



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MIGORI

ELC CASE NO. 618 OF 2017

(Formerly Kisii ELC case no. 459 of 2014)

GEORGE ODHIAMBO KENYE.....1ST PLAINTIFF

SYMON OCHIENG OYIGO.....2ND PLAINTIFF

VERSUS

ABIGAEL AKATCH AMARA.....DEFENDANT

JUDGMENT

1. By a plaint dated 5th March 2014 and filed on 27th November 2014, the plaintiffs who are represented by learned counsel, Mr. Agure Odero of M/s Agure Odero and Company Advocates have sued the defendant for :-

a) Deregistration of LR NO. NORTH SAKWA/KADERA LWALA/143 measuring 3.307 hectare in the names of Abigael Aketch Amara and be registered wholly in the joint names of George Odhiambo Kenye and Symon Ochieng Oyigo.

b) Permanent injunction restraining the defendant either by herself, agents, servants or anyone claiming under the defendant from interfering, trespassing, cultivating, interfering or any manner with the suit land LR NO. NORTH SAKWA/KADERA LWALA/143.

c) Costs of the suit.

d) Any other relief court shall deem fit to grant.

2. The gist of the plaintiffs' claim is that the suit land, LR NO North Sakwa Kadera/Lwala/143 measuring approximately 3.3 hectares was initially jointly owned by Jeremiah Oyigo Onyuowa and Kristo Muga Onyuowa (both deceased) who were brothers. That the family of the late Jeremiah Oyigo Onyuowa was constituted of himself, his wife Rosabela Ngoye Oyigo (deceased) his son Joshua Oluoch Oyigo (Deceased) and his daughter (the defendant) who is married at Kamagambo in Migori county. That the Government of Kenya had acquired a portion measuring 0.093 acres vide Gazette Notice No. 2741 dated 21st September 1979 leaving out the suit land which was to be shared equally between the said two deceased joint owners.

3. The plaintiff claims further that on 16th November 2006, the defendant colluded with the Land Registry and without the consent of the families of the said two deceased joint owners of the suit land, fraudulently transferred it to her own name. That the defendant deprived the plaintiff's family of the right to cultivate, live or use the land and planned to evict the family from the land. On 19th September 2012, Zablon O. Otieno, chief North East Sakwa Location compiled history of the suit land and made a report to District Commissioner, Awendo of the defendant's conduct thus it provoked the instant suit.

4. The defendant was duly served on 24/12/2014 as shown on the affidavit of service sworn on 12th January 2015 by a duly licensed process server namely Julius Juma Otindo. The defendant failed to enter appearance or file a statement of defence within the prescribed period of time or at all.

5. To that extent, hearing of the suit proceeded on 25/3/2019 and the 1st plaintiff (PW1) testified in support of her claim. PW1 relied on a list of documents dated 5th March 2014 namely :-

a) Copy of green card covering the period between 2nd April,1980 and 27th December 2012 in respect of the suit land (PExhibit 1)

b) Official Searches of the land (PExhibit 2).

c) Letters or correspondence dated 27th August 2013 and 19th September 2012 (PExhibit 3 (a) and (b)).

6. Learned counsel for the plaintiffs submitted briefly and orally. Counsel relied on the plaint and evidence of PW1 including PExhibits 1 to 3 (b).

7. I have studied the entire plaint, the evidence of PW1 and the brief oral submissions in support of the plaintiffs' claim. The issues for determination are as follows :-

a) Is the defendant the registered proprietor of suit land?

b) Was the title to the land obtained by the defendant through fraud or mistake?

c) Are the plaintiffs entitled to the reliefs sought in the plaint?

8. Notably, PW1 testified as follows:-

“ I rely on our respective statements as our evidence in this suit in relation to the suit in relation land, LR NO. North Sakwa/Kadera Lwala /143 measuring 3.30 hectares in area”

9. In his verifying affidavit sworn on 5th March 2014, PW1 stated that he had authority to plead and swear affidavit on behalf of 2nd defendant.

10. It is quite clear from PExhibit 1 that the defendant was registered as proprietor of the land on 16th November 2006. She collected the title to the land on 17th November 2006.

11. PExhibit 2 reveals that PW1 is the registered proprietor of the suit land. In the case of **Wainaina –v- Murai and another (1976-80) 1 KLR 283 at 289** and 290, it was observed that the land in question was registered under the repealed Registered Land Act (Cap 300 Law of Kenya). In the instant case PW1 is the registered proprietor of the suit land under the repealed Act.

12. This court is conscious of the definition of the term “**Legal representative**” under **Section 2 of the Civil Procedure Act (Cap 21 Laws of Kenya)**. I note **Section 79 of the Laws of Succession Act (Cap 160 Laws of Kenya)** and the case of **Trouistik Union International and another –v- Mbeyu and another (1993) eKLR** that the estate of the deceased person is vested in the legal representative.

13. In the instant matter, it is alleged that the defendant obtained grant of letters of administration in respect of the estate of Kristo Muga Onyuowa. Therefore, the plaintiffs did not have any opportunity to ventilate their claim through the Succession process.

14. Under **Section 80(1) of the Land Registration Act, 2016 (2012)** this court has the powers to cancel or amend title to land if it is proved that it was obtained by fraud or mistake and the affected person must be notified of the same. Apparently the defendant obtained title to the suit land by mistake. She was notified of the mistake by PExhibit 3 (a). There is no doubt that she is aware of the mistake in the title to the land and she failed to defend this suit.

15. In the premises, the plaintiffs have established that the defendant obtained title to the suit land by mistake. They are entitled to the orders sought in the plaint. The plaintiffs have proved their claim against the defendant on a balance of probability.

16. Wherefore, I enter Judgment for the plaintiffs against the defendant in terms of orders (a) to (c) sought in their plaint dated 5th March 2014.

DELIVERED, DATED and SIGNED at MIGORI this 1st day of APRIL 2019.

G.M.A. ONGONDO

JUDGE

In the presence of: -

Mr. Agure Odera Learned counsel for the plaintiff.

Tom Maurice – Court Assistant.