. The record shows that the Plaintiff did not plead that the Defendants’ registration was obtained by fraud or mistake. No particulars of fraud or mistake were pleaded in the plaint and neither was it pleaded that the 3<sup>rd</sup> Defendant was privy thereto or substantially contributed thereto. In the circumstances, the court finds no basis for making an order for rectification of the register.

22. The 3<sup>rd</sup> issue is whether the Plaintiff has demonstrated his claim for adverse possession. The Plaintiff did not adduce any evidence in support of his claim for adverse possession. It was not demonstrated that he had been in occupation of the various suit properties for the statutory minimum period of 12 years and in a manner adverse to the title of the true owners. It is doubtful if as an adopted son of the 1<sup>st</sup> Defendant he was in occupation of the suit properties without the consent or permission of the registered owner. The court is thus not satisfied that the Plaintiff has proved the elements of adverse possession as required by law. See **Kasuve Vs Mwaani Investments Ltd & 4 others [2004] 1 KLR 184**.

23. The 4<sup>th</sup> issue is whether the Plaintiff is entitled to the reliefs sought in the plaint. The court has found that the Plaintiff has no reasonable cause of action against the 1<sup>st</sup> Defendant. It has also found that he has failed to demonstrate a basis for cancellation of titles or rectification of the land register. The court has found that the Plaintiff has failed to demonstrate his claim for adverse possession. It would, therefore, follow that the Plaintiff is not entitled to the reliefs sought in the plaint or any of them.

24. The 5<sup>th</sup> and final issue is on costs of the suit. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event. **See section 27 of the Civil Procedure Act (Cap 21)**. As such, a successful litigant should normally be awarded the costs of the suit unless, for good reason, the court directs otherwise. See **Hussein Jannohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court has noted that the suit against the 1<sup>st</sup> Defendant has abated by operation of law and that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants did not participate at the trial hereof. The court is of the view that each party should bear his own costs.

25. The upshot of the foregoing is that the court finds no merit in the Plaintiff’s suit. Accordingly, the same is hereby dismissed. Each party to bear his own costs.

26. It is so decided.

**JUDGEMENT DATED, SIGNED and DELIVERED in open court at ELDORET this 24<sup>TH</sup> day of JANUARY, 2019.**

**In the absence of the absence of the Plaintiff and the Defendant.**

**Court clerk EMMANUEL**

**Y.M. ANGIMA**

**JUDGE**

**24.01.19**