



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 1249 OF 2016

(FORMERLY HCC NO. 134 OF 2003)

SAMUEL NYANKANGA ARERI.....PLAINTIFF

VERSUS

FRANCIS OMUNDI GWAKO.....1ST DEFENDANT

NKURU GWAKO.....2ND DEFENDANT

J U D G M E N T

Background and Pleadings:

1. The Plaintiff is the administrator of the estate of Areri Nyakanga (the deceased) and claims that the deceased in 1960 sold part of his land to the Defendants for 25 heads of cattle. He claims the Defendants only paid 20 heads of cattle leaving a balance of 5 Cows. After the death of his father the Plaintiff avers the Defendants unlawfully caused the land to be registered in their names being **LR. No. Bassi/Bondonya/349** ("suit property") measuring 1.5 hectares and in the process unlawfully awarded themselves 2 additional acres in excess of the land purchased from his deceased father.

2. By a Plaint dated 13th August 2003, the Plaintiff's brought the present suit against the defendants. The Plaintiff subsequently amended the plaint on 28th February, 2004 and sought judgment against the Defendants jointly and severally for:

(i) A declaration that a trust exists wherein the defendants holds the two (2) acres of land which did not form part of the contract as trustees for the plaintiff herein.

(ii) A declaration that the defendants have fundamentally and flagrantly breached the contract herein entered sometime in the year 1960 between the defendants and the plaintiff's late father and the same cannot be salvaged and therefore is null and void and the plaintiff be an is hereby discharged from all obligations arising thereof.

(iii) A declaration that a trust exists wherein the defendants holds land parcel no. Bassi/Bondonya/349 as trustee for the plaintiff herein.

(iv) A declaration that the aforesaid (i & ii) be and are hereby terminated.

(v) A declaration that the defendants effect a transfer of the said both 2 acres of land not forming part of the contract and land parcel no. Bassi/Bondonya/349 into the name of the plaintiff herein in default thereof the executive officer of this honourable court be and is hereby authorized to effect the same on behalf of the defendants herein.

(vi) An order of an injunction restraining the defendants by themselves, their agents, servants, employees and/or any other person whatsoever from interfering, selling, alienating, leasing, wasting, mortgaging, entering, encroaching onto, clearing trees, tilling or in any manner whatsoever.

(vii) Mesne profits and interest thereon.

(viii) Costs of the suit.

3. The 1st and 2nd Defendants filed a Defence and Counterclaim dated the 2nd September, 2003 where they denied the allegations by the Plaintiff and contended that the Plaintiff lacked any locus to bring the suit as there was no privity of contract with him. They averred that

they paid the full purchase price and were put in possession in 1960. Thereafter when the land adjudication was conducted in the area in 1967 the suit property was entered into the adjudication register and their names entered as the owners. The Defendants stated no objections were raised with the adjudication committee and that they obtained the title to the suit property on 16th August 2001. It is the Defendants' case that the suit property does not share a boundary with **L.R. No. Bassi/Bondonya/350 ("Parcel 350")**. In fact they aver there is a market that separates the suit property and parcel 350. They filed a counter-claim and averred that on March 2003 the Plaintiff trespassed onto the suit property and committed acts of waste thereon by cutting crops and preventing the Defendants from picking their tea and sought the following prayers against the Plaintiff:

- a) **Special damages for Kshs. 329, 870/=**
- b) **General damages for trespass to private property**
- c) **Costs on (a) and (b) above.**
- d) **Interests on (a), (b) and (c) above.**
- e) **Any other relief that this court will deem fit to grant.**

4. The Plaintiff filed a Reply to Defence and Counterclaim dated the 11th September, 2003. He contended that the counterclaim is misplaced, ill-timed and a total abuse of the court process. The Plaintiff denied the allegations contained in the counter-claim.

Evidence of the Plaintiff:

5. PW1 testified that the deceased sold the land measuring 4 acres to the 1st Defendant, which was in the middle portion of the original land. The deceased land extended from the hill towards the river and after the sale the deceased remained with two portions, the portion extending towards the hill, and the other was the portion towards the river. PW1 stated there was an access road leading to the river. He told the court that at the time adjudication took place in 1968 he was 12 years old. He stated the Defendants started cultivating the 2 acres that was next to the river in 1980 and that in 2002 he lodged the initial complaint at the District Commissioner's Office in Gucha, and the complaint was referred to District Officer and was finally heard by the Chief. He claimed that the Defendants admitted at the Chief's office that the two acres were not sold to them. He stated following the conclusion of the hearing before the elders, the two acres were set apart and marked and a road measuring 9 metres was established upto the river. As regards the balance of the 5 heads of cows the elders decided that there was only a balance of 3 heads of cattle owing as Kshs 1,600/= had already been paid. The Defendants however refused to yield vacant possession of the portion of 2 acres and caused the Plaintiff to be arrested and charged with trespass in Criminal Cases 312 and 313 of 2013 which were however quashed by the High Court.

6. PW2 a brother to the deceased testified that the deceased died in 1964 and at the time the suit property had not been demarcated. He stated that at the time of his death the deceased had divided his land between his two wives and had also given PW2 a portion. PW2 admitted that the deceased sold a portion of his land to the 1st Defendant on the lower part, PW2 was present at the time of sale. He told the court that the 1st defendant was shown the dimension of the land but declined to take up the land that was in swampy area which measured around 2 acres. He recalled that in 1968 the area was demarcated and he was given his portion when the survey was done, and the same for the deceased two wives. He told the court he was not aware that the 1st Defendant had been allocated a number for the suit property. He told the court that the 1st Defendant must have misled the surveyor to include the extra 2acres of land in his land parcel. He testified that before the 2 acre portion was given to the Plaintiff by elders the Defendants had not been using the portion and therefore the Plaintiff could not have damaged the Defendants' crops. On cross examination, he stated that that when the land was being demarcated the land was parceled out as indicated by the owners. He stated that when the surveyors came during the adjudication process he showed them his land.

7. PW3 a former Senior Chief testified that in August 2001 a complaint was made by the Plaintiff in regard to the suit property which prompted him to invite the parties, elders and his colleague chief Edward Momanyi from the location where the Defendants reside. He stated that after hearing the dispute the Defendants admitted that they had not bought the portion next to the river and agreed to reverse the same to the Plaintiff and also pay 2 cows. He however testified that he was not part of the deliberations and that it was the elders who resolved the issues referred to his office. However when the Plaintiff took possession of the 2 acres he was prevented by the Defendants from using the land and only planted for one season. He stated that there was tea and maize on the disputed land that belonged to the Defendants.

8. PW4 told court that when the matter was referred to the chief's office there were elders from both side of the disputing parties as they hail from different locations. He told the court that he was present and was in charge of the vigilante group that provided security. He said Henry Ndege Nyanchoka chaired the deliberations. After the deliberations the parties agreed and the parcel measuring 2 acres was set apart.

Defence Case

9. After the plaintiff closed his case DW1 testified that he purchased the suit property with the 2nd Defendant from the Plaintiff's father (deceased) in 1960 for the price of 25 cows which was paid in full. The portion purchased was from the shop to the river where clay is extracted. He told the court he had occupied the suit property peacefully until 2003 when the plaintiff lay claim to part of the land. On cross examination he told the court that the purchase price was 25 cows and he paid 20 cows in 1960. He acknowledged attending the meeting with the elders in 2003 but denied that the elders visited his land. He also maintained that there is no access road on his land. He told the court he paid the balance of 5 cows in kind, he built a bridge and also gave the deceased money.

Analysis and Determinations:

10. The parties filed final written submissions following the close of the trial. The Plaintiff's submissions were filed on 18th September 2018 and those of the Defendants on 13th November 2018. I have considered the pleadings, the evidence adduced by the parties and the submissions made on behalf of the parties. The following issues arise for determination:

(i) Whether the Plaintiff has the locus to institute the present suit?

(ii) Whether the Plaintiff's suit against the Defendants is statute barred?

(iii) Whether the Defendants hold land parcel title No. Bassi/ Bondonya/349 wholly or partly in trust for the Plaintiff?

(iv) What reliefs if any should the court grant and to whom?

11. The Plaintiff under paragraph 3 of the Plea averred that he was the administrator of the estate of Areri Nyankanga (deceased) who was his father.

12. The Plaintiff produced in evidence as "PEX.1" a limited Grant of Letter of Administration Ad Colligenda bona issued to him under Section 67(1) of the Law of Succession Act, Cap 160 Laws of Kenya. Though not explicitly stated the Plaintiff was relying on this grant as enabling him to institute the present suit. Indeed on the face of the grant the following words were endorsed "**Limited only for purposes of filing a civil suit and to enable me to have locus standi to collect and preserve the estate of my father**". The Grant of Letters of Administration "**Ad Colligenda Bona**" does not entitle a person to institute a legal action on behalf of a deceased person. The Court of Appeal in the case of **Morjaria -vs- Abdalla [1984] KLR 490** inter alia held:

(i) The purpose of a Grant of Letters of Administration Ad Colligenda bona is to collect the property of the deceased person where it is of a perishable or precarious nature and where regular probate and administration cannot be granted at once.

(ii) The appointment of a person as an administrator Ad Colligenda Bona in respect of the estate of a deceased person cannot include the right to take the place of the deceased for the purpose of instituting an action or appeal, especially where there is specific provision for that purpose in paragraph 14 of the Fifth Schedule to the Law of Succession Act.

13. The Grant Ad Colligenda Bona obtained by the Plaintiff in this matter is not such as would have enabled him to commence the suit as such a grant is limited to collecting and preserving the assets of an estate. Their Lordships in the **Morjaria -vs- Abdalla** case [supra] at page 497 stated as follows:-

"However, we do not think that the appointment of a person "Ad Colligenda bona" can possibly include the right to stand in the shoes of the deceased for the purpose of instituting an action, or, indeed, an appeal, especially where there is a specific provision, paragraph 14 of the fifth schedule, designed for this purpose. The Latin verb "Colligere" means to collect, bring together or assemble, and we are satisfied that this form of grant is only to be used for the purpose we have indicated and not for purpose of representation in a suit or in an appeal."

14. For purposes of instituting the suit the Plaintiff required to have obtained an Ad Litem grant under paragraph 14 of the fifth schedule before commencement of the suit. In the premises therefore, it is my view the Plaintiff lacked the capacity and/or locus to institute the present suit. Where a party has no *locus standi* the Court cannot hear him and cannot grant any reliefs in his favour as the suit would virtually be null and void *ab initio* for want of a competent party. In the case of **Alfred Njau & Others -vs- City Council of Nairobi [1982-88]1KAR 229** the Court stated:-

"...to say a person has no cause of action is not necessarily tantamount to shutting the person out of the Court but to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth of listening to."

15. Although the finding on the issue on whether or not the Plaintiff had the *locus standi* to institute the instant suit should have been sufficient to dispose of the suit. I will nonetheless consider the other issues just in case I could be wrong on my holding on the issue of *locus standi*.

16. I will deal with the issue whether or not the suit is statute barred together with the issue whether or not the Defendants hold the suit property in trust for the Plaintiff as the two issues are related. The Plaintiff has pleaded and submitted that the Defendants got themselves registered as the owners of land parcel No. **Bassi/ Bondonya/349** and in doing so awarded themselves an extra two(2) acres of land over and above the portion of land they had purchased from his late father.

17. The undisputed fact is that about the year 1960 the Plaintiff's deceased father sold to the Defendants a parcel of land for the consideration of 25 heads of cattle. It is admitted that 20 heads of cattle were paid to the Plaintiff's deceased father leaving a balance of 5 heads of cattle. There is no agreement on how the 5 heads of cows were paid but I don't think that is really material in the determination of this matter. The Plaintiff stated they were never paid to his father but the Defendants stated the same were paid in kind in form of a bicycle and cash. The Plaintiff averred that the Defendants included an additional portion 2 acres to the land that was sold to them by his father. The Defendants deny this and assert that the land they purchased stretched from up the hill (mountain) up to the river and they assert that is the land that was adjudicated in their favour during the land adjudication.

18. The defendants stated that they took occupation of the land and in 1967 when the land adjudication process commenced, the land they had purchased was numbered **Bassi/Bondonya/349**. An adjudication register dated 9th March 1968 attached to the 1st Defendant's affidavit sworn on 12th May 2004 in support of an application of even date to strike out the Plaintiff's suit indicates that the suit land was awarded to

the defendants jointly in equal shares. A copy of the title deed issued to the Defendants on 16th August 2001 shows the register for the parcel of land was opened on 20th November 1970 and that the land measured 1.5hectares (approximately). It is therefore clear that the Defendants were registered as proprietors of the suit property following an adjudication process. Their right to be adjudicated as the owners of the property flowed from the purchase they had made from the Plaintiff's father. The Defendants interest in the suit property crystallized upon being adjudicated as the owners of the land in 1968 as evidenced by the adjudication register. Any cause of action the Plaintiff may have had against the Defendants accrued as from that date.

19. There is no evidence that anybody raised any objection during the land adjudication process to the Defendants allocation of the suit property. The Land Adjudication Act Cap 284 Laws of Kenya provides an elaborate dispute resolution mechanism. Where the adjudication process under the Act is completed and no objection has been raised the adjudication register becomes final. Section 26 of the Act provides for any party affected by the adjudication register to lodge an objection to the adjudication officer.

Section 26 of the Act provides:-

26 (1) Any person named in or affected by the adjudication register who considers it to be incorrect or incomplete in any respect may, within sixty days of the date upon which the notice of completion of the adjudication register is published, object to the adjudication officer in writing, saying in what respect he considers the adjudication register to be incorrect or incomplete.

(2) The adjudication officer shall consider any objection made to him under subsection (1) of this section, and after such further consultation and inquiries as he thinks fit he shall determine the objection.

20. Appeals from the decision of the adjudication officer lie to the Minister pursuant to Section 29 of the Act and the Minister's determination is final and no appeal lies unless his decision is challenged by way of judicial review. Section 29(1) of the Act provides:

29(1) Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by-

(a) delivering to the Minister an appeal in writing specifying the grounds of appeal; and

(b) sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.

21. From the evidence adduced by the parties, it is apparent that no objection was raised against the registration of the Defendants as the owners of the suit property. There is evidence that the Plaintiff's members of the family, as testified by PW2, the Plaintiff's brother, participated in the adjudication process. PW2 testified he got his land and that the Plaintiff's mother and step mother got their land. The Court in the circumstances finds and holds that the Defendants were validly registered as the owners of the suit property through due process of land adjudication.

22. The Plaintiff has predicted his claim to portion of 2 acres out of land parcel **Bassi/Bondonya/349** on the basis that the Defendants caused themselves to be registered as the owners of an extra two acres that were not sold to them by his late father. No formal agreement was tendered in evidence to confirm what the terms of the agreement were. It is not clear on what basis the Plaintiff determined the Defendants got an extra 2 acres. It appears what embolded the Plaintiff to institute the present suit was the decision by elders who had been convened by the Chief following complaints by the Plaintiff in February 2003 who decided that the Defendants should cede some undefined portion of land to the Plaintiff which had not been sold to them by the Plaintiff's father. The Minutes of meeting (Baraza) at the Chief's office dated 12th February 2003 are unintelligible and I doubt they could pass as an agreement. The Defendants however did not agree with what transpired at the Chief's Baraza as thereafter the Defendants lodged complaints of trespass by the Plaintiff when he entered the land pursuant to the alleged determination by the elders. It is also questionable whether the elders could have had the jurisdiction to adjudicate on issues relating to ownership and title to land as that is what they purported to do. It is equally not clear why the dispute was not initiated through the Court (High Court) or through the Land Disputes Tribunal Act of 1990, though the Tribunal would have had no jurisdiction (see Section 3(1) of the Act as relates to jurisdiction).

23. The Plaintiff's claim to the 2 extra acres that he claims his father did not sell to the Defendants has its origin to the contract of sale that his father entered with the Defendants in 1960. As observed earlier this contract was not in writing and therefore it is impossible to know what its terms were. The Plaintiff in his evidence stated that in 1968 when land adjudication was done he was about 12 years meaning in 1960 when the agreement between his father and the Defendant was struck he was barely 4 years old. He could not therefore have been party to or a witness to the agreement. The Plaintiff has claimed that the Defendants were constituted trustees of the portion of the 2acres. With respect, I do not see how a trust can be said to have been created. The Defendants insist they got the land that they had agreed to buy from the Plaintiff's father and they paid for it.

24. The Plaintiff's counsel has submitted that on the evidence of the Plaintiff and his witnesses there is credible evidence to show that the Defendants held the land subject to the overriding interests of the Plaintiff in favour of a trust and he relied on the provisions of Section 28 of the Land Registration Act of 2012 which under (b) and (c) provide that "**trusts including customary trust**", and "**rights of way, rights of water and profits subsisting at the time of first registration under the Act**" respectively are overriding interest which need not be noted in the register. While the Act of Limitation of Actions Act, Cap 22 Laws of Kenya would have no application where an action is brought by or on behalf of a beneficiary under a trust, proof of the existence of a trust is a must before the operation of the provisions of the Limitation of Actions Act, Cap 22 Laws of Kenya relating to limitation of actions can be ousted. Section 20(1) of the Limitation of Actions Act provides:-

20. (1) None of the periods of limitation prescribed by this Act apply to an action by a beneficiary under a trust, which is an

action-

(a) in respect of a fraud or fraudulent breach of trust to which the trustee was a party or privy; or

(b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use.

25. In the present case, I am not satisfied that the Plaintiff has proved that the Defendants were in the position of trustees customarily or otherwise. There was no evidence of creation of any trust. The Plaintiff merely stated the Defendants acquired unlawfully an extra 2 acres over the above what they had purchased. The Plaintiff raised the issue in 2002/2003 whereas the sale is said to have taken place in 1960. The Defendants were occupying and utilizing the land since the time of purchase. **Why did it take the Plaintiff over 40 years to raise the issue?** The Plaintiff and/or his family had an opportunity to raise the issue during the adjudication process. That was not done with the result that the Defendants were registered as the owners of the suit property without any objections.

26. The suit land was adjudicated in 1968 and registered in 1970 although the Defendants were issued title in 2001. The evidence shows the Defendants have been in occupation of the suit property since 1960 when they purchased the same. The Defendants were adjudicated as owners on 9th March 1968. The Plaintiff did not institute suit to recover the land from the Defendants within the statutory period of 12 years and in the premises it is my determination that the Plaintiff's present suit against the defendants is statutorily barred by limitation.

27. The defendants have by their counterclaim claimed as special damages a sum of kshs. 329,870/=. The claim is unsubstantiated and it is trite law that special damages must be specifically pleaded and proved. The Defendants did not even attempt to offer any proof of this claim and it must fail. The Defendants have further claimed general damages for trespass onto their land. Though no proof of damage is required where trespass is proved in order for general damages to be awarded, I am not persuaded there was proof of trespass on the part of the Plaintiff. The Defendants evidence was that they had occupied and utilized the suit land since 1960. There is no evidence that they were at any time prevented from utilizing the land by the Plaintiff. The claim for general damages is declined.

28. In the premises and in view of the foregoing, it is my holding and finding that the Plaintiff has failed to prove his case on a balance of probabilities and equally the Defendants have failed to prove their counterclaim to the required standard. The net result is that the Plaintiff's suit is dismissed and also the Defendants counterclaim is dismissed. The parties will bear their own costs of the suit and the counterclaim.

JUDGMENT DATED, SIGNED AND DELIVERED AT KISII THIS 14TH DAY OF JUNE 2019.

J. M. MUTUNGI

JUDGE