



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC CASE NO. 99 OF 2005

(FORMERLY ELDORET HCCC NO 52 OF 1998 (OS))

GEORGE KUNYORIA MATOKE.....PLAINTIFF

VERSUS

GEORGE KUNYORIA MATOKE.....DEFENDANT

JUDGMENT

Introduction

1. The plaintiff in this case is also named as the defendant. The background to that fact is that the original defendant passed on during the pendency of this suit and after a citation was issued, the plaintiff applied for letters of administration and was appointed the administrator of the defendant's estate. Subsequently he substituted himself for the deceased defendant, as the latter's estate's administrator, and proceeded with the hearing of this case both as the plaintiff and as the defendant. As a defendant, he represents the estate of his deceased adversary whose surviving kin were said to be not keen on taking out letters of administration to his estate.

2. The pertinent facts about the process in this case are as follows: After the original defendant filed his response to the originating summons a list of agreed issues was filed by the parties through their advocates on **13/5/1999**. Vide an order of the Eldoret High Court made on **13/7/2005** this matter was transferred to Kitale. An application was made seeking orders that the suit be struck out but the same was dismissed on **25/7/2007**. Orders of temporary injunction restraining the defendant from dealing with the suit land and inhibiting registration of all dealings on the land were issued on **21/3/2006**. On **6/5/2013** the plaintiff's counsel informed the court that the defendant was deceased. It appears that a citation issued and, apparently there being no one else to do so, the plaintiff obtained a grant of letters of administration to the defendant's estate on **27/2/2018** in **Kitale Succession Cause Number 130 of 2017**. He subsequently made an application for substitution dated **10/4/2018** in this cause and on **27/4/2018** orders of substitution were made in this suit and the amended originating summons was filed on **25/6/2018** substituting the deceased defendant's name with the plaintiff's in his capacity as the administrator to the estate of the defendant. On **25/10/2018** this suit was dismissed for non-attendance but upon an application by the defendant's counsel the same was reinstated on **20/2/2019** when the court fixed **26/3/2019** as the hearing date for the amended originating summons. The hearing of the case proceeded in an interesting manner in that it is the same person who testified on both sides, as witness for the plaintiff and also witness for the defendant.

The Plaintiff's Case

3. The plaintiff commenced this suit vide an originating summons dated **8<sup>th</sup> March, 1998** and filed in court on **16/3/1998** seeking to be declared the owner through adverse possession of **a part of 10 acres** out of land reference number **Trans Nzoia/Chepchoina/Twiga/333** which he has allegedly occupied and enjoyed quiet possession of since **20<sup>th</sup> September 1984** when he allegedly bought the same from Elizafan Mokuwa Nyakwara, the defendant. He sought an order that he be registered as the owner thereof.

The Defendant's Defence

4. On **9/4/1998** the defendant filed a replying affidavit to the Originating Summons. In that affidavit the defendant deponed as follows: that he owns the suit land and has not sold any portion thereof to the plaintiff by way of any agreement and has never put the plaintiff into possession of the suit land; that he is not related to the plaintiff; that the plaintiff has never cultivated on the said land; that the plaintiff lodged a dispute before the Chepchoina Land Disputes Tribunal at Kitale and the award therefrom was adopted as the judgment of the court in **Kitale SPMCC No 361 of 1996** but the **High Court in Kitale HC MISC App 361 of 1994** quashed the award of the tribunal; that a decree was prepared in his favour and that if there was any claim against the defendant the same is *res judicata*.

5. The affidavit also states that in **1998** the defendant allowed one *Sophia Nyangongo Koros* to enter into the suit land whereupon he gave her the rights of use thereof; that the said *Sophia* has been in possession of the suit land and she has developed the same; that the plaintiff is a cousin to *Sophia Nyang'ong'o* who helped *Sophia* prepare the land during the period **1989-1983**, and later on at the beginning of each year's

season on the mutual understanding that he is a cousin to her; that the period **1989 -1993** does not exceed the statutory period required for a plaintiff to claim adverse possession; that the plaintiff's acts of dealing with or using the said land have been unlawful.

6. From the defendant's affidavit evidence the following can be briefly observed: that he denies sale to the plaintiff; he also denies occupation of the land by the plaintiff; finally, he alleges other proceedings existed in relation thereto before a Land Disputes Tribunal and the High Court.

### **Evidence at the Hearing**

7. **PW1** the plaintiff testified on **26/3/2019**. The plaintiff's evidence matched the contents of his Originating Summons and its supporting affidavit. The same natural person testified as the defendant's sole witness in this suit as **DW1** on the same date.

8. I have considered the pleadings, the evidence on the record and the submissions. Citing **Public Trustee And Beatrice Muthoni -vs- Kamau Wandimi 1982-88 eKLR (CA 73 of 1982)** the plaintiff's submission is that the claim is not based on a sale of land but on adverse possession under the provisions of **section 38** of the **Limitation of Actions Act Cap 22** since the sale agreement became null and void at the expiry of 6 months from its date in **1984**. The plaintiff also relied on the provisions of **Section 7** and **Section 17** of **Cap 22** the plaintiff submits that

### **DETERMINATION**

#### **Issues for Determination**

9. The issues that arise from the pleadings in this suit are as follows:-

*(a) Is the plaintiff's claim fatally defective by reason of conflict of interest?*

*(b) Is the land registered in the name of the estate of the deceased?*

*(c) Is the plaintiff entitled to be declared and registered as the proprietor of the land pursuant to the doctrine of adverse possession?*

*(d) Who should bear the costs?*

**(a) Is the plaintiff's claim fatally defective by reason of conflict of interest?**

10. Justice must not only be done but must be seen to be done. Conflict of interest in litigation must be avoided if this principle is to be observed.

11. **Order 24 rule 4(1)** states as follows:

"(1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit."

12. It is not also lost to this court that **Order 24 Rule 4 (2)** provides as follows:

**"Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant." (emphasis mine).**

I have no doubt that these provisions of law accord well with the principle "*Nemo iudex in causa sua*" or "*No man should be judge in his own cause.*" This is evidently occasioned by the need to rule out bias. Failure to observe this rule would result in breach of Natural Justice.

13. I have noted that by virtue of the fact that it is the plaintiff who took up letters of administration to the defendant's estate and was substituted in this suit in that capacity, no evidence to controvert the duration of the plaintiff's stay on the suit property which claim forms the backbone of the instant suit was given at the hearing. The plaintiff's evidence is therefore unchallenged. Where the defendant does not adduce evidence to support the statements in his defence the court does not consider the allegations in the filed defence as proved. This court can only go by the evidence adduced by the parties in a case. However, the court must in this peculiar case raise *suo motu* the issue as to whether justice would be seen to have been done if judgment issued in favour of the plaintiff in the instant suit for want of any evidence to controvert his.

14. Though the legal process of taking out letters of administration in respect of the deceased defendant's name appears to have been followed by the plaintiff, the original defendant who is now deceased had already indicated that he was opposed to the suit.

15. Had the defendant not filed any response to the suit this court would not have considered this issue since the plaintiff would have in the circumstances been entitled to proceed and obtain judgment *ex-parte*. And this is where the plaintiff's conduct as a substitute for the

deceased's legal representative must be examined within the context of the provisions of **Order 24 Rule 4 (2)**.

16. Has the plaintiff acting as defendant pursued any ***“defence appropriate to his character as legal representative of the deceased defendant”*** within the context of that rule? Can he, when he testifies as a defendant, be relied on to give an unbiased narrative which the original defendant, could have given if he were alive? It is the conviction of this court that the answer to this question lies in whether the evidence of the plaintiff, which he indeed gave in court while acting as the defendant, rhymed with the filed defence of the deceased defendant.

17. In the instant case, an excerpt of the evidence given by the plaintiff in his capacity as the administrator of the defendant's estate, and therefore as the defendant, reads as follows:

**“I agree with the plaintiff's case, that he be given 10 acres as per the agreement. He has stayed there since 1984 to date.”**

18. In the current scenario the plaintiff whose interest is adverse to that of the deceased defendant's estate has substituted himself for the defendant, with the knowledge that the defendant had opposed the suit, and proceeded to give evidence that contradicts the original defendant's defence.

19. Any other administrator of the estate of the deceased other than the plaintiff would have been entitled, once substituted, to appear and either, naturally, oppose the plaintiff's claim or if he desired, concede to it without any obvious perception of conflict of interest or bias, but not the plaintiff. Since the defence denying the claim is in the record, and therefore the deceased had opposed the claim during his lifetime that other person would be considered in the circumstances to be acting in the best interests of the deceased's estate if he opposed the claim and in my view, that would naturally accord with **Order 24 Rule 4(2)**. If he conceded to the claim then it would also not raise any apprehension that he was acting in bad faith or against the estate of the deceased, since he would *prima facie* be considered to be having no interest similar to the plaintiff's that could jeopardize the very estate he has been put in charge of by way of grant issued by the court.

20. In this court's view the same may not be said of a plaintiff who as in this case, substituted himself for a deceased defendant in the same suit.

21. By virtue of substitution for the deceased defendant, he has been handed great power over the deceased's estate and has been made judge over whether the claim ought to be opposed or conceded to, and what evidence to call or conceal. The administrator of an estate of a deceased litigant would naturally be reasonably expected to defend the estate's interests by defending the claim if no such admission has been filed prior to his substitution.

22. While acting as the same individual on both sides of the litigation divide, would the plaintiff have been reasonably expected to divorce himself from his interests as a plaintiff to the extent that he may be trusted to oppose the same suit that he has already prosecuted at the same sitting? Obviously, since the plaintiff has an interest adverse to the deceased's estates' interest in the suit land he would not wish to have anything he states as evidence, or files in the matter, to be deleterious to his claim.

23. Supposing the defendant herein, after substituting himself simply filed a formal admission of the claim? In my view he would face the same hurdles he faced in giving evidence at the hearing. In this court's view, since it is only natural that he would not be expected to oppose the very claim that he himself has filed, he can not also concede to the claim with any propriety, even in his capacity as the defendant's administrator without raising apprehension that he has acted contrary to the interests of the estate, and in that case justice would not be seen to have been done. In my view it was open to the plaintiff to seek to substitute any person other than himself who had no interest in the suit similar to the plaintiff's, for the deceased defendant which he never did.

24. The prosecution of the defence by the plaintiff (as a substitute for the deceased) did not accord with the deceased defendant's filed defence as envisaged by **Order 24 rule 4(2)**. This court is alive to the provisions of **Order 24 Rule 5** which grant power to the court to determine who is or is not a legal representative of a deceased person. It provides as follows:

**“Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff, or a deceased defendant, such question shall be determined by the court.”**

25. Further, **Section 2** of the **Civil Procedure Act** provides as follows:

**“legal representative” means a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued;”**

26. Given the interplay between the definition of a “legal representative” as provided for in **Section 2** of the **Civil Procedure Act** and the provisions of **Order 24 Rule 4(2)** and **Order 24 Rule (5)**, this court can not uphold the plaintiff's claim to be the proper legal representative of the deceased defendant for the purposes of the prosecution of the defence. The excerpt from his evidence which I set out above has reinforced this conclusion. I find that the plaintiff's claim should fail.

27. In view of the above finding I am of the view that this court does not need to examine the merits of the other issues listed herein above.

28. It would be contrary to the two principles, namely, that justice must not only be done but must also be seen to be done, and that no man should be judge in his own case, to try this matter on the merits while the plaintiff remains the person substituted for the deceased defendant. However, it is noteworthy that this problem can only be nipped in the bud by denial of letters of administration to litigants at the succession

proceedings when it is crystal clear that they only seek letters to enable them be substituted for an opposite party in a suit filed in an adversarial setting and that only depends on what is disclosed by an applicant/petitioner in the succession proceedings.

29. I hereby dismiss the plaintiff's claim with no orders as to costs.

It is so ordered.

**Dated, signed and delivered at Kitale on this 3<sup>rd</sup> day of October, 2019.**

**MWANGI NJOROGE**

**JUDGE**

**3/10/2019**

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Khisa holding brief for Onyinkwa for plaintiff

Defendant in person

**COURT**

Judgment read in open court.

**MWANGI NJOROGE**

**JUDGE**

**3/10/2019**