



**REPUBLIC OF KENYA**

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

**E & L CASE NO. 62 OF 2015**

**BARRACK BIWOTT**

**(Suing as the Administrator of the Estate of the late**

**RUTH JESEREM alias RUSE JESEREM)...1<sup>ST</sup> PLAINTIFF/APPLICANT**

**PHILIP ARAP LELEI.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**MARY JEPKOECH.....3<sup>RD</sup> PLAINTIFF/APPLICANT**

**ELDAD KIPNGETICH.....4<sup>TH</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**PETER BOISIO NGETICH.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**KIMORONG MIBEI.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**JOSEPH CHERUIYOT.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

The applicants have come to court for orders the orders issued on 11<sup>th</sup> August, 1999 together with the vesting order given on 11<sup>th</sup> August, 1999 and issued on 12<sup>th</sup> August, 1999 by the Deputy Registrar of this court and all consequential orders and steps taken pursuant thereto be set aside *ex-debito justice* and be declared null and void. Costs of this application be awarded to the applicants.

The application is based on the grounds that the applicants reside and are in possession of L. R. No. 8822 and that were born on the said parcel of land. The suit parcel of land was prior to the institution of this suit registered in the name of Eugenie Dorothy Hughes, the wife of the late John Joseph Hughes. Eugenie Dorothy Hughes died on 16<sup>th</sup> August, 1987. On or about Jul, 1999, the respondents instituted this suit claiming adverse possession and a vesting order over the suit land. The applicants being people in possession were never joined to the proceedings. No directions were taken under the provisions of O.XXXVI R.10 of the Civil Procedure Rules. No hearing was conducted in the matter. The orders sought in the originating summons were issued by the Deputy Registrar on 11<sup>th</sup> August, 1999. A vesting order was issued pursuant to the orders made by the Deputy Registrar. The vesting order was registered against the title to the suit land and the transfer effected. An originating summons filed in the High Court can only be heard by a Judge after directions are given. An originating summons or any other suit can only be filed against an existing person or legal entity. At the time the suit was instituted, the defendant named in the suit was dead. It is the applicants and not the respondents who were in possession of the land. The suit was therefore deliberately instituted to deprive the applicants of their rights. The suit is therefore a nullity ab-initio and all orders issued pursuant and all the consequential orders should be set aside *ex-dibito judicie*.

The 1<sup>st</sup> applicant claims to be the administrator of the Estate of the late Ruth Jeserem pursuant to grant of letters of administration issued on 12.5.2000. The applicants are children of the late Ruth Jeserem who died on 20.8.1993 and prior to death was a Minister of African Inland Church. His mother and father were converted Christian and had associated with Missionaries who had constructed a church building on land parcel Number. L. R. No. 8822. His father being a convert was welcomed to live on the land since 1930. His mother joined him in 1932 and resided on the land and therefore, the whole family lived on the land. The members of the family who are deceased were buried on the land. The rest of the family still lives on the suit land. He claims that upon the death of their mother, strangers started claiming that they purchased suit land from one John Joseph Hughes. He did a search and established that the certificate of lease had entry No. 3 whose import was that a grant of probate of the will of the late John Joseph Hughes (deceased) to Eugenie Dorothy Hughes was registered against the certificate of title on 12.2.1980. Entry No. 4 is a vesting order issued in Eldoret High Court Civil Case No. 150 of 1999 (OS) in favour of one of the respondents and registered on 26.7.2001. Entry No. 5 was a provisional certificate of title issued to the respondent pursuant the

He established further that the respondent filed an originating summons claiming adverse possession. He obtained a vesting order against the late John Joseph Hughes. The order was granted by the Deputy Registrar. Moreover, that at the time of filing the suit, the respondent, John Hughes was dead.

The 1<sup>st</sup> and 3<sup>rd</sup> respondents filed grounds of opposition on the basis that the application is incurably defective and that the applicant has no locus standi to bring the application and that counsel for the applicants has represented the respondents in another case over the same property. That the application has been caught with laches and therefore, overtaken by events and that third parties have purchased the property. The respondents have not filed a replying affidavit and therefore, the facts of the application are not controverted.

The applicant submits that the Deputy Registrar had no powers under the law to grant a vesting order. Moreover, that the suit property was fraudulently transferred to the defendants and that the vesting order by the Deputy Registrar was an illegality. Furthermore, the plaintiff submits that the suit for adverse possession was brought against an Estate that was not administered. The Estate of John Joseph Hughes at the time of filing the suit was un-administered due to the death of Eugenie Dorothy Hughes in 1987. It is argued that the applicants being the persons in possession at the time of filing suit should have been enjoined in the suit for adverse possession.

The defendants/respondents argue that the application is barred by Limitation of Actions Act as the respondents have been in possession for more than 12 years. The respondents cite the provision of section 7 of the Limitation of Actions Act. The respondent further argue that the vesting order was issued by the Judge but signed by the Deputy Registrar and therefore, is valid. The respondents further argue that the order sought is final and therefore, granting the same will amount to the final determination of the suit.

I have considered the application, grounds of opposition and the rival submissions and do find that on the 30th July, 1999, Peter Boisio Ngetich, Joseph Arap Cheruiyot and Kimorong Mibei filed a suit by way of originating summons against the Estate of the late Mr. & Mrs. J. J. Hughes (deceased). The plaintiffs were representing the estates of Kipngetich Arap Tanui, Joseph M. Twigeny Margari respectively save Kimorong Mibei who sued on his own behalf. The plaintiffs prayed for a vesting order in respect of parcels of land No. 8822 and 6617 in their names.

The originating summons was based on affidavit sworn by Kimorong Mibei who states that the land in dispute was bought in partnership between himself Joseph Arap Twigeny and Kipngetich Arap Tanui. The two deceased are now represented by the other plaintiffs. They could not get transfer of title because J. J. Hughes died before he could transfer the land to them. The wife to J. J. Hughes was registered by grant of probate but also died. They took possession after buying the land and had been in possession for 30 years after purchase.

The indisputable facts in this matter are that the land in dispute was initially registered in the names of J. J. Hughes who died and later the wife was registered as the administratrix of Estate of the deceased. She also died while the land was registered in her name as the administratrix of the Estate. This was in 1980.

On 26.7.2001, a vesting order in the Hccc (OS) No. 150 of 1999 was made vesting the property to Kimorong Mibei, Peter Boisio Ngetich and Joseph Arap Cheruiyot for Kshs. 1,000,000. I have looked at the originating summons and ascertained that at the time of the order, the defendant was deceased and therefore, the case was not contested. It is trite law that civil proceedings cannot be commenced against a deceased person. It is also not disputed that at the time of filing the suit, the applicants were residing on the land and therefore were entitled to be heard before the vesting order was made. The right to be heard is cardinal and cannot be wished away especially when an order affects the fundamental rights of an individual.

The vesting order was made by the Deputy Registrar who did not have jurisdiction to do so. Having been made by a Deputy Registrar who lacked jurisdiction, the vesting order is some nullity ab initio.

It is also a settled principle in law that nullities are nullities and have no time limit and therefore, it cannot be argued that the action is time barred. On the other hand, the vesting order was made on 12.8.1999 whilst the application was filed on 17.11.2009 approximately 10 years after the vesting order and therefore, the 12 years limitation period for claiming of the land by the applicants has not lapsed.

The upshot of the above is that the vesting order made on 12.8.1999 is set aside. The applicants are enjoined in the originating summons as 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants. The originating summons to be set down for hearing. Costs in the suit.

**Dated and delivered at Eldoret this 18<sup>th</sup> day of April, 2018.**

**A. OMBWAYO**

**JUDGE**