



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

CASE NO 189 OF 2010

AGNES MORAA NYANGESO.....1ST PLAINTIFF

DOUGLAS OBWOGI NYANGESO.....2ND PLAINTIFF

VERSUS

JOSEPH BARONGO MONYANCHA.....1ST DEFENDANT

ISAAC MANOA ONKENYO.....2ND DEFENDANT

J U D G M E N T

1. Agnes Moraa Nyangeso and Douglas Obwoge Nyangeso, the plaintiffs herein vide a plaint dated 6th July 2010 filed in court on 7th July 2010 sought a permanent and injunctive order against the defendants restraining them by themselves, agents, servants and or anybody claiming under them from or in anyway interfering with, damaging, wasting, alienating or doing any construction and/or anything on the plaintiff's land parcel Wanjare Bogiakumu/1296 ("**the suit property**").

2. The plaintiffs are the administrators of the estate of Sebastian Nyangeso Oyugi. The plaintiffs claim was that the defendants had without any consent from them gathered construction materials on a portion of the suit property and had commenced the construction of a permanent structure thereon to the prejudice of the plaintiffs. The 1st defendant entered appearance and filed his defence on 17th September 2010. The defendant denied the allegations by the plaintiffs and claimed that he purchased a plot No. 10 Itibo out of land registered in the name of Sabastiano Nyangeso (deceased) on 29th December 2007 from one Joseph O. Nyangeso. He averred that immediately after the purchase he took possession of the plot and erected permanent structures thereon. He further claimed that the issues regarding the suit land had been ventilated before the assistant chief and village elders and therefore there was no forceful entry onto the suit property.

3. The suit was part heard before Okongo, J. before whom both plaintiffs testified and closed their case. The 1st defendant testified before me as the sole witness for the defence. On the evidence adduced both by the plaintiffs and the defendants there is no dispute that land parcel Wanjare/Bogiakumu/ 1296 was owned by Sebastiano Nyangeso (deceased) prior to his death in 1981. The deceased had two wives whom he had settled in separate parcels of land. The 1st plaintiff was one of the wives and had been allocated the suit property. The plaintiffs are mother and son respectively and it was their evidence that the defendants have unlawfully constructed structures on a portion of the suit property. The plaintiffs evidence was that Joseph Nyangeso had no right to sell the land as the plaintiffs were the only administrators to the deceased estate.

4. DW1 testified that he bought a portion of the suit property measuring 32 feet by 100 feet from Joseph Nyangeso in 2007. He stated that at the time of sale the land was in the name of the deceased and the seller assured him he had the authority to make the sale and deal with the estate of the deceased. He told the court that he took possession and constructed permanent rental houses. He testified that he lawfully purchased the parcel of land and is not a trespasser. On cross examination he stated that he applied for an official search and confirmed that the deceased was the registered proprietor. He also testified that the agreement entered into did not indicate the parcel number of the land sold. He told the court that the purchase price was Kshs 130,000/-, he paid Kshs 50,000/- as the initial amount and the balance of the purchase price in installments but unfortunately had no receipts for the payments made.

5. At the close of hearing the parties filed written submissions.

6. The plaintiffs inter alia submitted that Joseph O. Nyangeso who allegedly sold the property to the 1st defendant had no capacity to sell the suit property as the deceased who was the then proprietor had died in April 1981. The plaintiffs further contended that the purported sale offended the provisions of the Law of Succession Act as it amounted to intermeddling with the property of the deceased estate.

7. The 1st defendant submitted that the plaintiffs were not the registered proprietors of the suit property at the time the same was sold to the 1st defendant. The 1st defendant contended that the plaintiffs only started the succession proceedings after the 1st Defendant had acquired the suit land which the 1st defendant averred constituted an abuse of the court process and relied on the case of **Rev Madara Evans Onkanga Dondo v Housing Finance Company of Kenya Civil Case No. 262 of 2005 (unreported)**. The 1st defendant further argued that the plaintiff waited until the suit property was developed before raising the issue of the defendant's occupation which was an indication of the plaintiffs' lack of bonafides. The 1st defendant further submitted that the prayer sought by the plaintiff was not viable as the construction of the premises comprising of the shops had already occurred and could therefore not be injuncted/ restrained and relied on the case of **Mavoloni Co. Ltd v Standard Chartered Estate Management Ltd Civil Application No. 226 of 1997 (unreported)** where the court of appeal held that an injunction cannot be granted once the event intended to be injuncted has been overtaken by events. The 1st defendant further submitted that the plaintiff was registered as the proprietor of the suit property while the 1st defendant was in occupation without taking into consideration the interest of the 1st Defendant. The 1st defendant contended the plaintiffs could not be entitled to the reliefs sought as they had not come to court with clean hands.

8. Having duly considered the pleadings, the evidence and the submissions of the parties, the following issues arise for determination:

(i) Whether plot 10 Itibo formed part of land parcel Wanjare/Bogiakumu/1296 initially registered in the name of Sebastiano Nyangeso Oyuge (deceased).

(ii) Whether the plaintiffs are the administrators of the estate of Sebastiano Nyangeso Oyugi.

(iii) Whether the purchase by the 1st defendant of plot 10 Itibo on or about 29th December 2007 from one Joseph O. Nyangeso was lawful?

(iv) What reliefs and/or orders should the court make in this suit.

9. It is not disputed that Sebastiano Nyangeso (deceased) was the registered owner of land parcel Wanjare/Bogiakumu/1296 or that Plot No. 10 Itibo formed part of this parcel of land. The 1st defendant under paragraph 3 of the defence pleaded thus:-

“3.That the 1st defendant is a purchaser of a portion of land known as Plot No. 10 Itibo which is registered in the names of Sebastiano Nyangeso who is now deceased having purchased it on 29th day of December 2007 from one Joseph O. Nyangeso.”

10. The plaintiffs adduced evidence to the effect Nyangeso Oyunge alias Sebastian Nyangeso Oyugi (deceased) was before his death on 23rd April 1981 (see death certificate “**PEX.1**”) the registered owner of land parcel Wanjare/Bogiakumu/1296 as evidenced by the copy of the certificate of official search issued on 29th June 2010 (“**PEX.4**”). As per the official search the deceased was registered as owner of the suit land on 21st September 1974 and was so registered as at the date the official search was issued on 29th June 2010.

11. The plaintiffs instituted the present suit as the legal administrators of the deceased. The plaintiffs were issued grant of letters of administration intestate to the estate of Sebastian Nyangeso Oyugi (deceased) on 14th May 2009 vide Kisii HC Succession Cause No. 127 of 2009 (“**PEX.2**”) and were subsequently registered as owners of land parcel Wanjare/Bogiakumu/1296 on 15th June 2011 and issued a title deed on the same date (“**PEX.6**”).

12. The 1st defendant admitted that he was sold the suit plot by one Joseph O. Nyangeso who was a son of the deceased as per the agreement dated 29th December 2007. The said Joseph O. Nyangeso as per the 1st defendant claimed he had authority to transact in regard to the deceased property. It is evident that the said Joseph O. Nyangeso was not the administrator of the deceased estate and could not properly seek to represent the estate of the deceased in any transaction. Joseph O. Nyangeso had no authority and/or capacity to deal with the deceased estate as he had no grant of representation. His actions amounted to intermeddling with the estate of a deceased person within the meaning of Section 45(1) of the Law of Succession Act Cap 160 Laws of Kenya.

13. Section 45(1) of the Act provides

45(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

14. The only person who is authorized and/or empowered to deal with the estate of a deceased person is the personal representative to whom grant of letters of administration has been issued. Section 82 of the Law of Succession Act outlines the powers of a personal representative. Section 82(a) and (b) provides as follows:-

82. Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;

(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best: Provided that—

(i) any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and

(ii) no immovable property shall be sold before confirmation of the grant;

15. Having regard to the above provisions of the law, it is apparent the agreement the 1st defendant entered into with Joseph O. Nyangeso was illegal and unlawful on account of want of authority on the part of the vendor. He had no capacity to deal with the assets of a deceased person without first obtaining grant of letters of administration. The transaction related to immovable property and in terms of Section 82 (b) (ii) such property could not be disposed before the grant was confirmed. In the premises, I have no hesitation in holding that the agreement the 1st defendant entered into was unlawful and was incapable of being enforced. The vendor had no plot that he could lawfully sell to the 1st defendant as what he purported to sell still formed part of the estate of the deceased. The 1st defendant in his evidence stated that the land he was buying was in the name of the deceased but the seller had informed him he had authority to deal with the estate of the deceased. The only thing that could have given the seller that authority was if he had grant of letters of administration which he did not have.

16. It is unfortunate that the 1st defendant was duped into entering into the sale transaction. Worse still is the fact that he entered into possession and effected some developments on the portion of land. The 1st defendant took a risk in effecting developments on the suit land before due process was followed to transfer ownership of the land to him. The law cannot come to the aid of the 1st defendant. The court in the administration of justice is guided by the rule of law and in interpreting and applying the law the court must pay adherence to the dictates of the enabling statutes and the Constitution. To do otherwise would be to delegate the law to a state of uncertainty, confusion and ambiguity.

17. The plaintiffs were the persons who were legally authorized to deal with the estate of the deceased and the only option available to the 1st defendant would perhaps to seek a negotiated settlement with the plaintiffs as he cannot otherwise stake any lawful claim to plot 10 Itibo within land parcel Wanjare/Bogiakumu/1296.

18. The net result is that I hold and find that the plaintiffs have proved their case on a balance of probabilities. I enter judgment in favour of the plaintiffs and make the following final orders:-

1. The defendants are ordered to vacate and remove the structures erected on plot No. 10 Itibo within land parcel Wanjare/Bogiakumu/1296 within 90 days from the date of this judgment failing which an order of eviction to issue on application by the plaintiffs.

2. An order of permanent injunction is hereby issued restraining the defendants, their servants and agents from entering onto or remaining or in any manner interfering with the plaintiffs land parcel Wanjare/Bogiakumu/1296 or any portion thereof.

3. Costs of the suit are awarded to the plaintiffs.

JUDGMENT DATED AND SIGNED AT NAKURU THIS 9TH DAY OF OCTOBER 2019.

J. M. MUTUNGI

JUDGE

JUDGMENT DELIVERED AT KISII THIS 23RD DAY OF OCTOBER 2019.

J ONYANGO

JUDGE